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"FIGHTING SLURS":
CONTEMPORARY FIGHTING WORDS AND THE
QUESTION OF CRIMINALLY PUNISHABLE RACIAL
EPITHETS

WILLIAM C. NEVIN

I. INTRODUCTION

In State v. Smith, the Court of Appeals of Wisconsin was faced with the somewhat novel question of whether racist Facebook comments could serve as the basis for disorderly conduct and unauthorized use of a computer system charges. The case against Thomas Smith began when the Village of Arena police department posted a Facebook status update thanking area residents that assisted law enforcement in locating two suspects. However, comments on the police department's post took a turn as some Facebook users complained about past actions by department officers. Smith posted two comments in reply to those complaints, writing: "Fuck the fucking cops they ant shit but fucking racist basturds an fucking all of y'all who is racist [sic]," and "Fuck them nigers policy bitchs wat the you got on us not a darn thing so fuck off dicks [sic]."

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2 See id. at *2.
3 See id. at *2–3.
4 Id. at *3.
Because of those two comments, Smith was arrested on charges of disorderly conduct and the unlawful use of a computerized communication system under a theory that his comments were "fighting words,"5 or words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace."6 A jury convicted Smith, and he appealed his conviction to the Court of Appeals of Wisconsin, where his conviction was overturned.7

The ruling for the defendant was based primarily on one unescapable truth about the fighting words doctrine—namely, that it has "rarely if ever been applied outside of the face-to-face context."8 Thus, because Smith's screed was only online—not directed to someone else in person—it could not meet the traditional definition of a fighting word, which is communication that could result in a reasonable person resorting to physical violence.9 With the physical distance between Smith and the Arena police officers, there was simply no possibility of an immediate breach of the peace. Therefore, Smith's conviction could not rest on the fighting words doctrine.

In examining Smith's actual communication, rather than simply evaluating his means of communicating—the court made two points: (1) that it was difficult to determine exactly who was the target of Smith's "nigger" slur; and (2) that all authorities cited by prosecutors involved the in-person use of racial slurs.10 From there, the court noted the "racially charged" environment in which the comments were made, and agreed with the prosecution that "context matters."11 It did not, however, explore whether racial slurs can serve as the basis for a successful fighting words prosecution.

5 See id. at *3–4 (noting that a pretrial motion to dismiss charges on First Amendment grounds was denied after prosecutors argued that the comments represented fighting words).
8 Id. at *8–9.
9 See id.
10 See id. at *11.
11 See id. at *11–12 ("[T]he State points to evidence that the juveniles the police arrested were black and were detained at gunpoint by private citizens until the police arrived.").
This Article will do what the Smith court did not: specifically examine whether racial slurs are fighting words under the current understanding of the doctrine created in 1941 with the Supreme Court’s decision in Chaplinsky v. New Hampshire. Part II will trace the development of the fighting words doctrine through Chaplinsky and subsequent cases at the Supreme Court. Part III will examine successful fighting words prosecutions of the last five years, while Part IV will examine conflicting case law on racial slurs as fighting words, looking at cases that support the idea that racial slurs are fighting words and discussing courts reaching a contrary result. Part V will then examine the normative question of whether racial slurs should be fighting words by comparing racial slurs as fighting words to racial misidentification as grounds for defamation. Finally, the Article will conclude in Part VI by suggesting that whatever controversy that exists in the matter of racial slurs as fighting words should be resolved in favor of treating slurs as prohibitable under the doctrine.

II. FIGHTING WORDS DOCTRINE: A HISTORY

As previously mentioned, the Supreme Court’s 1941 decision in Chaplinsky v. New Hampshire established the “fighting words” exception to the First Amendment in American jurisprudence. The defendant in that case, a member of the Jehovah’s Witnesses named

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16 Chaplinsky, 315 U.S. 568.
Walter Chaplinsky, was arrested in 1940 for calling a Rochester, New Hampshire city marshal "a God damned racketeer" and "a damned Fascist" after a crowd caused a disturbance while Chaplinsky was attempting to distribute literature.\textsuperscript{17} Chaplinsky was specifically charged with a violation of a state law that made it a crime to address any offensive, derisive, or annoying word to any other person who is lawfully in any street or other public place.\textsuperscript{18} Additionally, the law prohibited calling such persons by offensive or derisive names or making any noises or exclamation with the intent "to deride, offend or annoy, or to prevent such persons from pursuing their lawful business or occupation."\textsuperscript{19}

After Chaplinsky was unable to introduce evidence at trial to show he was provoked, he was convicted of the charge, and his conviction was upheld by the New Hampshire Supreme Court.\textsuperscript{20}

Likewise, the United States Supreme Court affirmed Chaplinsky's conviction.\textsuperscript{21} Early in the Court's unanimous majority opinion written by Justice Frank Murphy, the Court stated that "it is well understood that the right of free speech is not absolute at all times and under all circumstances"\textsuperscript{22}—a declaration that certainly did not bode well for the defendant. Following that statement, Justice Murphy explained, "[t]here are certain well-defined and narrowly limited classes of speech" that are subject to criminal sanction even under the Constitution, with those categories of speech including "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."\textsuperscript{23} Justice Murphy then quoted the New Hampshire Supreme Court's decision upholding

\textsuperscript{17} \textit{Id.} at 569–70 (1942) (quoting Chaplinsky's statement, "[T]he whole government of Rochester are Fascists or agents of Fascists.").

\textsuperscript{18} \textit{Id.} at 569 (citation omitted).

\textsuperscript{19} \textit{Id.}

\textsuperscript{20} \textit{Id.} at 570; \textit{see also} Burton Caine, \textit{The Trouble with "Fighting Words": Chaplinsky v. New Hampshire is a Threat to First Amendment Values and Should Be Overruled}, 88 MARQ. L. REV. 441, 446–47 (2004) (describing how Chaplinsky was likely physically assaulted before he spoke to the town marshal).

\textsuperscript{21} \textit{Chaplinsky}, 315 U.S. at 574.

\textsuperscript{22} \textit{Id.} at 571.

\textsuperscript{23} \textit{Id.} at 572.
Chaplinsky's conviction to define the parameters of fighting words speech:

The test is what men of common intelligence would understand would be words likely to cause an average addressee to fight . . . . The English language has a number of words and expressions which by general consent are 'fighting words' when said without a disarming smile . . . . Such words, as ordinary men know, are likely to cause a fight. So are threatening, profane or obscene revilings.\(^\text{24}\)

Under that test, as the unanimous Court concluded, Chaplinsky had violated the state statute in question because "[a]rgument is unnecessary to demonstrate that the appellations 'damn racketeer' and 'damn Fascist' are epithets likely to provoke the average person to retaliation, and thereby cause a breach of the peace."\(^\text{25}\)

In addition to relying heavily on the New Hampshire Supreme Court decision—an opinion that the Court quoted "extensively," according to Professor Burton Caine\(^\text{26}\)—Justice Murphy also premised important portions of the Chaplinsky opinion on a previous Court decision that suggests a much broader prohibition on speech than the modern fighting words doctrine. Justice Murphy quoted from the Court's prior decision in Cantwell v. Connecticut\(^\text{27}\) to state that to "[r]esort 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."\(^\text{28}\)

Cantwell, decided a year before Chaplinsky, arose out of similar facts.\(^\text{29}\) Again, three Jehovah's Witnesses were arrested for soliciting in violation of state law and breaching the peace for door-to-door

\(^{24}\) Id. at 573 (quoting State v. Chaplinsky, 18 A.2d 754, 762 (N.H. 1941)).

\(^{25}\) Id. at 574.

\(^{26}\) Caine, supra note 20, at 449.

\(^{27}\) 310 U.S. 296 (1940).

\(^{28}\) Chaplinsky, 315 U.S. at 572 (quoting Cantwell, 310 U.S. at 309–10).

\(^{29}\) Cantwell, 310 U.S. at 301.
preaching.\textsuperscript{30} The \textit{Cantwell} Court, however, overturned the defendants' convictions.\textsuperscript{31} In addressing the breach of the peace charge, Justice Owen Roberts, writing for a unanimous Court, noted that the defendant "was upon a public street, where he had a right to be, and where he had a right peacefully to impart his views to others."\textsuperscript{32} Furthermore, there was no evidence to show that the defendant was "noisy, truculent, overbearing or offensive" in his proselytizing.\textsuperscript{33} Yet Justice Roberts observed that at least one witness testified at trial that he felt like hitting the defendant—\textsuperscript{34} a curious note given that \textit{Cantwell} presaged \textit{Chaplinsky}.\textsuperscript{35}

While the \textit{Cantwell} court held for the defendant, at least two passages would serve to lay the foundation for upholding Chaplin-
sky's conviction. Just before the \textit{Cantwell} Court's observation that epithets and abuse are not protected under the Constitution, Justice Roberts noted:

\begin{quote}
One may, however, be guilty of [breaching the peace] if he commit[s] acts or make[s] statements likely to provoke violence and disturbance of good order, even though no such eventuality be intended. Decisions to this effect are many, but examination discloses that, in practically all, the provocative language which was held to amount to a breach of the peace consisted of profane, indecent, or abusive remarks directed to the person of the hearer.\textsuperscript{36}
\end{quote}

\textsuperscript{30} \textit{Id.} at 300.
\textsuperscript{31} \textit{Id.} at 311. The soliciting conviction, based on a state law that prevented fund-raising for religious, charitable, or philanthropic causes without prior approval from the state, was overturned because the Court found the law to be an unconstitutional infringement on religious liberty. \textit{See id.} at 301–02, 307.
\textsuperscript{32} \textit{Id.} at 308.
\textsuperscript{33} \textit{Id.}
\textsuperscript{34} \textit{Id.} at 309.
\textsuperscript{35} \textit{See id.}
\textsuperscript{36} \textit{Id.} at 309–10.
Cantwell's preaching, despite its natural tendency to offend Catholics and all those who adhere to organized religion, failed to meet this standard of "profane, indecent, or abusive remarks," according to Justice Roberts. Yet, the Court still signaled what might be proscribable language and, furthermore, argued that insults are outside the purview of the First Amendment. The Cantwell Court would hint at the means of silencing such offensive speech at the end of its opinion, as Justice Roberts concluded: "[I]n the absence of a statute narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the State, the petitioner's communication . . . raised no such clear and present menace to public peace and order . . . ." The passage thus implied that a narrowly drawn criminal statute could very well serve as the grounds to punish offensive speech of the "profane, indecent, or abusive" nature. Indeed, in Chaplinsky, the defendant's conviction was upheld in part because the New Hampshire statute in question was "narrowly drawn and limited to define and punish specific conduct." Even though Cantwell and Chaplinsky both suggested a broad interpretation of the newly created fighting words doctrine, the Supreme Court subsequently narrowed its application in a series of cases. The first of those cases, Cohen v. California, came 30 years after Chaplinsky and saw the Court overturn a criminal conviction for wearing a jacket in public that bore the words "Fuck the Draft." In writing for the Court's majority, Justice John Marshall Harlan defined

See id. at 309 ("The record played by Cantwell embodies a general attack on all organized religious systems as instruments of Satan and injurious to man; it then singles out the Roman Catholic Church for strictures couched in terms which naturally would offend not only persons of that persuasion, but all others who respect the honestly held religious faith of their fellows.").

Id.

Id. at 309–10.

Id. at 311.


Id. at 16. The defendant, Paul Robert Cohen, wore the jacket in a Los Angeles County Courthouse corridor, and he did so "knowing that the words were on the jacket as a means of informing the public of the depth of his feelings against the Vietnam War and the draft," according to his testimony at trial. Id.
fighting words as "those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction." 44 The jacket, however, did not represent a fighting word because it was not directed to a specific individual. 45 "No individual actually or likely to be present," Justice Harlan concluded, "could reasonably have regarded the words on [Cohen's] jacket as a direct personal insult." 46 Thus, the first major limitation on the fighting words doctrine was that speech had to be directly addressed to a specific individual rather than a crowd or a general population to be constitutionally prohibitable, such as the individuals in the Los Angeles County Courthouse on the day Cohen wore his jacket.

A year after Cohen, the Court further limited the application of the doctrine and attempted to better define it with the 1972 decision in Gooding v. Wilson. 47 In Gooding, the Court reviewed a constitutional challenge to a Georgia statute that made it a misdemeanor to use "opprobrious words or abusive language" that tended to cause a breach of the peace. 48 While the facts of the underlying conviction in Gooding involved a Vietnam War protestor saying to police officers, "White son of a bitch, I'll kill you," "You son of a bitch, I'll choke you to death," "You son of a bitch, if you ever put your hands on me again, I'll cut you all to pieces," 49 the Court's task was to examine the constitutionality of the state law and how it had been applied by Georgia courts. 50 While the Court, in a majority opinion written by Justice William Brennan, found that the state law was successfully narrowed in principle to prohibit only fighting words, 51 the Court determined that in practice Georgia courts had expanded the limits of Chaplinsky

44 Id. at 20.
45 Id.
46 Id.
48 Id. at 519 (quoting Georgia Code Ann. § 26-6303).
49 Id. at 520 n.1. It is worth noting that the defendant in Gooding was originally convicted under the fighting words—and not true threat—doctrine. See generally Watts v. U.S., 394 U.S. 705 (1969) (establishing the Court's "true threat" doctrine).
50 See Gooding, 405 U.S. at 520 (noting that only Georgia state courts could authoritatively construe § 26-6303).
51 See id. at 524.
to cover otherwise protected speech.\textsuperscript{52} In reaching the decision, Justice Brennan noted that appellate courts in the state had upheld convictions for exclamations of “God damn” and refused to dismiss a criminal charge for accusing someone of lying.\textsuperscript{53} Furthermore, Justice Brennan observed that at least one Georgia court speculated that fighting words might still result in a breach of the peace “at some future time, when the person to whom it was addressed might be no longer hampered by physical inability, present conditions, or official position.”\textsuperscript{54} The expansion of the definition of fighting words to cover mere insults and blasphemy, especially when combined with the removal of the likelihood of instant physical violence, in essence “licenses the jury to create its own standard in each case” and mandated a finding of unconstitutionality, according to Justice Brennan.\textsuperscript{55}

With \textit{Gooding}, therefore, the Court reinforced that fighting words must be beyond mere insults and they must be likely to cause instant physical violence.

Three months after \textit{Gooding} was decided, the Court gave more hints as to what were \textit{not} constitutionally prohibitable fighting words in \textit{Rosenfeld v. New Jersey},\textsuperscript{56} an order that vacated a criminal conviction for shouting “motherfucker” four times during a rant at a public school board meeting\textsuperscript{57} in light of both Cohen and Gooding. The dissents in \textit{Rosenfeld}, however, also applied to other cases from Louisiana and Oklahoma\textsuperscript{58} that resulted in convictions for addressing police officers as “god damn motherfucking police,”\textsuperscript{59} and referring to officers as “motherfucking fascist pigs” and a particular officer as a “black motherfucking pig.”\textsuperscript{60} Although the majority gave no explicit reasoning for vacating the conviction other than citations to the Court’s decisions in Cohen and Gooding, three dissenters—Chief Justice Warren Burger and Associate Justices Harry Blackmun

\begin{itemize}
\item \textsuperscript{52} See id. at 524–25.
\item \textsuperscript{53} Id. at 525.
\item \textsuperscript{54} Id. at 526 (quoting Elmore v. State, 83 S.E. 799, 800 (Ga. Ct. App. 1914)).
\item \textsuperscript{55} Id. at 528 (quoting Herndon v. Lowry, 301 U.S. 242, 263 (1937)).
\item \textsuperscript{56} 408 U.S. 901 (1972).
\item \textsuperscript{57} Id. at 904 (Powell, J., dissenting).
\item \textsuperscript{58} See id. at 902 (Burger, J., dissenting).
\item \textsuperscript{59} Id. at 909 (Rehnquist, J., dissenting).
\item \textsuperscript{60} Id. at 911.
\end{itemize}
and William Rehnquist—wrote to express their disapproval with the majority's decision. Chief Justice Burger wrote of his disappointment in especially apocalyptic terms:

It is barely a century since men in parts of this country carried guns constantly because the law did not afford protection. In that setting, the words used in these cases, if directed toward such an armed civilian, could well have led to death or serious bodily injury. When we undermine the general belief that the law will give protection against fighting words and profane and abusive language such as the utterances involved in these cases, we take steps to return to the law of the jungle. These three cases, like Gooding, are small but symptomatic steps. If continued, this permissiveness will tend further to erode public confidence in the law—that subtle but indispensable ingredient of ordered liberty.\(^61\)

Despite the Chief Justice's objections, Rosenfeld at least suggests that, again, mere insults and profanity—even when directed at specific individuals—cannot serve as fighting words without the likelihood of imminent physical violence.

In the Court's most recent case to address fighting words, R.A.V. v. St. Paul,\(^62\) the Justices attempted to shape the means by which states can regulate fighting words rather than fundamentally altering the doctrine itself.\(^63\) In that case, the Court examined the constitutionality of a St. Paul, Minnesota city ordinance that made it a crime to place on either public or private property a symbol traditionally associated with racial hatred such as a burning cross or a swastika, in which an individual "knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of

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\(^{61}\) Id. at 902 (Burger, C.J., dissenting).


\(^{63}\) See id. at 381 ("Assuming, arguendo, that all of the expression reached by the ordinance is proscribable under the 'fighting words' doctrine, we nonetheless conclude that the ordinance is facially unconstitutional in that it prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses.").
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race, color, creed, religion or gender." The Court, in a majority opinion by Justice Antonin Scalia, found the ordinance to be an unconstitutional content-based restriction on speech and overturned the criminal conviction of a teenager who had been found guilty of burning a cross in a black family's yard. The law was impermissible under the First Amendment because it was a ban on fighting words "of whatever manner that communicate messages of racial, gender, or religious intolerance." Thus, instead of a complete ban on fighting words—a ban which could have included racial slurs—the city's targeted attempt to deal with racial and religious prejudice was an unconstitutional attempt to censor speech. As Justice Scalia explained, "The politicians of St. Paul are entitled to express that hostility—but not through the means of imposing unique limitations upon speakers who (however benightedly) disagree."

Importantly, R.A.V. did not foreclose attempts to punish racial slurs through the fighting words doctrine; rather, the case only signaled that the Court would not allow statutes that only punished hate speech and other intolerant forms of communication using the constitutionally acceptable prohibition on fighting words. R.A.V. also tacitly reaffirmed Chaplinsky and its progeny, but as Cohen, Gooding, and Rosenfeld show, Justices have not always been able to agree on what is and what is not a fighting word. As the doctrine has developed, there are ultimately four elements in removing constitutional protection from speech under a fighting words theory: (1) the content of the speech must consist of personally abusive speech directed at a specific individual; (2) the target of the speech must be in such close proximity as to create the possibility of physical violence; (3) the target must be likely to retaliate; and (4) the violent reaction to

64 Id. at 380 (quoting St. Paul, Minn., Legis. Code § 292.02 (1990)).
65 Id. at 379–81.
66 Id. at 394.
67 See id. at 396 ("An ordinance not limited to the favored topics, for example, would have precisely the same beneficial effect. In fact the only interest distinctively served by the content limitation is that of displaying the city council's special hostility towards the particular biases thus singled out.").
68 Id.
69 See id. at 396.
70 See supra text accompanying notes 43–62.
the speech must be immediate.\textsuperscript{71} Without any further guidance from the Court, the definition in \textit{Gooding} of fighting words—“words that have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed”—is perhaps the best insight into determining whether racial slurs—or any words for that matter—can be fighting words.\textsuperscript{72}

\section*{III. Contemporary Examples of Fighting Words: Successful Prosecutions From 2010–2015}

Contemporary courts have found that a variety of insults and profanities can be considered fighting words.\textsuperscript{73} Additionally, for some courts, it may simply be a matter of profanity in the wrong setting, such as in front of a potentially hostile crowd\textsuperscript{74} or a captive audience.\textsuperscript{75} Other courts have determined that threats or attempts to goad others into fighting can naturally be considered fighting words, while some courts have relied on gestures or the manner of presentation to find defendants liable for speech that would otherwise be protected.\textsuperscript{76}

In cases that focused almost exclusively on the content of the speech, recent courts have found that a variety of obscenities—even single or isolated words—can be prohibited fighting words. The Eleventh District Court of Appeals of Ohio suggested in a 2014 case that “asshole” and a request to “stay the [fuck] away” could support a disorderly conduct conviction under a theory of fighting words.\textsuperscript{77} Likewise, the U.S. District Court in New Hampshire found that a sin-

\begin{itemize}
  \item \textsuperscript{71} Clay Calvert, \textit{Fighting Words in the Era of Texts, IMs and E-Mails: Can a Disparaged Doctrine Be Resuscitated to Punish Cyber-Bullies?}, 21 \textit{DEPAUL J. ART TECH. & INTELL. PROP. L.} 1, 4–5 (2010).
  \item \textsuperscript{72} 405 U.S. at 524 (internal quotations omitted).
  \item \textsuperscript{73} See infra text accompanying notes 78–83.
  \item \textsuperscript{76} See infra text accompanying notes 99–103.
\end{itemize}
gle taunt of "suck my dick" could "cross[] the threshold into the realm of fighting words."78

Other courts have found that the repeated use of profanity and insults can constitute fighting words. For example, the U.S. District Court for the Southern District of Alabama concluded that "[t]here can be little doubt that repeatedly calling a 13 year-old girl a 'whore' and a 'slut' in the presence of the girl's mother serves no purpose other than to provoke a confrontation[.]")79 The Tenth District Court of Appeals of Ohio likewise upheld the disorderly conduct conviction of a defendant who "repeatedly called" a bus driver "a few bitches, mother fuckers, [and] full of shit."80 Finally, in People v. Craig,81 the Third District Appellate Court of Illinois upheld the disorderly conduct conviction of a woman who yelled "vulgarties about being fired, 'over and over again'" while witnesses "wait[ed] for fists to start flying."82

In some cases, it is not the simple presence of obscenities or profanity that makes for fighting words, but rather the environment in which they are communicated. In State v. Nelson,83 the Court of Appeals of Minnesota noted that an on-duty liquor store clerk was a "captive audience" who could not leave the job as a customer called the clerk "a piece of [shit]" and a "[fucking asshole]."84 In State v. Frazier,85 the Ninth District Court of Appeals of Ohio found that a defendant created "a public spectacle that threatened the safety of law enforcement officials [] as well as a crowd of 50 to 70 people"86 after

82 Id. at *3, *5.
84 Id. at *7, *9.
86 Id. at 46
she called police officers "crooked a** cops," "b***," "mother f******" and "f****** crooked a** cops." 87

Outside of simple profanity, recent court decisions show that threats or simple attempts to encourage another person to fight can be considered fighting words. The Court of Appeals of Kansas noted that the presence of a threat was "merely another factor" to be considered in a fighting words determination as it upheld the disorderly conduct conviction of a defendant who told his ex-wife, "I hate you, you F'ing cunt. I hate you bitch. I'm going to get you." 88 Similarly, a Pennsylvania appellate court found that a "volatile and combative" defendant was guilty of disorderly conduct after repeatedly pointing his finger at others, suggesting he had access to firearms, and asking a principal, "[H]ow would you like it if you left work here one night at six (6) o'clock in the evening and there was somebody waiting for you outside by your car?" 89 In the case of In re T.W., 90 the Third District Court of Appeals of Ohio found that while verbal criticism of police was protected by the First Amendment, such protection did not include "threats of violence to kill the officers and their families," which instead constituted fighting words. 91 Finally, the Third District Appellate Court of Illinois noted in Craig that the defendant remarked that her former employer would "pay for it" after firing her, emphasizing that threats or the appearance of threats can be a factor in a determination of fighting words. 92

In addition to threats, attempting to provoke another individual to physical violence has logically been found to constitute fighting words in recent cases. In State v. Ford, 93 the Court of Appeals

87 Id. at *44.
91 Id. at *18. The juvenile in the case also threatened to "slap the white" off an officer's face. Id. at *17.
of Minnesota determined that the defendant uttered constitutionally unprotected fighting words when he told a former co-worker that he would "like to put [his] fist into [the former co-worker's] body" and that he wanted to "kick [his] [ass]" and to "meet [him] outside."\footnote{Id. at *17.} The Supreme Court of North Dakota reached the same conclusion in \textit{Rebel v. Rebel}\footnote{837 N.W.2d 351 (N.D. 2013).} as the Court upheld a two-year disorderly conduct restraining order resulting from an incident in which a woman called her husband's ex-wife a "fucking liar" and suggested the ex-wife was "not brave enough" to get out of her car.\footnote{Id. at 356.} The Court determined that the language used to entice the ex-wife to leave the vehicle constituted fighting words that "compromised" the woman's "safety, security, and privacy."\footnote{Id. at 359.}

Finally, some courts have found lewd or otherwise hostile gestures to be important in determining whether speech is a fighting word. The Court of Appeals of Colorado, for example, found that a juvenile defendant's companion who pointed his finger at a security guard added to a breach of the peace in which the defendant "repeatedly yelled [fuck you]."\footnote{People ex rel. K.W., 317 P.3d 1237, 1241–42 (Colo. App. 2012).} In a similar case where gestures and obscenities, considered together, resulted in a fighting words prosecution, the U.S. District Court for the Southern District of Ohio found that a defendant's "aggressive speech" combined with physical arm "flapping" and "flailing" were both "provocative enough to incite an average person to violence."\footnote{Marsili v. Vill. of Dillonvale, No. 2:12-CV-00741, 2014 U.S. Dist. LEXIS 65831, at *39 (S.D. Ohio May 13, 2014).} Lastly, in \textit{Watkins v. State},\footnote{377 S.W.3d 286 (Ct. App. Ark. 2010).} the Court of Appeals of Arkansas upheld the fighting words conviction of a man described as "alternat[ing] between states of calm and irrationality . . . flailing his arms, cursing loudly, and eventually demonstrating a violent demeanor."\footnote{Id. at 291.} However, a dissenting justice in the case
argued that the majority's decision served only to "criminalize[] body language."

Successful contemporary fighting words prosecutions, at least as evidenced by lower court case law from 2010–2015, are premised on either obscenities, threats or challenges to physical violence, or obscenities coupled with physical gestures. If lower courts consider racial slurs to be fighting words, then these general observations should be the same as obscenities are replaced with racial slurs. As Part IV will show, aside from courts that have found racial slurs to be mere insults, racial slurs are generally treated much like the previously discussed obscenities for the purposes of a fighting words analysis.

IV. RACIAL SLURS AS FIGHTING WORDS: LOWER COURTS ADDRESS THE ISSUE

Of the handful of courts to address the question of whether racial slurs can be fighting words, most—but importantly not all—courts have determined that such slurs can be properly excluded from First Amendment protection as fighting words. Part IV will first examine cases that found slurs to be protected speech (IV.A) before addressing cases to the contrary (IV.B).

A. Slurs as Protected Speech

Courts overturning convictions for racial slurs have done so under a variety of rationales, including statutory interpretation, general application of the fighting words doctrine, the use of state constitutional law to protect speech that might otherwise be subject to criminal liability, and a simple categorical declaration that slurs cannot be fighting words.

The Court of Appeals of Michigan overturned a conviction based on the defendant calling restaurant customers "spics," but the court stopped short of determining that racial slurs were or were not fighting words, as the court's decision instead found that a city ordi-

102 Id. at 292 (Hart, J., dissenting) (internal quotations omitted).
103 See supra text accompanying notes 78–103.
nance failed to provide constitutionally sufficient notice of prohibit-
ed speech.\textsuperscript{104} The ordinance in question banned "indecent, insulting, immoral or obscene conduct in any public place,"\textsuperscript{105} but as applied, "[t]he term 'insulting' . . . did not give adequate forewarning that the challenged conduct—referencing a person by a racial slur—may rise to the level of 'fighting words' . . . .\textsuperscript{106} Thus, as the court concluded, the defendant had been unfairly convicted without proper judicial or statutory notice that the word "spic" could be a fighting word.\textsuperscript{107}

In cases that applied general principles of the fighting words doctrine to dismiss charges or overturn criminal convictions, the Appellate Court of Illinois came to one of the more unusual decisions in \textit{People v. Redwood}.\textsuperscript{108} In that case, the court affirmed a decision\textsuperscript{109} to dismiss charges against a defendant accused of shouting across a street, "How long are you going to be a shoe-shine boy?" to an African-American attorney who had represented him in a previous case.\textsuperscript{110} The court agreed that "[the attorney] and many others may find the words offensive," but under Illinois case law, the court concluded the offensiveness simply was not enough to render "shoe-shine boy" a fighting word.\textsuperscript{111} Instead, the court found that, to be a fighting word under state law, the communication in question had to contain "an explicit or implied threat."\textsuperscript{112} As the court concluded, "[V]ulgarities and epithets do not suffice to trigger the State's prosecutorial powers and criminal sanctions."\textsuperscript{113}

The court's decision was, again, unusual because fighting words and threatening speech are generally two distinct propositions.\textsuperscript{114} By requiring fighting words to contain explicit or implied threats, the doctrine begins to merge with the prohibition on true

\textsuperscript{105} \textit{Id.} at 655.
\textsuperscript{106} \textit{Id.} at 657.
\textsuperscript{107} \textit{Id.}
\textsuperscript{109} \textit{Id.} at 762.
\textsuperscript{110} \textit{Id.}
\textsuperscript{111} \textit{Id.} at 765.
\textsuperscript{112} \textit{Id.}
\textsuperscript{113} \textit{Id.} at 764.
threats and loses an independent reason for excluding speech from the normal protections of the First Amendment. The court’s reasoning notwithstanding, in a civil case resulting from the events in Redwood, a federal district court concluded that a court could reasonably determine that calling an African-American man a “shoe-shine boy” was an example of “a ‘personally abusive epithet[]’ which, when addressed to the ordinary citizen (in this case, an African American man) was ‘as a matter of common knowledge, inherently likely to provoke violent reaction,’” and, thus, a fighting word.\footnote{Redwood v. Dobson, 2005 U.S. Dist. LEXIS 44610, *36 (Cent. Dist. Ill. 2005).}

Other courts finding particular examples of slurs to be protected speech have used more traditional applications of the fighting words doctrine. In \textit{Downs v. State},\footnote{366 A.2d 41 (Md. 1976).} a 1971 case involving a criminal conviction for yelling in a crowded restaurant that “[t]he fucking niggers in this County are no better than goddamn policemen,”\footnote{Id. at 42.} the Court of Appeals of Maryland overturned a lower court’s finding that the defendant’s speech represented fighting words.\footnote{See \textit{Downs v. State}, 351 A.2d 166, 171 (Md. Ct Spec. App. 1976) (“The coarse, vulgar remarks passed by appellant in a loud, yelling type of voice, under the circumstances of this case, we think, entitled the trier of fact to infer that the strong racial slur inflicted injury and tend[ed] to incite an immediate breach of the peace. We do not believe that the State must demonstrate that a riot or fight was on the verge of occurring, and, but for the officer’s intervention, would have happened. In our view, it is enough for the State to show the words used were such that men of common intelligence would understand that such words would so arouse emotion that the average person or persons to whom they were addressed, directly or indirectly at the time spoken, would be stirred to the point of violent eruption or fighting.”) (internal quotations omitted).} In reaching its decision, the court noted that fighting words have “some social value”\footnote{Downs, 366 A.2d at 44.} after accounting for the Supreme Court’s then-recent decision in \textit{Gooding v. Wilson}.\footnote{See supra text accompanying notes 47–55 (discussing \textit{Gooding}).} Therefore, as the court determined, fighting words cannot be punished on a “per se” basis; instead, they must only be punished “when there is a likelihood of imminent disturbance.”\footnote{\textit{Downs}, 366 A.2d at 44.} Because, as the court reasoned, “there was no direct evidence [the defendant’s statement] was spoken to anyone other than
the persons sitting in the booth with [him]," the defendant's slur was protected speech.\textsuperscript{122}

In another general application of the fighting words doctrine, a New York state district court found that a telemarketer's use of the phrase "dumb nigger" in phone calls to potential clients who refused his services to be protected speech.\textsuperscript{123} The court in \textit{People v. Livio} framed the case as one that involved two "fundamental" principles in conflict: "a person's right to say what is on his or her mind, versus another person's right to be left alone."\textsuperscript{124} The court resolved the matter for the former because, as it explained, the defendant's slurs, even though "offensive and uncalled for," did not fit into the statutorily prohibited categories of fighting words, threats, or obscenity.\textsuperscript{125} Rather, as the court said, when "[t]aken in context, 'nigger' is not equivalent to 'fighting words.' It is only where words are utilized as a deliberate challenge to a breach of the peace . . . that a prosecution may lie."\textsuperscript{126}

The \textit{Livio} court seemed to premise its finding of protected speech on the notion that the defendant's epithets lacked the necessary "calculated" intent to provoke others to violence.\textsuperscript{127} Indeed, as the court characterized it, the defendant's statement "was not confirmed by any other words or acts showing that it was anything more than a crude outburst after being turned down" and was simply "a natural human reaction."\textsuperscript{128} Concluding that the epithets were protected speech was not necessarily wrong, but the court certainly would have been on firmer footing had it focused on the physical distance between the defendant and the customers he insulted via telephone.\textsuperscript{129}

\begin{footnotes}
\item[122] Id. at 46. \textit{See also} id. ("That his views might be offensive to someone who overheard him does not warrant a conviction for disorderly conduct.").
\item[123] People v. Livio, 725 N.Y.S.2d 785, 788 (D. N.Y. 2000).
\item[124] Id. at 787.
\item[125] Id. at 791.
\item[126] Id.
\item[127] Id.
\item[128] Id. at 792.
\item[129] \textit{See} Zoril v. Cross, 2010 U.S. Dist. LEXIS 71158, *1 (N.D. Ill. 2010) (finding as a matter of law that it was unreasonable to arrest a man who used the words "fucking nigger" several times during the course of a telephone call).
\end{footnotes}
Instead of focusing on the fighting words doctrine as created by the Supreme Court, at least one court used its state constitution to uphold the dismissal of criminal charges against a defendant accused of using racial slurs. In State v. Harrington, the Oregon Court of Appeals affirmed a lower court decision dismissing a criminal complaint against a defendant who “repeatedly” called another individual a “fucking nigger.” The defendant in Harrington was charged under a state statute that prohibited “abusive or obscene words or gestures in a manner likely to provoke a violent or disorderly response,” and the court analyzed the law under an Oregon constitutional provision that guaranteed “the right to speak, write or print freely on any subject whatever.” Under prior case law, as the court explained, the state constitution’s guarantee of free expression mandated a two-pronged analysis: first, whether the law in question was “directed to the substance of any opinion or any subject of communication,” and if so, whether the statute fell under a historical exception to the Oregon Constitution. In answering the first prong in the affirmative, the court rejected the state’s argument that the statute was aimed simply at preventing violence; rather, as the court said, the language of the statute and the legislative commentary suggested that the law was intended to protect listeners from abusive or obscene language rather than violence. Then, under the second part of its analysis, the court considered whether the statute could be viewed as an exception to free expression already established when either the U.S. Constitution or the Oregon Constitution was adopted. The court then established that even if the state statute was successfully limited to Chaplinsky’s prohibition on fighting words, the case would not be decided because, as the Oregon court stated, Chaplinsky stands for the proposition that the Supreme Court endorsed “a balancing test to determine that some forms of expression are unworthy of constitutional protection.”

131 Id. at 668.
132 Id. (quoting OR. REV. STAT. § 166.065(1)(b), OR. CONST. art. I, § 8).
133 Id. at 668, 669 (internal quotation marks omitted).
134 See id. at 669.
135 See id. at 671 (The Oregon Constitution was adopted in 1859).
egon Court of Appeals argued, contrasted with the Oregon Constitution's mandate that forbids legislation "restricting the right to speak freely on any subject whatever." Thus, the state constitution "precludes the state legislature or the courts from balancing away the right to free expression," as the court concluded. Furthermore, because the court did not find abusive language or even fighting words to be sufficiently similar to mid-nineteenth century free speech exclusions, such as perjury, fraud, and soliciting a duel, the statute was invalid under the Oregon Constitution.

Finally, the Court of Appeals of Ohio made the broadest and most categorical statement against racial slurs as fighting words in *State v. Dotson*. In that case, the defendant was convicted of disorderly conduct after calling a police officer a "Nigger" and "Uncle Tom" while the police officer was attempting to restore order after a fight at a night club. In discussing the fighting words doctrine, the court said that although "there is no requirement that [a listener] be provoked to a violent response," none of the evidence admitted at trial showed that the four police officers at the scene were incited into breaching the peace. Yet, as the court admitted, the fact that there was not a violent response could not be dispositive. Rather, the court concluded that racial slurs simply could not be fighting words as a matter of law:

Words such as "Uncle Tom" and "Nigger" are not fighting words. Even though the use of such words is totally abhorrent to all people, the words, by themselves, do not rise to the level of criminal behavior. Although such words may be offensive to persons of all races, they do not

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137 Id.
138 Id.
139 See id. at 670–71.
141 Id. at *1–2.
142 Id. at *3.
143 Id.
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prove a reasonable person to an immediate retaliatory breach of the peace. The Dotson court went clearly beyond the other courts discussed in this section by categorically concluding that racial slurs are not fighting words. However, with its caveat that slurs "by themselves" cannot be fighting words, the court seemed to suggest that such slurs coupled with some overt act may be sufficient to support a fighting words conviction. As the next section will detail, many courts that conclude that slurs are fighting words have examined other circumstances in conjunction with mere speech to conclude that the slurs in question were criminally punishable.

B. Slurs as Criminally Punishable Speech

Contrary to the cases described above, some courts have used the fighting words doctrine to remove First Amendment protection from racial slurs in some instances. Most of these courts, however, have used both the words themselves and accompanying circumstances—usually a physical action or a threat—to find that defendants had strayed into criminally sanctionable speech. However, a few courts have argued that racial slurs are powerful enough unto themselves to instantly provoke a reasonable person to violence and are therefore fighting words without having to consider any other circumstances.

In the case of In re John M., for example, the Court of Appeals of Arizona upheld the delinquency adjudication of a juvenile who had been accused of shouting "nigger" and "fuck you, you god damn nigger" from a car window. The series of events that served as the basis for the juvenile's adjudication involved two incidents slightly separated in time. The first incident was one in which the juvenile was accused of throwing a soda and yelling "nigger" from a car at one victim, and a second incident was one in which the juve-

144 Id. at *4–5.
145 Id. at *4.
147 Id. at 773.
148 Id.
nile yelled "fuck you, you god damn nigger" from the same car at a different victim but did not throw anything toward the victim.\textsuperscript{149} Importantly, the court concluded there was not enough evidence to show that the juvenile was the person who shouted at the first victim.\textsuperscript{150} However, the court determined that the second incident alone could sustain a juvenile adjudication under the fighting words doctrine.\textsuperscript{151} As the court wrote:

\begin{quote}
We agree with the State that few words convey such an inflammatory message of racial hatred and bigotry as the term "nigger." According to Webster's New World Dictionary, the term is "generally regarded as virtually taboo because of the legacy of racial hatred that underlies the history of its use among whites, and its continuing use among a minority as a viciously hostile epithet." . . . Consequently, [the juvenile's] direction of the word "nigger" to [the second victim], an African-American woman, constituted a personal attack on her that was likely to provoke a violent reaction when addressed to an ordinary citizen of African-American descent.\textsuperscript{152}
\end{quote}

Therefore, as the \textit{John M.} court concluded, the slur in the second incident—without any overt act such as the soda throwing of the first incident—was a fighting word due simply to the impact of the word itself and the likelihood that the slur would produce a violent reaction in the average African-American individual.\textsuperscript{153} The Montana Supreme Court reached a similar conclusion in upholding a conviction in \textit{City of Billings v. Nelson},\textsuperscript{154} a 2014 case that involved a woman in a car saying "[f]uck you" and "[s]pic bastard" to someone walking near the road before leaving the area in the car.\textsuperscript{155} In its analysis, the Mont-

\textsuperscript{149} \textit{Id.}
\textsuperscript{150} See \textit{id.} at 776.
\textsuperscript{151} \textit{Id.} at 776–77.
\textsuperscript{152} \textit{Id.} at 776 (internal citation omitted).
\textsuperscript{153} \textit{Id.}
\textsuperscript{154} \textit{332 P.3d} 1039 (Mont. 2014).
\textsuperscript{155} \textit{Id.} at 1042.
tana Supreme Court concluded that, "[r]acial slurs, including 'spic,' may be considered fighting words," but the court cautioned that the necessary "potential to elicit an immediate violent response exists only where the communication occurs face-to-face or in close physical proximity." However, the distance between the car and the listener provided the requisite closeness as the court concluded that the victim was "close enough to recognize the women's faces and to hear their words clearly, even though they did not 'holler' [at] them." The Court also further concluded that "spic bastard" represented a fighting word because "[t]he use of a racial slur is the type of speech that would, by its very utterance, inflict injury and tend to incite a breach of the peace." Because the slur was used in a "face-to-face" manner—even though the defendant was inside a car—the Court concluded that the speech was not protected by the Constitution.

Outside of criminal trials and juvenile proceedings, other courts in various civil matters have argued that racial slurs are categorically fighting words. In *Sims v. Montgomery County Commission,* a sexual and racial discrimination suit, a federal district judge concluded that "in these modern times, because African-Americans are no longer taught that they are second-class citizens but rather that they stand equal with people of all races, the term 'nigger' is often a 'fighting word.'" Similarly, the Supreme Court of North Carolina found that the same slur "squarely falls" within the fighting words doctrine as it upheld a decision to remove a state district attorney from office after "loudly and repeatedly" calling an African-American bar patron a "nigger." According to the Court, "No fact is more generally known than that a white man who calls a black man a 'nigger' within his hearing will hurt and anger the black man and often provoke him to confront the white man and retaliate." Finally,

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156 *Id.* at 1045.
157 *Id.*
158 *Id.*
159 *Id.*
161 *Id.* at 1097 n. 128.
162 In re Spivey, 480 S.E.2d 693, 695, 698 (N.C. 1996).
163 *Id.* at 699.
in *Lee v. Superior Court*, the California Court of Appeal refused to grant a man's request to change his name to "Mister Nigger" on the grounds that the state "should not sanction a 'fighting word' as [an] official surname."

Again, however, most courts concluding that slurs are fighting words have relied on the presence of a threat or a physical act beyond the words themselves to find slurs constitutionally unprotected speech. Threats in these cases have ranged from the implied and subtle to more overt and even true threats. Likewise, acts cited as defining elements to fighting words in these cases have been minor, such as incidental contact, and major, like causing a serious disturbance.

Threats and other statements associated with violence were important for several courts in determining that slurs were fighting words. In *State v. Hoshijo*, the Supreme Court of Hawaii upheld a judgment against the University of Hawaii in a racial discrimination suit after a student manager on the basketball team yelled, "Shut up you f[uc]king nigger! I'm tired of hearing your shit! Shut your mouth

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165 76 P.3d 550 (Haw. 2003).
166 See *In re H.K.*, 778 N.W.2d 764 (N.D. 2010); *In re A.R.*, 781 N.W.2d 644 (N.D. 2010).
167 See *Bailey v. State*, 972 S.W.2d 239, 241 (Ark. 1998) (describing how defendant touched officer on the arm before saying, "Fuck you, nigger").
or I'll kick your ass!" The Court determined that the statements were not protected by the First Amendment because they were slurs "accompanied by threats of violence." In *State v. Myers,* the Court of Appeals of Ohio refuted a defendant's claim that her disorderly conduct charge was premised only on calling another person a "stupid n****r." Instead, the court found support for her conviction in "overtly disruptive, threatening and abusive behavior" as she confronted the victim in a "physically threatening manner," told him to "come hit on me," and "loudly proclaimed, 'n****r, I ain't scared of you.'" Finally, in the most serious and overt threat in these cases, the Supreme Court of New York Appellate Division upheld the delinquency adjudication of a juvenile, finding that the statement, "[W]e shoot niggers like you in the woods," when coupled with, "I've got a gun with your name on it," constituted fighting words as it upheld the delinquency adjudication of a juvenile.

Other courts have pointed to actions in determining that slurs were unprotected speech, but these actions have varied in severity. *In re J.K.P.* and *Wichita v. Hughes* represent two of the more serious examples of slurs losing their constitutional protection when coupled with certain overt actions. In *In re J.K.P.*, the Court of Appeals of Kansas upheld the delinquency adjudication of a juvenile who called another boy a "nigger" after throwing rocks at him. The court noted that the juvenile "clearly used the word in a tense and antagonistic situation while the boys were yelling and throwing rocks at each other." The Court of Appeals of Kansas pointed to a similar situation in *Hughes* as it upheld a disorderly conduct conviction for a defendant accused of calling various people "nigger;"
"Communist spic," "moustached (sic) fag," "son of a bitch," "mother-fucker," and "criminal cop."\textsuperscript{182} The words, however, were "accompanied by the slamming of a metal rack down onto a counter and the grabbing of a store customer by the shirt."\textsuperscript{183} When the slurs and insults were "considered in conjunction with the actions," the court concluded they amounted to fighting words under Chaplinsky.\textsuperscript{184}

Other courts, however, have upheld convictions or juvenile adjudications for the use of fighting words in conjunction with less serious actions. In \textit{Bailey v. State},\textsuperscript{185} the Arkansas Supreme Court upheld a disorderly conduct conviction under the fighting words doctrine after a defendant stood and grabbed a police officer's arm in addition to saying, "Fuck you, nigger, and fuck you, too."\textsuperscript{186} The Arkansas Supreme Court concluded that the slur and other profanities, "when considering his surrounding conduct, such as standing up and grabbing [the officer's] arm," were properly considered fighting words, as the Arkansas Supreme Court concluded.\textsuperscript{187} A dissenting justice, however, found the surrounding conduct to be lacking in \textit{Bailey} and suggested the defendant was improperly convicted for a per se use of a fighting word.\textsuperscript{188} Additionally, in two separate cases, the Supreme Court of North Dakota seemed to suggest that the bar for conduct that serves to define prohibited fighting words is a low threshold.\textsuperscript{189} In \textit{In re H.K.},\textsuperscript{190} the Court upheld a juvenile's delinquency adjudication after she told a teen to "'watch out' because she 'owns this town' and does not want 'niggers' in it."\textsuperscript{191} The Court suggested that the words were constitutionally unprotected in part because they were threatening but also because the juvenile "followed

\textsuperscript{182} Hughes at *5-6.
\textsuperscript{183} Id.
\textsuperscript{184} Id.
\textsuperscript{185} 972 S.W.2d 239 (Ark. 1998).
\textsuperscript{186} Id. at 241.
\textsuperscript{187} Id. at 245.
\textsuperscript{188} Bailey v. State, 972 S.W.2d 239, 248 (Ark. 1998) (Newbern, J., concurring in part, dissenting in part) ("Even racial slurs are not 'automatically' to be viewed as fighting words.").
\textsuperscript{189} See \textit{In re H.K.}, 778 N.W.2d 764 (N.D. 2010); \textit{In re A.R.}, 781 N.W.2d 644 (N.D. 2010).
\textsuperscript{190} 778 N.W.2d 764 (N.D. 2010).
\textsuperscript{191} Id. at 770.
[the teen] into the bathroom" and yelled at her.192 The Court similarly upheld another delinquency adjudication in the case of In re A.R.,193 after a juvenile yelled "stupid nigger" at another teen.194 In that case, the Court found the juvenile's speech constituted a fighting word because he was "a member of [a] group that circled around" the teen before the juvenile called her a slur.195 "[T]he conduct accompanying the speech," as the Court concluded, "takes it outside of the First Amendment protections."196

These cases illustrate the variety of approaches courts take when examining racial slurs in the context of fighting words. Some courts have found slurs to be categorically protected as mere insults, while other courts have determined that slurs are almost per se fighting words. Other courts probe more deeply into the surrounding factual context, often relying on the presence of threatening language or overt actions in determining that slurs represent fighting words. In the latter case, these overt actions may be rather minimal, suggesting that any act when coupled with a racial slur may be sufficient to elevate an insult into the realm of a constitutionally unprotected fighting word. After examining the descriptive question of whether slurs are treated as fighting words by courts, this Article now turns toward the normative issue of whether slurs should be deemed fighting words.

V. SHOULD RACIAL SLURS BE FIGHTING WORDS? A HELPFUL EXAMINATION OF RACIALLY-BASED DEFAMATION

In answering the question of whether slurs should be considered fighting words, it is helpful to compare this area of the law to race and defamation law. In his 2010 article Negro Blood in His Veins: The Development and Disappearance of the Doctrine of Defamation

192 Id.
193 781 N.W.2d 644 (N.D. 2010).
194 Id. at 645.
195 Id. at 649–50.
196 Id. at 650.
Per Se by Racial Misidentification in the American South,\textsuperscript{197} scholar Samuel Brenner traced the emergence and subsequent death of an unusual tort in American law—"defamation \textit{per se} by racial misidentification."\textsuperscript{198} This "morally egregious" legal action allowed individuals to sue for civil damages when white plaintiffs were incorrectly identified as being African-American or having such ancestry.\textsuperscript{199} Defamation, as Brenner explained, traditionally consists of a false statement about an individual that lowers that person's standing in the community and deters others from associating with them, whereas per se defamation is a category of such loathsome association that "all that need be proved is the utterance of the words, and because of their character the law will presume damages and dispense with the showing of actual special damages as a necessity for recovery."\textsuperscript{200} Thus, the tort of defamation \textit{per se} by racial misidentification enshrined into law the idea that merely being called African-American or having African-American ancestors was as damaging to one's reputation as untrue allegations of crime, sexual misconduct, vile disease, or allegations reflecting poorly upon business, trade, or office.\textsuperscript{201} Brenner wrote that the cause of action, which persisted as accepted law until the 1950s,\textsuperscript{202} eventually died out due to a shift away from the acceptance of per se defamation, the disappearance of "state-sponsored racism," and Supreme Court decisions that gave First Amendment protections to otherwise defamatory speech regarding "public figures or matters of public concern."\textsuperscript{203} Still, the fact remains that courts in Virginia, Alabama, Arkansas, Oklahoma, Tennessee, Texas, Louisiana, and South Carolina accepted as a matter of law—and without any further proof—that it was injurious to a white


\textsuperscript{198} Id. at 334.

\textsuperscript{199} Id. at 334–35.

\textsuperscript{200} Id. at 339–40.

\textsuperscript{201} Id. at 335, 340.

\textsuperscript{202} See id. at 334–36, 348–49.

\textsuperscript{203} Id. at 392.
person's reputation to accuse them of being African-American, a conclusion that remains racist and morally offensive.

The idea that racial identity or association could be defamatory persisted in other cases. In *Polygram Records v. Superior Court*, the California Court of Appeals rejected the notion that a wine's association with African-American consumers could possibly be defamatory as a matter of law. The dispute in *Polygram Records* began with a comedic performance by Robin Williams that included a joke about wine:

> Whoa -- White Wine. This is a little wine here. If it's not wine it's been through somebody already. Oh. -- There are White wines, there are Red wines, but why are there no Black wines like: Reggie, a Motherfucker. It goes with fish, meat, any damn thing it wants to. I like my wine like I like my women, ready to pass out.

After Williams' joke was released on an album and HBO special, David Rege, an African-American winemaker, sued, claiming trade libel and personal defamation. Rege's claim for defamation "rest[ed] in part on the argument that Williams' joke 'associates "Rege" brand wines with blacks, allegedly a socio-economic group of persons commonly considered to be the antithesis of wine connoisseurs who harbor obviously unsophisticated tastes in wines.' While the court's decision to dismiss the suit rested primarily on the fact that Williams' performance was in a comedic setting so no reasonable audience member would take the joke as an assertion of fact, the court also attacked Rege's racially-based defamation argument as

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204 See id. at 375–76 (listing states that accepted doctrine of defamation per se by racial misidentification).
206 See id. at 557–58.
207 Id. at 546–47 (quoting Williams' performance) (changing of the spelling of "Reggie" to "Rege," the plaintiff's last name was done by the court, but the spelling quoted here is presumably original to the joke).
208 Id. at 546.
209 Id. at 557 (internal quotations omitted).
210 See id. at 555–57.
"utterly untenable." As the court argued, "Rege's contention that the joke disparaged his wine products by associating them with blacks is repugnant to values embedded in our Constitution and must be resoundingly rejected."212

In short, there is something profoundly racist and disturbing in accepting racial misidentification or association as grounds for defamation. By signaling that some topic or accusation is defamatory, such as crime or a loathsome disease, we pass judgment as a society on those things. To reward a plaintiff under the law for being misidentified as a minority or for having some association with a minority is to say that being a minority is something to be shunned. Clearly, in the 21st century, the law cannot abide such an inherently racist declaration.

Yet, this fundamental problem does not exist with the fighting words doctrine as applied to racial slurs. Indeed, to say that a racial slur is a fighting word serves to infantilize the person that it is directed toward because we are making a decision under the law that such an individual is incapable of restraint. Society, therefore, must punish the speaker before the listener resorts to violence. However, that infantilization is applicable to the entire fighting words doctrine. As Harvard Law School Professor Randall L. Kennedy noted, the fighting words doctrine weakens the "salutary message" that individuals should have discipline in the face of taunts.213 Again, though, this is a dispiriting assumption that all individuals—when faced with the right insult or set of circumstances—lack the necessary self-control to avoid a physical confrontation. Nothing about designating racial slurs as fighting words serves to single out minorities as lacking control or needing protection. Rather, the fighting words doctrine as a whole does that for all people.

Therefore, in answering the question of whether racial slurs should be deemed fighting words, it is at least worth considering the fact that, unlike racial identity and defamation law, there is nothing

211 Id. at 557.
212 Id. at 558.
inhernently racist or discriminatory about designating slurs as fighting words. Whatever damage to notions of self-control such a determination does, that damage is not done to minorities alone.

VI. CONCLUSION

With its decision in Chaplinsky v. New Hampshire, the Supreme Court created the fighting words exception to the First Amendment. As that decision has been refined by the Court and applied by lower courts across the country, the general scope of the doctrine is clear in that it covers words said in a close physical proximity that are likely to cause average individuals to retaliate with violence.

However, what is less clear is the boundary between mere insults that individuals are expected to bear and words that are criminally prohibitable as fighting words. Courts examining this question as applied to racial slurs have generally reached three conclusions: racial slurs are categorically not fighting words, slurs are definitely fighting words, or slurs are fighting words in the right verbally or physically threatening situations.

In answering the question of whether slurs should be considered fighting words, there is nothing inherently damaging to minorities in criminalizing this specific subset of speech, as our notions of self-control and restraint are all damaged equally by the fighting words doctrine. Therefore, if the Supreme Court continues to find that fighting words are an exception to the First Amendment, there is nothing to say that racial slurs should not be considered part of that classification.