



Maure Gildea is a third-year Political Science major with a concentration in Global Politics. She is minoring in Law and Society, as well as German. After graduating next year as a member of the Class of 2019, she plans to volunteer abroad and later attend graduate school for International Affairs.

By Kelly Eaton

FIGHTING WORDS: APPLICATIONS IN MODERN RACIAL CONTEXTS

Maure Gildea

Abstract

The notion of “fighting words” was established in the benchmark case *Chaplinsky v. New Hampshire*, which chronicled how Chaplinsky, a proselytizing Jehovah’s witness, called the city marshal a “God damned racketeer” and a “damned fascist,” and was convicted for violating a state statute forbidding individuals from addressing others in an offensive way. The New Hampshire statute and the Chaplinsky ruling established a new framework for classifying speech as fighting words, which are not constitutionally protected speech. For speech to be considered fighting words, it must satisfy three criteria: The speech must be individually addressed and incite immediate violence in an average addressee. This essay explores the fighting words doctrine as presently constructed, determines that the criterion regarding an “average addressee” is particularly problematic, and suggests that the doctrine be altered to include specific demographics such as race. First, opposing viewpoints in favor of the current doctrine, including maintaining a high level of protection of free speech and avoiding issues regarding content-based speech restrictions, are discussed. These arguments are rebutted to conclude that the doctrine has only adverse effects. The latter portion of the essay argues that the case *Miller v. California* provides legal precedent for altering the fighting words doctrine, so that specific contexts are considered. It also contends that doing so aligns with both the contemporary social zeitgeist and the state’s key interests.

Interpreting Fighting Words

Freedom of speech is a key tenet of American society and government, and restrictions on speech are understandably hotly contested. Among the various types of speech that are not constitutionally protected, fighting words cases are the least prevalent. “Fighting words” are defined as speech that is individually addressed to an average addressee and would incite immediate violence towards the person making the speech. The primary reason that fighting words cases are so rare is that there is no speech that would be universally regarded as so heinous that anyone would reasonably expect individuals to respond violently. Of these criterion, the most problematic is the second, which specifies an “average addressee.”

For speech to be considered fighting words, it would have to be universally regarded as so offensive as to incite violence, regardless of the individual addressee’s identifiable characteristics. At the time of *Chaplinsky v. New Hampshire* in 1942, calling an individual a “God damned racketeer”¹ and “a damned Fascist”² was considered so offensive as to incite violence against the speaker, yet today this would not be the case. However, speech that is biased against a specific demographic, such as race, could, by today’s standards, understandably be responded to with violence; still, according to the aforementioned criteria, the speech would qualify as constitutionally protected. Thus, the fighting words doctrine – as presently constructed – fails to establish a class of speech which ought not to be constitutionally protected. Mainly, it is universally inapplicable to most speech and simultaneously so narrow in its scope that it fails to provide a legal standard for the punishment of unconstitutional speech. Considering these inadequacies as well as prior case

¹ Steven H. Shiffrin and Jesse H. Choper, *The First Amendment, Cases–Comments–Questions*, 5th Edition (Saint Paul, Minnesota: West Academic Publishing, 2011).

² *Ibid.*

history, contemporary standards, and potential benefits, the fighting words doctrine should expand its scope by allowing specific demographics, such as race, to be taken into account.

The Status Quo

Proponents of the fighting words doctrine, notably traditionalists, assert the importance of maintaining the status quo regarding fighting words and the current level of constitutional protection that the doctrine affords to certain speech. As it is, the doctrine is highly protective of speech, in the sense that it is nearly impossible to argue that specific speech would satisfy all three criteria, particularly the criterion which regards an “average addressee.” Placing further restrictions on fighting words speech would thus make the speech less protected, and more speech would likely lose its constitutional protection. This results in somewhat of a chilling effect. Since the doctrine would ultimately be less protective of speech, those making speech such as racial commentary or criticism may fear that their speech could be conflated or construed as a verbal attack on a racial demographic. Rather than face potential legal repercussions for making the speech, an individual may choose to not make the speech at all. Avoiding this type of self-censorship is a key interest of the state, as the state – both by law and in practice – aims to uphold the First Amendment to encourage a “marketplace of ideas.”³ Referenced in Justice Holmes’ dissent in *Abrams v. United States*, the marketplace of ideas is encapsulated by the notion that only by competing with other ideas, claims, or speech can truth be found.⁴ Essentially, if an expansion in the scope of the fighting words doctrine leads to a chilling effect, it is less likely that ideas will be compared and the truth will be discovered – or that knowledge will be advanced for all.

Another reason that the status quo regarding fighting

³ *op. cit.*, fn. 1

⁴ *Ibid.*

words should be maintained, according to opposing viewpoints, is that prior case history illustrates that the government cannot regulate speech based on its specific content. One case that demonstrates this is *R.A.V. v. St. Paul*. The U.S. Supreme Court ultimately reversed the decision of lower courts, ruling that the St. Paul Bias-Motivated Crime Ordinance was unconstitutional in its regulation of the content of speech. Under the ordinance, displaying a symbol or object that would cause anger or alarm based on demographics such as race was considered a misdemeanor.⁵ The issue with the ordinance, according to Justice Scalia, was its effect: one side of the debate was being forced to fight under “the Marquis of Queensbury Rules.”⁶ In other words, the ordinance essentially gave one side of a debate regarding demographics like race a certain advantage. For example, in a debate, minority groups might have had an advantage because the ordinance targeted racism, and they would thus have special protections that others did not. In effect, the government would be biased towards certain viewpoints – endorsing some while condemning others – resulting in viewpoint discrimination. Ultimately, further regulating the content of fighting words speech would also have the effect of increasing self-censorship, since the government would establish the primacy of certain viewpoints over others.

Fighting Words and Contemporary Standards

Despite these objections, specific demographics such as race should be considered under the fighting words doctrine. Prior cases provide evidence that content-based rulings are both possible and supported by legal precedent. In *Miller v. California*, a Supreme Court case regarding sexually explicit speech, the Miller Test was established to distinguish between obscene and non-obscene speech – the former is not constitutionally

⁵ *Ibid.*

⁶ *Ibid.*

protected. Similar to the problematic criterion of the fighting words doctrine, the first standard of the Miller Test seeks to determine if an average person, applying contemporary community standards, would find that the work, taken as whole, appeals to the prurient interest.⁷ Here is a prime example of a precedent for rulings which are based upon the meaning derived from the specific content of a work. The key issue with the fighting words doctrine is that its scope is so broad that it has the unfortunate effect of limiting what can be considered fighting words. If an individual makes a specific racial slur towards another person, it is reasonable that the addressee might react violently toward the speaker. However, it is not necessarily reasonable to expect that someone of a different racial group would react violently as well. Nevertheless, under the current fighting words doctrine – though the first addressee’s actions might be a perfectly reasonable response – the individual’s speech would be constitutionally protected, since the racially-targeted speech would not universally result in violence. Applying the criterion of contemporary community standards emphasizes the notion that experiences are contextual, not universal, and recognizes that values and standards regarding what is offensive may not be or remain the same.

Additionally, the fighting words doctrine should take specific demographics like race into account due to the contemporary social climate. As mentioned previously, calling someone a “God damned racketeer”⁸ would not, by today’s social standards, be considered so insulting that someone would reasonably react violently towards the speaker. It is difficult to think of many utterances that would incite violence now, likely due to how the nature of discourse itself has changed. Over time, language has become both less formal and more callous,

⁷ *Ibid.*

⁸ *op. cit.*, fn. 1

particularly in comparison to language used at the time of the Chaplinsky case. As a result of an increase in the prevalence of vulgar and offensive speech, people have become accustomed and hardened to it, so that it is less likely that they will react violently to any language used at all. Language has devolved such that there is a greater sense of indifference to harmful speech, and the standard for speech that is offensive enough to provoke violence has changed. Social movements have also played a role in this change. Now more than ever are individuals more conscious about their identity in terms of the unique aspects that define their character and experience, such as their racial background. Considering how race is so tied to one's political, economic, and social experiences, as well as the historical plight of racial groups specifically, it is reasonable that it would be so integral to one's identity that if one is insulted egregiously based on their race, they would react towards the speaker with violence. Both language and individuals' sense of identity have shifted, and it is pertinent that the fighting words doctrine be adapted accordingly.

There are also several state interests and benefits in considering race within the fighting words doctrine. It should first be noted that there is little, if any, value in fighting words generally. There is no public utility in sanctioning the exercise of free speech that exists only to inflame or injure. It follows then, that there is little to no meaningful value in racially-biased speech that intends to inflame or injure to the extent that an addressee will be incited to respond violently. Further, it is a key interest of the state to promote overarching equality. The state has a vested interest in limiting free speech which is racially biased and inflammatory, so that true equality can be pursued. Considering race within the fighting words doctrine would also have the effect of supporting state interests in protecting its citizens and maintaining the peace. If individuals were faced

with the prospect of legal repercussions for using racially-inflammatory speech that would incite violence, they would be less incentivized to make the speech in the first place. Thus, citizens would be less likely to be harmed, and breaches of the peace would be less likely to occur. Lastly, reconsidering the framework of the fighting words doctrine would mean that those who rightfully deserve legal consequences for inciteful speech would be punished. Under the current doctrine, which limits the scope of fighting words speech to what would universally incite violence, racially-biased inflammatory speech is constitutionally protected, even though contemporary standards would consider this speech to be capable of inciting violence. In short, it is in the state's interest to alter the scope of the fighting words doctrine.

Objections

One set of possible objections to this argument is that there is potential danger in placing too much value on the specific contexts of free speech. An extreme example might be someone stating: "I don't believe in God" in a radically religious community. According to that individual, applying the community standards of their specific demographic, in this case, religion, it may be reasonable to expect that people would respond violently, as such utterances are considered blasphemous. Most people would argue that any reasonable person would not react violently to this speech, but the idea of contemporary community standards that allow room for specific contexts means that even extreme community standards would be constitutionally protected. Additionally, in reference to the devolution of language, it can be argued that the prevalence of harmful language actually sensitizes individuals rather than hardens them. As a result, people may become more reckless when it comes to inflammatory speech, making it more likely that individuals will react violently to targeted language. Lastly,

altering the fighting words doctrine might serve the state interest in maintaining the peace – but this is ultimately outweighed by the fact that it would result in viewpoint discrimination and a chilling effect. One side of the debate would be afforded protections that the other was not, and those fearing legal punishment would refrain from making any speech at all.

However, these objections are problematic and can be countered by three contentions. First, it is wholly necessary to observe the intent of free speech. Regardless of how perverse a community's standards may be, the original intent of speech is preserved when taken in the context of those standards and remains as a waypoint by which one can gauge if the speech ought to be constitutionally protected. This follows from the third criterion of the Miller Test, requiring consideration of the interest or concern of the work (or in this case, the speech) as a whole. Second, fighting words have nothing to do with the presence or absence of violence on the part of the addressee – it has to do with whether a person's speech in a specific instance is constitutionally protected or not. Further, altering the scope of the doctrine to allow room for more contextual-based analysis means that even if people are generally more sensitive to marginalizing language, it will meet community standards. Third, it is once again necessary to point out that it has been established that fighting words have little, if any, social value. If there is only one way of expressing a viewpoint that ultimately serves to inflame and injure, there is not only no value in the viewpoint, but the viewpoint can have only negative impacts as well.

Conclusion

Undoubtedly, there are several issues with the present fighting words doctrine. Prior case history such as *Miller v. California* has demonstrated that it is both possible and beneficial to alter the doctrine to be more context-based rather than universal – so that specific demographics such as race can be considered. Contemporary social understanding indicates that previous definitions of fighting words are no longer applicable, and that specific, targeted attacks on a person's racial identity are among the only kinds of speech to which a person may reasonably respond with violence. The state has an interest in altering the doctrine, as it would support its aims to promote equality and maintain the peace. Ultimately, expansion of the fighting words doctrine would function within existing case law and balance the state's interest in maintaining a marketplace of ideas in the context of changing social and cultural norms of acceptable discourse.