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The Fighting Words Doctrine Chaplinsky v. New Hampshire and Hate Speech

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The Fighting Words Doctrine
Chaplinsky v. New Hampshire and Hate Speech

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THESIS ACCEPTANCE

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ABSTRACT

A comprehensive look at First Amendment theory as it relates to hate speech codes on college campuses and the political correctness movement. Theoretical arguments written both for and against having hate speech codes on college campuses utilizing suggestions for constitutionally sound hate speech codes as well as case law history. Legal research conducted by Shepardizing and categorizing into propositions those United States Supreme Court cases that have cited Chaplinsky v. The State of New Hampshire; the case which set up the guidelines for restriction of the First Amendment by holding that "fighting words" are not protected speech.

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INTRODUCTION

In 1987, unknown persons distributed a flyer at the University of Michigan at Ann Arbor that declared "open season" on blacks, which were referred to in the flyer as "saucer lips, porch monkeys, and jigaboos." Also that year, a student disc jockey at the University of Michigan broadcast racist jokes from the campus radio station. Then, at a rally to protest these incidents, unknown persons, in an apparent effort to make a protest statement against the protest, displayed a Ku Klux Klan uniform from a dormitory window. As a result of these activities the university adopted a code in response to what the Board of Regents saw as an increase in racial intolerance and harassment on the campus. A biopsychology graduate teaching assistant, using the pseudonym John Doe to protect his privacy, challenged the constitutionality of the rule, saying he feared that under the code he could not discuss controversial theories stating that certain biological differences among the sexes and races caused differing personality traits and abilities. A federal district court judge permanently enjoined the parts of the code that restricted speech, leaving those parts regulating physical conduct. The judge ruled that the code was not only overly broad, but also vague. [1]

This case is only one of the recent cases that have been working their way through the United States legal system that deal with speech codes, commonly referred to as "hate speech codes" on state-funded college and university campuses. Why has this issue suddenly become a concern? Nat Hentoff, a popular columnist, says hate speech codes are simply another way in which the liberal left can institute and indoctrinate compliance with the whole notion of political correctness; in other words, "Don't say anything to anyone about anything that might hurt their feelings. Everyone now thinks they have a

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[1] Korwar, Aratis R., War of Words Speech Codes at Public Colleges and Universities (The Freedom Forum First Amendment Center, Nashville, TN, 1994), p. 16.

constitutional right to feel good."[2] Samuel Walker, in his book Hate Speech, says the campus speech code movement has been the most successful effort in American history to restrict hate speech — a phenomenon which he attributes to higher enrollment of minority students in colleges and universities as well as university administrators who were by and large receptive to the codes. [3]

Regardless of where and how it all began, opponents argue that the codes themselves are a violation of their First Amendment right to freedom of speech. To refute this argument, proponents have cited the fighting words doctrine as justification for and proof of the constitutionality of the codes. Few cases have reached the U.S. Supreme Court dealing with the issue of hate speech, and no code created at a university has been placed on the docket. However, in a 1992 case, R.A.V. v City of St. Paul, the state courts struck down a city ordinance which restricted hateful speech as unconstitutional, and this decision was upheld by the U.S. Supreme Court.

One of the key factors in the hate speech and political correctness movement has been the fighting words doctrine set out in the 1942 case Chaplinsky v. the State of New Hampshire. The United States Supreme Court ruled in this case that speech which could be defined as fighting words was not protected under the First Amendment. [4] The Supreme Court defined fighting words as epithets "likely to provoke the average person to retaliation, and thereby cause a breach of the peace." Further, the court said, "These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words — those which by their very utterance inflict injury or tend to incite an immediate

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[2] Hentoff, Nat, Free Speech for Me — but Not for Thee (New York: Harper Collins, 1992), p. 28.
[3] Walker, Samuel, Hate Speech This History of an American Controversy (Lincoln, NE: University of Nebraska Press), p. 133.
[4] Chaplinsky v. The State of New Hampshire 315 U.S. 568 (1942).

breach of the peace." [5] The movement to restrict speech that could be considered hateful in nature has relied on this definition to restrict that hateful speech.

However, times change, and what would have been considered patently offensive in 1942 may not even receive a second glance today. Now the question arises: Has the fighting words doctrine withstood the test of time? Is it still, and has it been, utilized by the courts consistently over the last 52 years? This research paper will address those and other questions.

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[5] Ibid.

LITERATURE REVIEW

"As much as hateful speech represents an idea, however abhorrent, the university community is not a place where we should suppress ideas." [6]

"-ism"

Perhaps one of the newest catch suffixes of the '90s and perhaps the most powerful. What are the -isms? According to a handout from Smith College, "Specific Manifestations of Oppression," some of the -isms are:

- "Ableism — oppression of the differently abled, by the temporarily able.
- "Ethnocentrism — oppression of cultures other than the dominant one in the belief that the dominant way of doing things is the superior way.
- "Heterosexism — oppression of those of sexual orientations other than heterosexual, such as gays, lesbians, and bisexuals; this can take place by not acknowledging their existence. Homophobia is the fear of lesbians, gays or bisexuals.
- "Lookism — the belief that appearance is an indicator of a person's value; the construction of standards for beauty/attractiveness; and oppression through stereotypes and generalizations of both those who do not fit that standard and those who do.
- "Racism — the belief that one group of people is superior to another and therefore has the right to dominate, and the power to institute and enforce its prejudices and discriminations." [7]

The list of -isms goes on and seemingly without end: ageism, sexism, Eurocentrism, heightism, weightism.

Attaching -ism to the end of a descriptor has become analogous to proclaiming and demanding preferred position in society today. The -isms, as a group, want the same civil rights afforded all other citizens of the United States, which in and of itself may not be wrong. However, the -isms seem to push a widely held notion that anything said against a

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[6] Jaschik, Scott, "Campus Hate Speech Codes in Doubt After High Court Reject a City Ordinance," The Chronicle of Higher Education (July 1, 1992), p. A20.

[7] Beckwith, Frances J. and Bauman, Michael E., (ed.) Are You Politically Correct? Debating American's Cultural Standards (New York: Prometheus Books, 1993), p. 10.

group is hateful in nature and therefore should be banned, or at the very least punished. From this philosophy comes the notion of political correctness, otherwise known as PC, and from that, hate speech codes, both of which have become trends on college campuses within the last decade. The notions of hate speech and PC are so closely woven together that without the explosion of PC, hate speech codes would likely not exist today. [8] Further enticing college and university campuses to enact hate speech codes is an ever increasing concern with the problem of racial intimidation. [9] A 1990 Carnegie Foundation report stated that 48 percent of the presidents of the nation's research and doctorate granting universities acknowledged that "racial intimidation and harassment was a 'moderate' to 'major' problem on their campuses." [10]

Depending on which side of the argument one is on, hate speech codes and political correctness can be productive or nonproductive ideologies. Civil libertarians maintain that these codes limit harassment and silence unpopular opinions, arguing further that students and faculty have a right not to hear offensive speech. [11] Conversely, those opposed to speech codes and political correctness question who is going to define what is considered offensive to whom. [12] Other opposition comes from those who question whether or not speech codes restrict the constitutional right to free speech guaranteed in the First Amendment. [13]

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[8] Aufderheide, Patricia, (ed.) Beyond PC: Toward a Politics of Understanding (Minnesota: Graywolf Press, 1992), p. 92.

[9] Gibbs, Annette, Reconciling Rights and Responsibilities of College and Students: Offensive Speech, Assembly, Drug Testing and Safety (ASHE-ERIC Higher Education Report No. 5, 1992), p. 7.

[10] Ibid., p. 7.

[11] Dodge, Susan, "Campus Codes That Ban Hate Speech Are Rarely Used to Penalize Students," The Chronicle of Higher Education (February 12, 1992), p. A35. and North, Gary "Being Politically Correct in the Newsroom," Editor and Publisher (May 9, 1992), p. 48.

[12] Beckwith, p. 10.

[13] Asante, Molefi Kete, "The Escape into Hyperbole: Communication and Political Correctness," Journal of Communication (Spring 1992), p. 144.

Historical Perspective

Newsweek has been credited with beginning the mass media discussion of political correctness/hate speech with its cover story on December 24, 1990, titled "Thought Police: There's a 'Politically Correct' Way to Talk About Race, Sex and Ideas. Is This the New Enlightenment — or the New McCarthyism?" [14] By April 1, 1991, *Time* joined in the discussion with "U.S. Campuses: The New Intolerance," [15] in which the beginning sentence by essayist William A. Henry III began, "Imagine a place where it is considered racist to speak of the rights of the individual when they conflict with the community's prevailing opinion." Ever since that time reporters, editors and columnists have rushed to cover as well as defend and criticize hate speech/PC. [16]

What was it that brought the discussion of hate speech and PC to the forefront of journalism? The article "Media Coverage of the 'Political Correctness' Debate" cites four suspected causes: 1) A wider concern with American education and whether educational institutions at all levels were preparing students in ways to keep the nation economically competitive globally. [17] 2) The costs of a university education were escalating, with tuition rising considerably faster than the rate of inflation and the decline in federal financial support for tuition grants and other types of financial aid. [18] 3) The age of reporters and editors among the elite media was such that they now had to worry about their ability to educate their own children in the future. [19] 4) The media, particularly newspapers, had been sensitized to the issue by their own problems of coping with diversity, multiculturalism and accommodation to a demographically changing

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[14] *Newsweek*, "Thought Police: There's a 'Politically Correct' Way to Talk About Race, Sex and Ideas. Is This the New Enlightenment — or the New McCarthyism?" (December 24, 1990), pp. 48-54.
[15] *Time*, "U.S. Campuses: The New Intolerance," (April 1, 1991), pp. 66-69.
[16] Whitney, Charles D. and Wartella, Ellen, "Media Coverage of the 'Political Correctness Debate." Journal of Communication (Spring 1992), p. 89.
[17] Ibid., p. 87.
[18] Ibid.
[19] Ibid., p. 88.

workforce, which occasionally has prompted sharp exchanges between a diversified reportorial staff and a largely white-male senior editorial staff . [20] In other words, Whitney and Wartella suggest that the explosion of the hate speech/PC-debate in the mass media was not the media necessarily reflecting what was going on in society, but rather the media's reflection of what was going on in their small circles. [21]

While the PC/hate speech debate is relatively new to the mass media, Ruth Perry in "A Short History of the Term Politically Correct" has traced the phrase itself back to the mid- to late-1960s within the Black Power movement and the New Left. [22] "To be politically incorrect in the late sixties as a black was to be an Uncle Tom, a non-revolutionary, or a sloppy person — a hippie." [23] In these contexts the phrase "politically correct" meant as many different things as the people who used it. It expressed a combination of distrust for party lines of any kind and a simultaneous commitment to whichever dimension of social change was being developed. [24]

Perry notes that the notion of being correct or having a correct or incorrect idea is almost timeless; the current focus is on the history of the phrase "politically correct" and its evolution into the meaning it has today. [25] The importance of examining the history of PC is to demonstrate that it has always been a double-edged sword in which the stakes for one side are "how to redistribute power, knowledge, and resources in this country" and the stakes for the other side are "how to minimize the change," because they believe that the existing distribution of wealth and power is natural or inevitable. [26]

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[20] Ibid.
[21] Ibid.
[22] Perry, Ruth, "A Short History of the Term Politically Correct," in Beyond PC: Toward a Politics of Understanding (Minnesota: Graywolf Press, 1992), p. 71.
[23] Ibid., p. 78.
[24] Ibid., p. 72.
[25] Ibid., p.79.
[26] Ibid., p. 79.

Ideological Motivations

The ideology of hate speech codes/political correctness is founded in the belief that minorities have not been given the opportunity to have their works, thoughts and ideologies brought into the mainstream predominantly white-male culture. [27] In an effort to change what some call a grievous error in higher education, many colleges and universities have made the study and introduction of minority culture and literature one of their primary goals, and in doing so have lessened some of the emphasis on Western Culture. [28] Were the PC movement to stop at this juncture, the debate and controversy surrounding it might well be non-existent. [29] However, along with the movement to add multicultural views to the curriculum has come more radical views about PC which have matured into speech codes being enacted with the intention of curbing what is said about minorities both in and out of the classroom by faculty, administrators and students. [30]

Huntly Collins, in an article in the January/February 1992 issue of *Change*, notes that political correctness and speech codes tell

> "a tale of how colleges and universities have adopted student conduct codes restricting free speech. A tale of how Third World and women's literature has supplanted the Western classics as requirements in the college curriculum. A tale of how conservative faculty members are being silenced and hounded out of their jobs by liberal colleagues and administrators. A tale of how unqualified black students are being admitted to elite private schools. A tale of how English professors have fallen captive to a strange brand of literary criticism known as deconstructionism, which challenges the existence of 'truth itself.'" [31]

However, it is not simply whether the right book is being taught in English Literature 101 or whether or not there is a class on slavery; PC pervades the very fabric of how people see

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[27] Gross, Larry, "There They Go Again," Journal of Communication (Spring 1992), p. 106.
[28] Ibid., p. 107.
[29] Nowell, Robert W. III, "An Examination of Revisionist Theories of the First Amendment Cited in Dinesh D'Souza's *Illiberal Education:* Arguments for Abridgment of Freedom of Speech on Campus to Protect the Educational Opportunities of Women and Minorities," paper presented at the Western States Communication Association Annual Meeting, (February, 1992), p. 1.
[30] O'Keefe, Barbara, "Sense and Sensitivity," Journal of Communication (Spring 1992), p.126.
[31] Collins, Huntly, "PC and the Press," Change (January/February, 1992), p. 14.

the world they live in. The differing ideologies about some PC topics, and therefore the justification of hate speech codes, can be seen in the following chart: [32]

Issue	Liberals	Conservatives
Race and Gender	We live in a racist, sexist society with a history of inequity and unfairness.	We live in a fundamentally decent society historically marred by elements of racism and sexism, but our democratic tradition has made significant progress in ensuring equitable treatment for all.
The Majority	Those better off in society and the major recipients of social benefits are themselves implicitly racist and sexist.	Most of those who enjoy social benefits have earned them through hard work -- not through harming others because of race and sex differences.
Preferential Treatment	Race- and gender-based preferential treatment (such as affirmative action) is necessary to ensure equality of result in the face of society's entrenched racism and sexism	Even as a temporary intervention, race-and gender-based preferential treatment as a means to achieve equity destroys the fundamental principles of equality and individual liberty on which the society rests. Equal opportunity, not equal results, is the solution.
The Other Side	Calls for equality that does not promote preferential treatment but merely endorses the racist-sexist status quo.	Proponents of preferential treatment are really seeking radical change that will undermine the fundamental principles of our society.

First Amendment v. Fourteenth Amendment

Richard Delgado states that people tend to react to speech codes in one of two ways, emphasizing either the First Amendment issues of the argument or the Fourteenth Amendment issues. "Some frame the issue as a First Amendment problem: The rules

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[32] Eaton, Judith S., "PC or Not PC: That is Not the Question," Educational Record (Winter 1992), p. 27.

(hate speech codes) limit speech, and the Constitution forbids official regulation of speech without a very good reason." [33] In this argument, then, the colleges and universities are saddled with the burden of proving that the interest of protecting those students on campus affected by the hate speech is compelling enough to meet the stringent standards of the four-part O'Brien test set up by the Supreme Court in United States v. O'Brien. [34] Restriction of speech must meet each of these four standards: 1) the governmental regulation must be within the constitutional power of government; 2) the regulation must further an important or substantial governmental interest; 3) the governmental interest must be unrelated to the suppression of free expression; and 4) the incidental restriction on alleged First Amendment freedoms must be no greater than is essential to the furtherance of that interest. All four prongs of the test must be met to restrict free speech. It could be argued that speech codes fail the test with the very first prong. Opponents and First Amendment literalists would argue that any form of speech codes is not within the powers of the Constitution because the 'no law' clause in the First Amendment means no law. [35] On point two opponents would likely be argued that the government (in this case the college/university) should not have a substantial interest in anything other than the education of its students. While proponents of hate speech codes could conceivably argue the first two prongs and win, point three goes undeniably to those opposed to hate speech codes: Hate speech codes *are* suppression of free expression.[36] As Delgado states, "Some people will worry that the people enforcing the regulations may become censors, imposing

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[33] Delgado, Richard, "Regulation of Hate Speech May Be Necessary to Guarantee Equal Protection to All Citizens," The Chronicle of Higher Education (September 18, 1991), p. B1.

[34] United States v. O'Brien 391 U.S. 367 (1968).

[35] Stevens, The Honorable John Paul, Associate Justice, United States Supreme Court; "The Freedom of Speech," Yale Law Journal (April 1993), p. 1295.

[36] Hymowitz, Craig, "Are Colleges Paying Lip Service to Free Speech? An Interview with Nat Hentoff," Campus (Fall, 1993), pp. 8-9.

narrow-minded restraints on campus discussion." [37] With the inability to meet prong three of the O'Brien test, hate speech codes would then fail the test. Opponents of hate speech codes would rely on their strong adherence to prong one to defeat prong four by saying again there exists no interest in restricting this kind of speech in the fire place, so the incidental restriction is greater than essential. Proponents of hate speech codes could possibly argue that this is the essence of hate speech codes: an incidental restriction essential to the furtherance of political correctness.

In other instances, the issue of PC and speech codes is cited as necessary to guarantee equal protection under the Fourteenth Amendment. [38] Those in favor of hate speech codes see the question not as one of free expression but rather as one of protection of equality — the First Amendment v. the Fourteenth Amendment. [39] "They ask whether an educational institution does not have the power to protect core values emanating from the Fourteenth Amendment's guarantee to all citizens of equal protection of the laws. Cannot an institution enact reasonable regulations aimed at assuring equal personhood on campus?" [40] In this light the argument shifts toward those in favor of hate speech codes. They must now show that the interest in equal protection under the law for minorities under the Fourteenth Amendment prevails over the relatively limited restrictions on the First Amendment. [41]

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[37] Delgado, p. B1.

[38] Lumsden, Linda, "Sticks and Stones: Why First Amendment Absolutism Fails When Applied to Campus Harassment Codes," paper presented to the Annual Conference of the Association for Education in Journalism and Mass Communication (August, 1992), p. 12.

[39] Jahn, Karon L., "Racist-Sexist-Hate Speech on College Campuses: Free Speech v. Equal Protection," paper presented at the Speech Communication Association 76th Annual Convention, (1990), p.1.

[40] Ibid.

[41] Ibid., pp. 1-2.

Fighting Words

One argument in the hate speech code and PC debate is the fighting words doctrine established by the Supreme Court in Chaplinsky v. State of New Hampshire. [42] In this case the Supreme Court defined fighting words as epithets "likely to provoke the average person to retaliation, and thereby cause a breach of the peace." [43] Chaplinsky was convicted for calling a marshal in Rochester, New Hampshire, a "goddamned racketeer and a damned Fascist." "Although the marshal did not strike Chaplinsky, the Court said that 'goddamned racketeer' and 'damned Fascist' were epithets likely to provoke the average person to physical retaliation. Chaplinsky, therefore, had no First Amendment right to make his provocative statements." [44] Specifically, the quotation widely relied upon to support the fighting words doctrine states: "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words — those which by their very utterance inflict injury or tend to incite an immediate beach of the peace." [45] It has been well observed that such utterances are not an essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. [46] In addition, the Court said, "Men of common intelligence would understand that they are likely to cause an average addressee to fight. Fighting words must have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed." [47] While

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[42] Chaplinsky v. The State of New Hampshire 315 U.S. 568 (1942).
[43] Ibid.
[44] Middleton, Kent R. and Chamberlin, Bill F., The Law of Public Communication, Second Edition (New York: Longman, 1991), p. 54.
[45] Chaplinsky, 315 U.S. 571
[46] Smolla, Rodney A., Free Speech in an Open Society (New York: Alfred A. Knopf, 1992), p. 151.
[47] Middleton, p. 54 and Chaplinsky v. The State of New Hampshire 315 U.S. 568 (1942).

fighting words have been equated with language that inflicts injury, incites a breach of peace, provokes retaliation or violent reaction, or is calculated to offend sensibilities, the body of words that causes those reactions varies over time. [48] Consequently, "goddamn racketeer" was considered fighting words in 1942 in the Chaplinsky case, but those same words may not be considered fighting words in 1994. The cultural aspects and the geographical and other contextual factors must be considered to distinguish fighting words from protected speech. [49]

The reasons that fighting words are excluded from First Amendment protection make this argument germane to the hate speech codes debate. "It is undeniable that such hate speech injures precisely because it communicates powerful ideas of subordination and inferiority, but speech that vilifies on wholly unrelated grounds also hurts." [50] In other words, hate speech is detrimental not only because it conveys messages of subordination and inferiority, but also because it hurts the feelings of those persons to whom it is directed. Further, hate speech has been said to exclude members of victim groups from public discourse in a variety of ways because it may induce fear, rage, shock and flight which interferes with a reasoned response to the hateful speech and because discourse requires that every participant must be equally adept and knowledgeable at speaking and listening; that speech which is hateful nullifies discourse by its definition. [51] As such, hate speech creates a situation where a dominant proportion of the speakers fail to hear what the other is saying because of its inherent, perhaps even unconscious, racism.[52] In addition, hate speech has been referred to as "intrinsically evil" speech that should not,

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[48] Brownlee, Don; "The Continuing Application of the Fighting Words Doctrine," paper presented at the Speech Communication Association 70th Annual Conference (November 1984), p. 5.
[49] Ibid.
[50] Massey, Calvin R., "Hate Speech, Cultural Diversity, and the Foundational Paradigms of Free Expression," UCLA Law Review (October 1992) p. 163.
[51] Ibid., p. 167.
[52] Ibid.

because of its inherent evilness, be provided the protection of the First Amendment. [53]

In the Chaplinsky case, the Court looked at both the content and the context of the speech in question. [54] The actual content of the words which sparked the case was a consideration to the Court because of the offensive nature of the speech. In addition, the contextual considerations addressed by the Court revolved around the fact that the speech was a face-to-face confrontation rather than a general statement added to the marketplace of ideas. [55] Because of this two-fold consideration, the Chaplinsky case has perhaps created much confusion over the use of the fighting words doctrine of the First Amendment [56] because it is not clear whether patently offensive words said to a group of people can be considered fighting words since there would exist no face-to-face speech with an individual.

One of the most complicated problems with this case is the re-interpretation of it in order to write constitutionally acceptable hate speech codes.[57] While codification can be legislated to try to enforce the fighting words doctrine, the problems that have arisen from these attempts have been the over-breadth and vague wording that have been utilized to write the codes or ordinances. [58] Although restrictions on speech can include limitations on time, place and manner of the speech, specifying in that regulation restriction of content is likely to fail constitutional muster. [59] Consequently, a restriction forbidding the general use of words (such as hateful language directed at a racial group) likely will not hold up in court.

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[53] Ibid., p. 170.
[54] Brownlee, pp. 1-2.
[55] Masey, p 179. Adherence to this notion of context was reiterated in the R.A.V. v. City of St. Paul case.
[56] Mannheimer, J., "The Fighting Words Doctrine," Columbia Law Review (October 1993), p. 1538.
[57] Tatel, David S., "How the First Amendment Applies to Offensive Expression on the Campuses of Public Colleges and Universities," paper presented to the American Association of State Colleges and Universities (1990), pp. 1-4.
[58] Ibid.
[59] Ibid.

The fighting words doctrine was further clarified in 1978 with the Skokie, Illinois, controversy. [60] In that case the federal courts upheld the right of a Nazi group to demonstrate in Skokie, a predominately Jewish town in Illinois. The federal court declared unconstitutional three municipal ordinances, including one that prohibited the dissemination of materials inciting hatred based on race, national origin, or religion. The Supreme Court did not hear an appeal of the case, letting the ruling of the lower court stand in which the lower court rejected Skokie's arguments that the Nazi slogans constituted "fighting words" as defined by the Chaplinsky case. [61] According to Walker, the Skokie decision affirmed a national policy that had evolved over the previous decades wherein the two-pronged definition of "fighting words" laid out in Chaplinsky would have allowed for the suppression of the Nazis' speech on two issues. The first was that the Nazis' words would be so offensive that they might cause "an immediate breach of the peace" [62] and the second was that the words "by their very utterance (would) inflict injury." [63, 64] Thus the Skokie case further fortified that the Chaplinsky decision was not absolute and that the "fighting words" test could not be used lightly simply to restrict speech that was unpopular.

Hate Speech

The Chaplinsky decision states: "Men of common intelligence would understand that they (the 'fighting' words) are likely to cause an average addressee to fight. Fighting words must have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed." [65] Therefore the question now becomes: Cannot

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[60] Collin v. Smith, 578 F. 2d 1197 (1978).
[61] Walker, p. 101.
[62] Chaplinsky, 315 U.S. 571
[63] Ibid.
[64] Walker, p. 105.
[65] Middleton, p. 54 and Chaplinsky v. The State of New Hampshire 315 U.S. 568 (1942).

college students, in fact most adults in America, be considered to have common intelligence and be average? If it is accepted that most Americans are common and average, is there even a need for hate speech codes since the fighting words doctrine already restricts, by its very definition, that speech which is so offensive as to cause violence?

That question as it applies to college campuses has not yet been directly addressed by the U.S. Supreme Court.

Two hate speech cases that have been decided by the United States Supreme Court illustrate the difficulties speech codes cause for both college campuses and local city governments.

In the UWM Post [66] case nine students had been disciplined under a hate speech regulation at the University of Wisconsin. [67] The code, which was first passed by the Board of Regents in 1988, was reviewed in terms of constitutional law criteria by a team of the university's law professors. [68] The school's "Design for Diversity" program was adopted as a response to rising incidents of harassment of racial minorities and gays. [69] "The code targeted only speech that was racist or discriminatory; directed at particular individuals; addressed to race, gender, religion, color, creed, disability, sexual orientation, national origin, ancestry or age; and that created an intimidating, hostile or demeaning environment for university activities." [70] The plaintiff claimed the code was an "impermissible content-based" regulation; the Board of Regents argued that only speech that was likely to cause violence was included in the code. [71]

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[66] The University of Wisconsin-Madison's "speech code," as well as other public universities' codes, were in essence declared unconstitutional with the Supreme Court decision of R.A.V. v. City of St. Paul, 112 U.S. 2538 (1992).
[67] University of Wisconsin-Madison Post Inc. v. Regents, U. of Wisconsin 90-C-328 (E.D. Wis.); (1991).
[68] ABA Journal, "Fighting Words?" (January, 1992), p. 67.
[69] Gibbs, pp. 11-14.
[70] Ibid.
[71] Ibid.

U.S. District Court Judge Robert Warren first applied the fighting words doctrine to the code and found that the regulation had problems with over-breadth because it discouraged speech that was not likely to provoke violence. [72] The District Court then applied the O'Brien balancing test in which the Board of Regents argued that the code's benefits outweighed its costs because it served four compelling interests: increasing minority representation, preventing disruption of educational activities, assuring equal educational opportunity and contributing to order and safety on campus. [73] The court disagreed, saying, "The rule does as much to hurt diversity as it does to help it by limiting the robust exchange of ideas. The problems of bigotry and discrimination sought to be addressed here are real and truly corrosive of the educational environment. But freedom of speech is almost absolute in our land and the only restriction the fighting words doctrine can abide is that based on the fear of violent reaction. Content-based prohibitions such as that in the UW Rule, however well intended, simply cannot survive the screening of our Constitutional demands." [74]

Hate speech codes and political correctness are not limited to college campuses. The R.A.V. v. City of St. Paul case [75] examined a city hate speech code in which a Supreme Court ruling in June, 1992, created questions about the legality of all hate speech codes — including those on college campuses. [76]

The R.A.V. v. City of St. Paul case began late one night in St. Paul, Minn., when a skinhead burned a cross in the yard of a black family in a neighborhood. [77] A St. Paul law made it a misdemeanor to burn crosses or place swastikas on public or private property. When Robert A. Viktora was charged with violating the law in 1990 for burning the cross,

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[72] University of Wisconsin-Madison Post Inc. v. Regents, U. of Wisconsin 90-C-328 (E.D. Wis.); (1991).
[73] Ibid.
[74] ABA Journal, p. 67.
[75] R.A.V. v. City of St. Paul, 112 U.S. 2538 (1992).
[76] Jaschik, p. A20.
[77] Hentoff, Nat, "The Bitter Politics of the First Amendment," Village Voice (February 11, 1992), p. 10.

a state district court dismissed the case on the grounds that the law violated the right to free expression. [78] In 1991, the Minnesota Supreme Court reversed the decision saying that a cross-burning was an "unmistakable symbol of violence and hatred" and that it was "the responsibility, even the obligation, of diverse communities to confront such notions." [79] That decision was appealed to the United States Supreme Court, which ruled unanimously against the city ordinance. "Justice Antonin Scalia, writing for the majority, said that the St. Paul law amounted to illegal favoritism for some kinds of speech as opposed to others, since it specified the kinds of offensive speech it banned. He acknowledged that federal courts had granted governments the right to limit speech, but said such limits could not be selective, based on content. Comparing fighting words to a sound truck, he said that while communities could limit the right of a sound truck to make noise in the streets, they could not impose limits based on what message the sound truck was sending out. The government may not regulate use based on hostility — or favoritism — toward the underlying message expressed." [80] Scalia also noted that the First Amendment does not permit St. Paul to have special prohibitions against speakers with unpopular views and that the St. Paul ordinance could not show a compelling interest in this law since it could have banned *all fighting words* rather than just the two (cross burnings and swastikas) that it specified. [81] "[Under the law,] those who wish to use 'fighting words' in connection with other ideas — to express hostility, for example, on the basis of political affiliation, union membership, or homosexuality — are not covered. The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects." [82]

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[78] Jaschik, p. A19.
[79] Ibid.
[80] Jaschik, p. A19.
[81] R.A.V. v City of St. Paul, 112 U.S. 2538 (1992).
[82] Ibid.

It was expected that the Court would hold the St. Paul ordinance as being overbroad but, instead it found that the ordinance had been authoritatively construed by the Minnesota Supreme Court to violate only the fighting words doctrine. [83] However, regardless of the fact that the ordinance as written prohibited only unprotected speech, the Court struck it down on the grounds that it discriminated against certain types of fighting words based on their content, a basis which the Court has treated as a particularly suspect element of any speech regulation. [84] More specifically, "the First Amendment means that government has no power to restrict expression because of its messages, its ideas, its subject matter, or its content. The Court has explicitly adopted the principle of equal liberty of expression." [85]

Assessment

According to Eaton, any proposal to limit or control hate speech "must avoid both the regulatory oppression of speech codes and the irresponsible assumption that individual conduct will spontaneously improve. An institutional agenda that supports open expression yet urges sensitivity to others must be promulgated by campus administrators, faculty and student leaders. Undesirable speech can be contained through thoughtful but informal condemnations of such sentiments. A climate that does not tolerate bigoted expression can be developed — but it cannot be regulated into existence." [86]

In essence, there are five elements that must be present to render a speech act unprotected under the fighting words doctrine: the words must constitute a direct personal insult; the words must be directed to the addressee personally and individually, and may not be a generalized insult addressed to a large group or indiscriminately to the world at

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[83] Mannheimer, p. 1547.
[84] Ibid., p. 1548.
[85] Ibid., footnote, n118.
[86] Eaton, p. 29.

large; the words must be addressed to the person face-to-face; the words must be of such a nature as to be likely to provoke the average addressee to an immediate violent response; the words must be likely to provoke the actual addressee to violence in light of all the circumstances. [87] Without the presence of these five elements, the history of the Court dealing with First Amendment issues has shown that few, if any, legislative efforts to restrict speech fit into the narrow definition the Court has set to be considered fighting words. The "average actual addressee" standard applied to fighting words allows the Court to differentiate between circumstances in which insulting words would merely anger someone and those in which they would create an overwhelming impulse to fight. [88] The likelihood-of-actual-violence requirement ensures that the harm was actually likely to occur, and the likelihood of violence from the average addressee requirement ensures that the words uttered, rather than the lack of reasonable self-control on the part of the addressee, are the real cause of the violence. [89]

Further, the opponents of the fighting words doctrine cite the theory that more speech is better, thereby allowing the free marketplace of ideas to ensure that the truth rises to the top — "bad speech" will be cured by "good speech." [90] Mannheimer points out that this philosophy is said to encourage the dialogue that is so essential to a stable democracy and thereby to further the self-governance rationale of the First Amendment. [91] College and university campuses are, sometimes mistakenly, seen as bastions of free expression where the free exchange of ideas is not only encouraged but attained at any cost. However, it has been noted that as a marketplace of ideas, universities have rarely been perfect

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[87] Mannheimer, p. 1552.
[88] Ibid.
[89] Ibid., 1553.
[90] Jahn, p. 3.
[91] Mannheimer, 1554.

instruments. "There was never an early and innocent time when any and all social ideas were not only tolerated but also welcomed." [92]

Possible Resolutions Between Hate Speech and Fighting Words

This issue of what college campuses can do about hate speech codes while remaining within the constitutionality of the fighting words doctrine is one which has been under much scrutiny as hate speech seems to become more and more prominent on college campuses. Annette Gibbs offers some solutions for colleges and universities in a post-R.A.V. v. St. Paul world. For drafters of future hate speech codes, Gibbs offers the following guidelines: Speech/expression can not be punished based on the subjects the speech addresses — the government must be neutral when regulating speech. [93] Policies that are overbroad when used to regulate speech are prohibited as are those policies which are vague. [94] There may be no restrictions on the time, place and manner of the speech, with the exceptions of appropriateness for the educational environment and maintaining peace and order on campus. [95] Those codes which are based on the fighting words doctrine, even in part, cannot discriminate on the basis of content or viewpoint. [96] Last, due process protections and procedures should be in place and followed during any disciplinary process in which the code is utilized. [97] It is also important to note that only public colleges and universities are held to the constitutional scrutiny of the Court. [98] Private colleges, not being part of the State Government, are free to enact hate speech codes without reprisal from the Court. However, Gibbs points out, private colleges must

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[92] Dennis, Everette E., "Freedom of Expression, the University and the Media," Journal of Communication (Spring 1992), p. 78.
[93] Gibbs, p. 17.
[94] Ibid.
[95] Ibid.
[96] Ibid.
[97] Ibid.
[98] Jaschik, p. A19.

take into consideration issues of the college's image, students' expectations and self respect. [99]

William A. Kaplin cites a five-criteria proposal that would help balance hate speech codes and the First Amendment on college campuses:

- 1) "The process must foster a comprehensive approach to, and comprehensive perspective on, the hate speech problem on campuses. The process must encompass both the legal and the policy aspects of the issue and must include consideration of both equality and free speech values. This could be accomplished through a campus-wide study to determine the severity of the problem on that campus; determination of what policies on campus already address the issue and how those policies are or are not working; and the advice of legal counsel.
- 2) "The process must both encourage and rely upon dialogue within the campus community. The full range of campus interests and perspectives should be reflected here. All the various groups represented in the student body should be included, as should faculty and administration. It is important that the dialogue remain active constantly. For example, workshops could be conducted on campus that address the issue; the student newspaper could encourage informal dialog; and dialog could be encouraged in the classroom setting.
- 3) "The process must encompass and facilitate consideration of non-regulatory as well as regulatory options for managing the hate speech problem, and give priority to the non-regulatory options. While the regulatory may be easier to implement, the non-regulatory option is more likely to impact a wider range

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[99] Ibid.

of students and may have more influence as well as a broader and longer range impact on student attitudes and values. For example, utilizing the influence of peers to impact attitudes.

- 4) "The process must assure that the institution's initiative for combating hate speech is adapted to the particular circumstances of its particular campus. There is no all-purpose, across-the-board solution. The solution, whatever it may be, must be tailored to fit each case individually. In other words, there is not a solution that will fit every campus or even, perhaps, every situation. The process the institution chooses to go with must be flexible enough to deal with the ever-changing attitudes and beliefs of the campus population.
- 5) "The process must focus on First Amendment issues in an exceedingly methodical and concrete way calculated to shed maximum light on legal obstacles to regulation as well as available latitude for regulatory initiatives. Matching concrete examples to theories of the First Amendment will ease the abstractness of the First Amendment concepts." [100]

Although neither Kaplin nor Gibbs proposes an all-inclusive answer to the problem of speech codes and political correctness, their criteria are a good starting point. However, until the Supreme Court has the opportunity to rule specifically on the legality of the speech codes issue, there will be no all-inclusive answer. However, in-depth knowledge of the history of the fighting words doctrine could be utilized to help create a code which closely follows those principles.

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[100] Kaplin, William A., "A Proposed Process for Managing the First Amendment Aspects of Campus Hate Speech," Journal of Higher Education (September/October, 1992), pp. 523-33.

STATEMENT OF PURPOSE

Hate-speech codes on college campuses have been a topic of much discussion in the last decade. Many, including the students who are punished by these codes, claim that their fundamental right to freedom of speech, guaranteed to them by the First Amendment, is violated by these codes. Others say that hateful speech and speech that causes damage to others should not be protected by the First Amendment. This debate is seemingly endless with both sides declaring victory in certain battles, but no one victorious in the war.

Perhaps the biggest concern with the hate speech-codes debate is the extent to which the fighting words doctrine, established in the Chaplinsky v. New Hampshire case and again clarified in the Skokie Illinois/Neo-Nazi case, affect speech codes. This question has recently been addressed, to a certain extent, by the Supreme Court in the R.A.V. v. City of St. Paul decision in 1992. Many state funded universities saw the R.A.V. case as affecting their speech codes since both cities and universities are under the purview of the state. Although no college hate-speech-code cases have been heard by the United States Supreme Court, the issue affects college students, faculty and administrators.

Since the fighting words doctrine is commonly used by both proponents and opponents of hate-speech codes, there is a benefit to complete understanding of the development of the doctrine. As such, this research will examine Supreme Court decisions that cite the Chaplinsky decision, which established the fighting words doctrine, in an effort to answer the following research question: How has the fighting words doctrine been used and developed since its inception and what implications does this development have for hate speech codes? Further, on the basis of literature and legal precedence, this research will present the case both for and against hate speech codes.

METHODOLOGY

There exist effective arguments which propose that in the 52 years since the Supreme Court decided the case Chaplinsky v. State of New Hampshire, the already unclear waters of First Amendment issues have further been muddied concerning the fighting words doctrine. In an effort to further clarify that doctrine, this research will culminate in answering the following question: How has the fighting words doctrine been used and developed since its inception and what implications does this development have for hate speech codes? Further, on the basis of literature and legal precedence, this research will present the case both for and against hate speech codes.

Since the early 1980s, which also coincides with the "politically correct" movement, universities and colleges throughout the United States have been enacting "Speech Codes" in an effort to ensure that their campuses are a safe and accepting environment for students of all walks of life. It is this seemingly pervasive problem that drives this research since it can be argued that the mere existence of the fighting words doctrine precludes the need for any such thing as a hate speech code. Although the reasoning for enacting hate speech codes may be a noble one, a plethora of court cases have been enjoined as a result.

This research will do two things:

1. It will examine court decisions to track how the fighting words doctrine has been used throughout its history in order to argue that hate speech codes on college campuses are unnecessary.

2. An analysis will be conducted citing the proposals Gibbs and Kaplin put forth as solutions to hate speech codes existing on college campuses in order to argue that hate speech codes can and should be a part of today's college campuses.

Finally, the definition of fighting words outlined in the Chaplinsky decision will be utilized to support both sides of the discussion.

Sample

As stated previously, the case of Chaplinsky v. State of New Hampshire is the landmark case which created the fighting words doctrine. The case was decided by the Supreme Court in 1942. As such, all Supreme Court cases from 1942 to 1994 that cite Chaplinsky v. State of New Hampshire will be analyzed. In an effort to cover the development of this case, no less than 50 cases should be analyzed. Should the Supreme Court decisions not yield that number of cases, this study will then look at those cases which cite Chaplinsky in the U.S. Court of Appeals. Cases will be chosen on the following criteria: 1. All cases from the Supreme Court will be chosen; and 2. Cases from the U.S. Court of Appeals will be chosen from the present to the past until the number of cases reaches at least 50. 3. The majority and concurring opinions in these cases will form the sample for this research.

Cases will be identified through two sources to account for errors in both systems. First, the Lexis system will be utilized to identify all cases in which Chaplinsky v. State of New Hampshire is cited. In addition, citations from the Chaplinsky case will be gathered from Shepard's Citations, an index to legal citations. [101] Both lists of citations will be compared to ensure that all cases which cite Chaplinsky are included in the sample.

Case Law Analysis

Cases citing Chaplinsky will be analyzed and sorted into propositions which will be developed according to how the Chaplinsky decision was used in the specific cases. The propositions will be determined by how the Supreme Court used the Chaplinsky case, not what the case itself stands for. A list will be created specifying which cases fall under

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[101] Jacobstein, J. Myron and Mersky, Roy M., Legal Research Illustrated, (Westbury, New York, 1990), p. 250.

which propositions. All citations of Chaplinsky will be from majority opinions unless otherwise noted as a concurring opinion.

No pretests will be conducted.

Operationalization

The list of cases will be analyzed to determine how Chaplinsky has been cited since the 1942 decision and conclusions will be drawn from those cases to enhance the discussion arguing that hate speech codes on college campuses are unnecessary. Propositions will be ranked by the number of cases in which that issue was addressed in order to determine which have been the most dominant over time. This will be done by relying on the doctrine of precedent, which states that the decisions of courts will serve as examples, or authorities, for decisions in later cases with similar questions of law. [102] Further, the doctrine of precedents encourages that similar cases be treated in relatively the same manner and also leads to stability in the legal system. [103] Hence, the more often a proposition is utilized, the stronger, or more stable, the precedents; likewise, the fewer times an issue is cited, the weaker, or less stable the precedents. This analysis will allow for conclusions to be drawn in regard to the Court's likelihood to depart from its previous decisions by ignoring these issues and creating new precedents.

Further, any changes the Court has made over the years regarding the intent of the propositions will be easily identifiable. This is important as the intent of the Chaplinsky decision is clearly defined in the case. However, the Court is free to change and/or refine definitions through other cases so that what was well defined in 1942 may be meaningless today. As such, the definition of fighting words outlined in the Chaplinsky decision will

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[102] Jacobstein, pp. 4-5.
[103] Ibid., p. 6.

be paramount to both arguments for and against hate speech codes on college campuses and will therefore be thoroughly analyzed.

Gibbs and Kaplin put forth standards which, they claim, if followed will aid in creation of hate speech codes for college campuses that would withstand the scrutiny of the courts. Gibbs' guidelines [104] and Kaplin's five criteria [105] will be utilized to argue that hate speech codes on college campuses are not only necessary, but also can be written in such a way that if/when challenged in a court, they would be found to be Constitutional.

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[104] Gibbs, p. 17.
[105] Kaplin, pp. 523-33.

RESULTS AND CONCLUSIONS

Case Law Research Results

The results of the legal research are as follows.

10 cases or more citing Chaplinsky for the same proposition.

Chaplinsky cited to set forth the notion that freedom of speech is not absolute (17 cases): *United Public Workers v. Mitchell*, 330 U.S. 75, 95 (1946); *Kovacs v. Cooper*, 336 U.S. 77, 85 (1948); *Giboney v. Empire Storage Co.*, 336 U.S. 490, 502 (1948); *Dennis v. United States*, 341 U.S. 494, 544, 560 (1951, concurring) [106]; *Breard v. Alexandria*, 341 U.S. 622, 642 (1950); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1951); *Times Film Corp. v. Chicago*, 365 U.S. 43, 48 (1960); *Konigsberg v. State Bar*, 366 U.S. 36, 50 (1960); *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964); *Police Department of Chicago v. Mosley*, 48 U.S. 92, 103 (1971); *Hudgens v. NLRB*, 424 U.S. 507, 520 (1975); *Virginia Pharmacy Board v. Virginia Consumers Council*, 425 U.S. 748, 762 (1975); *Virginia Pharmacy Board v. Virginia Consumers Council*, 425 U.S. 748, 776 (1975, concurrence); *Nebraska Press Association v. Stuart*, 427 U.S. 539, 590 (1975); *New York v. Ferber*, 458 U.S. 747, 776 (1981, concurrence); *Connick v. Meyers*, 461 U.S. 138, 147 (1982); *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 504 (1983); *United States v. Eichman*, 496 U.S. 310, 315 (1989).

Chaplinsky cited to set forth the idea that fighting words are unprotected (16 cases): *Terminello v. Chicago*, 337 U.S. 1, 3 (1948); *Edwards v. South Carolina*, 372 U.S. 229, 236 (1962); *New York Times v. Sullivan*, 376 U.S. 254, 296 (1963, concurring); *Cox v. Louisiana*, 379 U.S. 559, 563 (1964); *Cohen v. California*, 403 U.S. 15, 20 (1970); *Norwell*

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[106] Underlined cases will be described and dealt with specifically in the "Discussions" section of the paper.

v. City of Cincinnati, 414 U.S. 14, 16 (1973); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 495 (1974); *Bigelow v. Virginia*, 421 U.S. 809, 819 (1974); *Young v. American Mini Theatres*, 427 U.S. 50, 66 (1975); *FCC v. Pacifica Foundation*, 438 U.S. 726, 745 (1977); *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530, 538 (1979); *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530, 548 (1979, concurring); *NAACP v. Clairborne Hardware Co.*, 458 U.S. 886, 927 (1981); *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 65 (1982); *Dun & Bradstreet, Inc. v. Greenmoss Builders*, 472 U.S. 749, 758 (1984); *Houston v. Hill*, 482 U.S. 451, 462 (1986); *Hustler Magazine v. Falwell*, 485 U.S. 46, 56 (1987).

Chaplinsky cited in order to create the notion that fighting words statutes must be limited to the fighting words definition to be constitutional (11 cases): *Brown v. Louisiana*, 383 U.S. 131, 133 (1965); *Bachellar v. Maryland*, 397 U.S. 564, 567 (1969); *Gooding v. Wilson*, 405 U.S. 518, 522 (1971); *Grayned v. City of Rockford*, 408 U.S. 104, 111 (1971); *Hess v. Indiana*, 414 U.S. 105, 107 (1973); *Lewis v. City of New Orleans*, 415 U.S. 130, 132 (1973); *Lewis v. City of New Orleans*, 415 U.S. 130, 134 (1973, concurring); *Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 457 (1977); *FCC v. Pacifica Foundation*, 438 U.S. 726, 756 (1977); *Houston v. Hill*, 482 U.S. 451, 472 (1986, concurring); *Texas v. Johnson*, 491 U.S. 397, 409 (1989); *R.A.V. v. City of St. Paul*, 112 U.S. 2538 (1992).

Discussion

Seventy-eight cases have cited Chaplinsky, 44 of which rely on only three propositions. The remaining cases are split among a wide variety of propositions (see Appendix). The three propositions cited in 44 of the 78 cases are: "Chaplinsky cited to

set forth the notion that freedom of speech is not absolute;" "Chaplinsky cited to set forth the idea that fighting words are unprotected;" and "Chaplinsky cited in order to create the notion that fighting words statutes must be limited to the fighting words definition to be constitutional." The remaining cases vary widely from "First Amendment applicable to the states" to "incitement of riot is unprotected."

To fully understand how the cases citing Chaplinsky have utilized it in the three major propositions, it is important to have at least a rudimentary knowledge of those cases and the Chaplinsky citations. Following are brief descriptions of 16 of the cases that fell within the three propositions and notations on how the Court cited Chaplinsky.

- **Dennis v. United States:** In this case the Supreme Court upheld the conviction of members of the Communist Party for conspiring to overthrow the government saying the government does not have to wait to stop speech "until the catalyst is added" if "the ingredients of the reaction are present." Chaplinsky was cited to set the precedent that certain kinds of speech are so undesirable as to warrant criminal sanction — that freedom of speech is not absolute. [107]

- **Hudgens v. NLRB:** This case deals with the right to strike. In it the Supreme Court ruled that the right to picket during a strike is not required by the First Amendment. This case cited Chaplinsky to note the precedents that the freedom of speech may be restricted and is not absolute. [108]

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[107] Dennis v. United States, 341 U.S. 494 (1951).
[108] Hudgens v. NLRB, 424 U.S. 507 (1975).

- **Virginia Pharmacy Board v. Virginia Consumers Council:** The Supreme Court declared it unconstitutional for the state of Virginia to prohibit licensed pharmacists from advertising the price of prescription drugs, saying the ads did "no more than propose a commercial transaction." The Court cited Chaplinsky to determine if commercial speech is removed from the "exposition of ideas" — in other words, to determine that freedom of speech is not absolute. [109]

- **Nebraska Press Association v. Stuart:** The Supreme Court decision said Nebraska court's restriction on the reporting of a murder investigation and trial violated the First Amendment and prior restraint guidelines. Chaplinsky was cited with other cases to set the precedent that although freedom of speech is not absolute, press coverage of events in an open court room is speech that can not be restricted. [110]

- **New York v. Ferber:** The Court affirmed that child pornography constituted "speech" that was not protected by the First Amendment. Chaplinsky was cited by the Court as an example of an area of speech that does not enjoy First Amendment protection. [111]

- **Bose Corp. v. Consumers Union of U.S., Inc.:** In this case, the Supreme Court decided that a publication (Consumer Reports) could not be held liable for false statements made without malice in the magazine about the Bose 901

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[109] Virginia Pharmacy Board v. Virginia Consumers Council, 425 U.S. 748 (1975).
[110] Nebraska Press Association v. Stuart, 427 U.S. 539 (1975).
[111] New York v. Ferber, 458 U.S. 747 (1981).

speaker system. Chaplinsky is cited to say that the freedom of speech is not absolute. [112]

- **United States v. Eichman:** This cases challenged the Flag Protection Act of 1989 which prohibited the destruction of the American flag. The Court let stand its decision in Texas v. Johnson. Chaplinsky was cited with other cases when the Court declined to reconsider those expressions that do not enjoy the full protection of the First Amendment. [113]

- **New York Times v. Sullivan:** The Supreme Court ruled that the First Amendment protects criticism of government officials even if remarks are false and defamatory. This decision set up the standard of actual malice. Chaplinsky is cited to establish that there are classes of speech that are not protected and fighting words is one of those classes. [114]

- **Cohen v. California:** In this case the Supreme Court ruled that fighting words does not apply to groups of people, and since the offensive phrase "Fuck the Draft" on Cohen's jacket "was not directed at some particular person," it therefore failed the Chaplinsky test of face-to-face confrontation. "This [is not a fighting words case, i.e., a case of] personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction." [115]

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[112] Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485 (1983).
[113] United States v. Eichman, 496 U.S. 310 (1989).
[114] New York Times v. Sullivan, 376 U.S. 254 (1963).
[115] Cohen v. California, 403 U.S. 15 (1970).

- **Cox Broadcasting Corp. v. Cohn:** In this case, a station broadcast the name of a rape victim and the Court held that media can report from official records available in open court. The Court did note that a state might rule that records containing very sensitive private information not be made public. Chaplinsky was cited in this case to say that although fighting words are unprotected, this case did not meet those standards. [116]

- **Bigelow v. Virginia:** The Court struck down a state statute banning the publication of advertisements for an abortion referral service. Chaplinsky was cited to determine if advertisements for abortion referral constituted fighting words by being patently offensive. [117]

- **Bolger v. Youngs Drug Products Corp.:** This case dealt with a law prohibiting the mailing of unsolicited advertisements for contraceptives. The Court said that state statute violated the First Amendment. Chaplinsky was cited to state that fighting words were unprotected speech, but that this speech did not constitute fighting words. [118]

- **Hustler Magazine v. Falwell:** In this decision, the Court declared that a public figure cannot collect damages for emotional distress inflicted by a cartoon or caricature unless the publication contains false statements published with malice. "In Chaplinsky, we held that a state could lawfully punish an individual for the use of insulting fighting words — those which by their very

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[116] Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1974).
[117] Bigelow v. Virginia, 421 U.S. 809 (1974)
[118] Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1982).

utterance inflict injury or tend to invite an immediate breach of the peace. ... But the sort of expression involved in this case does not seem to ... be governed by any exception to the general First Amendment stated above." [119]

- **Gooding v. Wilson:** In this case the defendant said to a police officer, among other threats, "white son of a bitch, I'll kill you." The Supreme Court held that a fighting words statute must be limited to "words that 'have a direct tendency to cause acts of violence by the person to whom individually the remark is addressed'." The state statute was not so limited and was declared overbroad and vague. [120]

- **Texas v. Johnson:** The infamous flag burning case. Johnson was convicted in Texas of burning an American flag while protesting at the 1984 Republication National Convention. The Supreme Court decision held that burning the American flag is protected expression under the First Amendment. Chaplinsky was cited to determine if flag burning was a form of speech that would be likely to "seriously offend" the people witnessing the protest. Johnson's expression does not constitute fighting words "likely to provoke the average person to retaliate, and thereby cause a breach of the peace." The Court said a reasonable onlooker would not have regarded Johnson's act as a direct personal insult or provoke violence. [121]

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[119] Hustler Magazine v. Falwell, 485 U.S. 46 (1987).
[120] Gooding v. Wilson, 405 U.S. 518 (1971).
[121] Texas v. Johnson, 491 U.S. 397 (1989).

- **R.A.V. v. City of St. Paul:** This case stemmed from a city ordinance that restricted, among other things, the burning of crosses. The Court cited Chaplinsky throughout the case, but specifically to say that the city ordinance failed the Chaplinsky test of fighting words because it specifically prohibits those words/expressions that communicate messages of racial, gender or religious intolerance and that the government cannot regulate speech based on hostility or favoritism toward particular groups. [122]

Definition of Fighting Words

The three major propositions are all directly related to the First Amendment and deal specifically with the issue of which words are protected and to what extent are those words protected. These cases include many of the more well-known First Amendment cases that have reached the Supreme Court, including New York Times v. Sullivan, Texas v. Johnson and Cohen v. California.

It is meaningful that the majority of cases fall into three propositions represented by 17, 16 and 11 cases in each. The frequency of cases per proposition then dramatically drops off (See Appendix). There is evidence in some of the cases in the Appendix that the fighting words doctrine set forth in Chaplinsky was used to justify issues for which it was never intended. i.e., to clear the way to name a city street.

By looking at the third proposition, which had only 11 cases, "Chaplinsky cited in order to create the notion that fighting words statutes must be limited to the fighting words definition to be constitutional," it can be noted that the fighting words doctrine has been used as it was originally stated in Chaplinsky v. New Hampshire — to limit that speech which falls under the definition of "fighting words" and allow First Amendment

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[122] R.A.V. v. City of St. Paul, 112, U.S. 2538 (1992).

protection for those words which cannot be defined as "fighting words." It therefore stands that the fighting words doctrine, as cited by the Supreme Court throughout its history, has maintained its original narrow intent.

A majority of the cases cited in the first two propositions cite the Chaplinsky case to set up the argument that speech can be restricted and freedom of speech is not an absolute freedom. But in many of the 33 cases that fall under the scope of the first two propositions the Court was further broadening the scope of the First Amendment and not restricting the speech in question. Nebraska Press Association v. Stuart is a good example of this. Chaplinsky was cited, but the Court took the side of the Press Association and stated that freedom of the press/speech as well as freedom from prior restraint is paramount under the First Amendment. Hustler Magazine v. Falwell utilized Chaplinsky in the same manner. In that case the Court stated that while fighting words were unprotected, this was not a case of fighting words. So Chaplinsky is cited quite often in cases where the Court's decision does not restrict speech, and in many cases expands freedom of speech and the definition of what is protected by the First Amendment.

An interesting side discussion in the case of Cohen v. California is that both the majority decision and the dissenting opinion used Chaplinsky — in opposition to one another. The majority opinion stated, "This [is not a fighting words case, i.e., a case of] personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction." Justice Blackmun, joined by the Chief Justice and Justice Black, dissented, saying: "Cohen's absurd and immature antic, in my view, was mainly conduct and little speech. Further the case appears to me to be well within the sphere of Chaplinsky ..." [123] Both sides were relying on the same portion of Chaplinsky to make their arguments: "It is well understood that

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[123] Cohen v. California, 403 U.S. 15 (1970).

the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech ... which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words — those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. ... such utterances are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument." [124] The Chaplinsky decision also relied strongly on the fact that the speech in question was a face-to-face confrontation rather than a statement added to the general marketplace of ideas. [125]

So fighting words, as defined by Chaplinsky, must meet the following criteria to be classified as fighting words and therefore unprotected by the First Amendment:

1. Face-to-face confrontation;
2. Words by which their very utterance inflicts injury;
3. Or words which tend to incite an immediate breach of the peace.

These criteria are extremely important in arguments both for and against hate speech codes on college campuses.

Arguments For Hate Speech Codes

Hate speech codes on college campuses are a necessary addition to the college atmosphere in order to create an environment of learning and acceptance for all community members. These codes should, and can, be written in such a way as to restrict that speech

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[124] Chaplinsky, 315 U.S. 571
[125] Ibid.

which is hateful in nature while still retaining basic First Amendment rights for all members of the college community.

College and university campuses, as institutions of higher learning, should be places where multitudes of ideas can freely be exchanged in an intellectual and violence-free manner. The idiom of the "ivory towers" of higher education should be a goal institutions of higher learning strive to maintain, not to be broken down by allowing speech that is hateful in nature. Chaplinsky's definition of fighting words clearly states that "epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution." [126] As such, it should not be outside the responsibility of an institution to teach its community to speak their minds and opinions without personal abuse and in a proper sense of communication so that the information being presented can be freely discussed without fear of violence.

In today's pluralistic world, it is unreasonable to think individuals can surround themselves with people and expect to confront no forms of diversity. It should be of the utmost importance for colleges and universities to teach tolerance, respect and acceptance of diversity. Diversity should not be something to be feared, but rather something to be welcomed by one and all, and it should be the responsibility of these institutions to instill that fundamental principle through class offerings, community standards of the campus and hate speech codes. None of these things can happen if openly hateful and fighting words are being espoused freely. To clarify, in no way should campuses attempt to control what students, faculty and staff think nor should any attempt be made to control their opinions. However, institutions should take on the responsibility of teaching students, faculty and staff how to disseminate their opinions and beliefs in such a way that those ideas are not likely to cause violence and are not spoken hatefully. Those ideas that are spoken with such

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[126] Chaplinsky, 315 U.S. 571

force or those ideas that are by their very nature hateful, create an atmosphere of fear and reticence for those people to whom the speech is directed — fear and reticence that have the potential to create victims of those on the receiving end of the hate speech. This alone can create an atmosphere where there is a chilling effect on the very speech that might respond to and dissipate the speech that is hateful or likely to cause violence.

In these ideals, hate speech codes are a necessary part of an institution of higher education and two authors offer ways to create such codes that respect the First Amendment rights of all parties.

Gibbs offers the following guideline for hate speech codes:

1. Speech/expression can not be punished based on the subjects the speech addresses — the institution must be neutral when regulating speech.
2. Policies that are overbroad when used to regulate speech are prohibited as are those policies which are vague.
3. There may be no restrictions on the time, place and manner of the speech, with the exceptions of appropriateness for the educational environment and the maintenance of peace and order on campus.
4. Codes cannot discriminate on the basis of content or viewpoint.
5. Due process protections and procedures should be in place and followed during any disciplinary process in which the code is utilized.
6. Take into consideration issues of the college's image, students' expectations and self respect. [127]

William A. Kaplin cites a five-criteria proposal that would help balance hate speech codes and the First Amendment on college campuses:

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[127] Gibbs, p. 17.

1. Codes must foster a comprehensive approach to, and perspective on, the hate speech problem on campuses, encompassing both the legal and the policy aspects and must include consideration of both equality and free speech values.
2. Must encourage and rely upon dialogue within the campus community reflecting the full range of campus interests and perspectives. It is important that the dialogue remain active constantly.
3. Must encompass and facilitate consideration of non-regulatory as well as regulatory options for managing hate speech and give priority to the non-regulatory options. For example, utilizing the influence of peers to impact attitudes.
4. Must assure that the institution's initiative for combating hate speech is adapted to the particular circumstances of its campus. The solution must be tailored to fit each campus individually. The process must be flexible enough to deal with changing attitudes and beliefs of the campus.
5. Must focus on First Amendment issues in an exceedingly methodical and concrete way and shed maximum light on legal obstacles to regulation as well as available latitude for regulatory initiatives. [128]

By combining the ideals put forth by Gibbs and Kaplin, creation of a speech code that respects both popular and unpopular speech should simply be a matter of putting the time and effort into actually creating one. Gibbs' suggestions rely heavily on First Amendment law and include suggestions for avoiding the pitfalls other hate speech codes have encountered, the most notable being overbreadth and vagueness. She also offers the warning not to restrict the time, place or manner of speech or the content — sure ways to

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[128] Kaplin, William A., "A Proposed Process for Managing the First Amendment Aspects of Campus Hate Speech," Journal of Higher Education (September/October, 1992), pp. 523-33.

have any speech code declared unconstitutional. Although Gibbs offers no solution to dealing with the overbreadth and vagueness issues, perhaps the best suggestion for that problem is to create a code based on mutual respect for others and cite Chaplinsky.

For example, a speech code could be worded this way: "All members of the university/college community are expected, in face-to-face confrontations, to respect the First Amendment right to speech of the other party. Speech which is likely to inflict injury by its very utterance or is likely to cause violence is to be considered 'fighting words' and prohibited. Should a situation arise where fighting words are spoken and result in injury or violence, the following administrative actions will take place (fill in what ever policy dictates punishment dependent upon the structure of the institution). It should be the individual responsibility of each and every member of the community to foster a commitment to the freedom of speech within the guidelines of the First Amendment."

Since the restrictive wording of the speech code includes not only ideas, but also phrases, from Chaplinsky it would be difficult for the courts to declare vagueness or overbreadth as a problem. A code such as this takes into account all of Gibbs' suggestions. Kaplin's ideals are also included since this sample speech code is comprehensive and encompasses reliance on case law by its adherence to Chaplinsky in both intent and wording. The suggested speech code assumes that there already exists, but makes the provision for, open dialog on the campus and that all groups are included. Non-regulatory options address creating and/or maintaining societal pressures that encourage voluntary compliance with the hate speech code through the mutual respect clause. As with Gibbs' recommendation, Kaplin also relies on the adherence to legal precedents. Perhaps the most important point Kaplin and Gibbs make is that campus communities must recognize that there is no single solution to hate speech codes that will fit every campus and as such, each campus must make a hate speech code uniquely its own.

Arguments Against Hate Speech Codes

First Amendment law is quite succinct and specific in the regulations it places on the freedom of speech. As such, there is no reason for creating hate speech codes on college campuses when existing case law creates ample restrictions on speech to account for potential problems. All speech, both that which is popular and that which is unpopular should enjoy the light of day on university campuses. Hate speech codes attempt to regulate that speech that is nothing more than unpopular beliefs in this era of political correctness and that kind of restriction has no place on college campuses where the free expression of ideas in the marketplace should be fundamental. A basic reason for hate speech codes lies in creating an environment in which no one ever has to hear or be confronted with ideas that may hurt his or her feelings — an environment of forced, and false, tolerance. Such tolerance cannot be regulated into existence. The fundamental tenet of the First Amendment is freedom of speech and there should never be so many restrictions on that freedom that it is rendered useless, especially on a campus.

In the case of Chaplinsky v. New Hampshire, the Supreme Court agreed that there are certain types of speech, such as fighting words, that are not protected by the First Amendment, and the Court specifically defined fighting words as "those [words] which by their very utterance inflict injury or tend to incite an immediate breach of the peace"; in addition, those words must also be spoken in a face-to-face confrontation. [129] All of the work put into creating speech codes that prohibit speech that inflicts injury was done more than 50 years ago and has withstood the test of time. The Supreme Court has repeatedly upheld the Chaplinsky decision and has, in fact, expanded it to restrict such speech as child pornography, as in the case of New York v. Ferber. [130] The First Amendment is a fundamental right given to citizens of the United States and the Court has been correct in

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[129] Chaplinsky, 315 U.S. 571.

[130] New York v. Ferber, 458 U.S. 747 (1981).

being very careful about placing too many limitations and restrictions on freedom of speech.

Freedom of speech is paramount to this country — it is, in part, what this country was founded on. Undue restrictions of speech creates a chilling effect wherein the marketplace of ideas no longer works properly and the speech that is the truth no longer rises to the top. The expression of unpopular and even hate speech should be done out in the open, where the marketplace of ideas can take care of the hateful expositions and untruths. Take, for example, the Ku Klux Klan: This is a group of individuals whose speech is, without a doubt, offensive and spews forth many untruths. Were these individuals to be restricted from stating their beliefs publicly and consequently punished, their offensive speech would not halt, it would simply not be in the marketplace of ideas. As it stands today, when a member of the KKK states that African Americans are inferior to Caucasians (a falsehood), the theory of the marketplace takes over and the truth rises to the top, the falsehood is defeated and shunned by society. Were that falsehood banned from the marketplace, it would still exist, but it would do so in the dark corners where the light of the truth could not defeat it.

Case after case has supported the freedom of speech. In Cohen v. California [131] the Court ruled that Mr. Cohen had a First Amendment right to protest against the draft to send troops to Vietnam by putting the phrase "Fuck the Draft" on his jacket. He was allowed to participate in the free expression of ideas, regardless of how those ideas made other people feel or whether his ideas were popular or unpopular. In Texas v. Johnson [132] and again in the United States v. Eichman, [133] the Supreme Court ruled that burning the American flag constituted freedom of expression — an idea so unpopular that after the

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[131] Cohen v. California, 403 U.S. 15 (1970).
[132] Texas v. Johnson, 491 U.S. 397 (1989).
[133] United States v. Eichman, 496 U.S. 310 (1989).

Court ruled on the Johnson case, Congress enacted the Flag Protection Act of 1989 to prohibit flag burning. The Court subsequently declared the Act unconstitutional in the Eichman case. Additional First Amendment freedoms that the Court has upheld include the ability to report what happens in open court, in part due to Nebraska Press Association v. Stuart, [134] and the right to publicly criticize government officials through the decision in New York Times v. Sullivan. [135] Some of the most basic freedoms afforded American citizens everyday are guaranteed by First Amendment law. Gratuitous restriction of the First Amendment could result in the tragedy of freedom *from* speech rather than freedom *of* speech, wherein the right of someone to not hear a specific kind of speech becomes paramount to the right to express that specific speech.

College campuses need not restrict First Amendment rights by prohibiting certain kinds of unpopular or hateful speech. Campus communities should focus on how to change those beliefs and attitudes through thought-provoking discussion and education — not regulation.

Concluding Commentary

It is no wonder the dilemma about hate speech codes on college campuses is such a difficult one — some of the principal ideas that can be used to argue for hate speech codes can also be used to argue against them.

Applying the Chaplinsky decision in today's world can sometimes be a tricky task since the decision is more than 50 years old and words that "inflicted injury" in 1942 would likely not even raise eyebrows today. Although the intent of Chaplinsky still exists, the list of words and phrases which are and are not protected has been altered by other court decisions over the years. Chaplinsky says obscene speech and fighting words are

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[134] Nebraska Press Association v. Stuart, 427 U.S. 539 (1975).
[135] New York Times v. Sullivan, 376 U.S. 254 (1963).

unprotected, but so are other kinds of speech: false advertising; advertising of illegal activities, and child pornography; and other forms of speech may still be added as Supreme Court decisions continue to be made regarding the First Amendment. Similarly, some of the speech listed in Chaplinsky as unprotected is now protected: lewd and profane speech that is not obscene, and libelous statements regarding public officials.

G. Michael Fenner, a Creighton University law professor, puts forth a suggestion for a new definition of fighting words that may be more to the point for today's society and not as likely to deteriorate over time: "Fighting words are words likely to immediately provoke the listener to fight with the speaker, uttered in the context of a personally provocative face-to-face confrontation between the speaker and the listener (whether the listener is an audience of one or individual members of an audience of many)." [136]

Suggestions for Additional Research

The discussion and debate surrounding hate-speech codes are not likely to cease any time soon. It is important to the study of the First Amendment to deal with the issue of hate-speech codes. Further research in this area should include studying the possibility of creating a hate-speech code that would likely stand up to constitutional challenge.

Further, research in the area of Chaplinsky v. New Hampshire and the fighting words doctrine should include additional study of Chaplinsky's prodigies to determine if the specific evidence in any of these cases is at all similar to the evidence that drove the Chaplinsky case all the way to the Supreme Court and that might therefore be used with constitutional justification as prototypes for hate speech codes on college campuses.

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[136] Fenner, G. Michael, Creighton University School of Law , Course Materials, Spring, 1993.

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APPENDIX

The following are the remaining cases in which Chaplinsky v. New Hampshire is cited by the U.S. Supreme Court.

Fewer than 10 cases citing Chaplinsky for the same proposition

Chaplinsky cited to substantiate that obscenity and libel are unprotected (9 cases): *Winters v. New York*, 333 U.S. 507, 510 (1947); *Roth v. United States*, 354 U.S. 476, 481 (1956); *Miller v. California*, 413 U.S. 15, 20 (1972); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 61 (1972); *New York v. Ferber*, 458 U.S. 747, 754 (1981); *New York Times v. Sullivan*, 376 U.S. 254, 268 (1963); *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 144 (1966); *Time, Inc. v. Firestone*, 424 U.S. 448, 456 (1975); *Herbert v. Lando*, 441 U.S. 153, 158 (1978).

First Amendment applicable to the states (4 cases): *Jones v. Opelika*, 316 U.S. 584, 593 (1941); *Largent v. Texas*, 318 U.S. 418, 422 (1942); *Spieger v. Randall*, 357 U.S. 513, 530 (1957, concurrence); *Gibson v. Florida Legislative Committee*, 372 U.S. 539, 560 (1962, concurrence).

***Chaplinsky* used as a example of a seemingly-vague or overbroad statute that was permissible (4 cases):** *Screws v. United States*, 325 U.S. 91, 129 (1944, concurring); *Jordan v. DeGeorge*, 341 U.S. 223, 231 (1950); *Erzonznick v. City of Jacksonville*, 422 U.S. 205, 217 (1974); *Hynes v. Mayor of Oradell*, 425 U.S. 610, 622 (1975).

Calculated falsehoods are unprotected (2 cases): *Time, Inc. v. Hill*, 385 U.S. 374, 390 (1966); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1973).

Statutes which ban only spoken words may be overbroad (2 cases): *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1972); *Young v. American Mini Theatres*, 427 U.S. 50, 59 (1975).

The following list represents 13 miscellaneous cases in which Chaplinsky is cited once per proposition to support things such as "Speech may be reasonably limited to accommodate for the purpose of naming a street," to "Words can be coupled with actions to produce violence."

Jamison v. Texas, 318 U.S. 413, 416 (1942); *Bennett v. City of Dalton*, 320 U.S. at 712 (1943); *Prince v. Massachusetts*, 321 U.S. 158, 169 (1943); *Niemotoko v. Maryland*, 340 U.S. 268, 281 (1950, concurrence); *Beauharnais v. Illinois*, 343 U.S. 495, 503 (1951); *Youngdahl v. Rainfair, Inc.*, 355 U.S. 131, 138 (1957); *Carroll v. Princess Anne*, 393 U.S. 175, 180 (1968); *Stanley v. Georgia*, 394 U.S. 557, 561 (1968); *Coates v. City of Cincinnati*, 402 U.S. 611, 613 (1970); *Lewis v. City of New Orleans*, 408 U.S. at 913 (1972, concurring); *Schaumberg v. Citizens For A Better Environment*, 444 U.S. 620, 634 (1979); *Secretary of State of Maryland v. J. H. Munson, Co.*, 4647 U.S. 947, 969 (1983); *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 685 (1985).