CONSTITUTIONAL LAW—First Amendment—New Jersey's Offensive Language Statute Limited by "Fighting Words" Construction—*State v. Rosenfeld*, 62 N.J. 594, 303 A.2d 889 (1973); *State v. Brown*, 62 N.J. 588, 303 A.2d 886 (1973).

David Rosenfeld and George Brown were charged and convicted as disorderly persons for violating New Jersey's offensive language statute.[1] Rosenfeld had addressed a public assembly in the local school auditorium on the topic of racism in the school system. He became emotionally overwrought and concluded his talk with a remark in which he repeatedly uttered a scurrilous epithet.[2] A police chief who had attended the gathering filed a complaint charging Rosenfeld with using loud and indecent language at a public meeting, and Rosenfeld was subsequently arrested at his home.[3] His conviction rested on the determination that his remark was likely to affect the sensibilities of the hearers.[4]

In a similar incident, George Brown had attended a public meeting of the local board of education, which had convened in a high school cafeteria. A police officer ordered him to move away from the area reserved for board members. Brown encountered the officer later during the meeting and uttered abusive and vulgar language at him.[5] The police officer filed a complaint the following day,[6] and Brown was subsequently convicted.[7] The appellate division sustained the convic-

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1 N.J. STAT. ANN. § 2A:170-29 (1971) provides in pertinent part:

> 1. Any person who utters loud and offensive or profane or indecent language in any public street or other public place, public conveyance, or place to which the public is invited;
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> . . . .
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> Is a disorderly person.

2 State v. Rosenfeld, 62 N.J. 594, 596, 303 A.2d 889, 891 (1973). Rosenfeld stated that if the whites didn't do something about the racial situation, "then the Mother F___ing town, the M.F. county, the M.F. state and the M.F. country would burn down." *Id.*

3 *Id.*

4 *Id.* at 599, 303 A.2d at 892. The facts showed that there were women and teenagers in the audience and that the reaction to Rosenfeld's speech ranged from "very shocked" to no reaction at all. *Id.* at 596-97, 303 A.2d at 891.

5 State v. Brown, 62 N.J. 588, 590, 303 A.2d 886, 887 (1973). The language used by Brown was as follows: "I'll kick the s___ out of you, you m___ f___ — remember you work for me—you take that badge off and I'll kill you." *Id.*

6 Complaint, No. 4697 (Roselle, N.J., Mun. Ct., July 1, 1971).

7 Brown was convicted in the Municipal Court of Roselle, New Jersey on a finding that his loud utterances were likely to incite violent action. On appeal to the Union County Court, that court concluded that the words were not loud and that they could not create a breach of the peace. The court did hold, however, that they were words which would affect the sensibilities and found Brown guilty under the statute. State v. Brown, No. A-443-71 (N.J. Super. Ct., App. Div., July 7, 1972). Slip Opinion at 2-3.

tion on a finding that the words used were "likely to evoke an immediate violent response by the person to whom they were addressed,"[8] and Brown appealed to the New Jersey supreme court.[9]

Rosenfeld appealed his conviction[10] and ultimately his case reached the United States Supreme Court, which vacated judgment and remanded the case to the New Jersey appellate division for reconsideration in light of recent standards limiting a state's right to proscribe opprobrious language.[11] Based on these guidelines, the appellate division determined that the statute was "overly broad and violative of the First Amendment" and thus struck down the statute and nullified Rosenfeld's conviction.[12] The state appealed this decision to the New Jersey supreme court.[13]

The New Jersey supreme court decided both cases on the same day. In *State v. Rosenfeld*,[14] the court held that the appellate division had needlessly invalidated the statute in its entirety, and that even under United States Supreme Court standards the state may still proscribe the use of words in public places which are likely to cause a breach of the peace.[15] The court construed the offensive language statute as prohibiting only those words spoken as fighting words, thus re-

8 *Id.* at 5. The appellate division made its own review of the record and found that Brown's words, "in the context and circumstances used," were "fighting words." *Id.*

9 The appeal was brought pursuant to N.J.R. 2:2-1. State v. Brown, 62 N.J. 588, 589, 303 A.2d 886, 887 (1973).

10 The Supreme Court of New Jersey denied Rosenfeld's petition for certification. State v. Rosenfeld, 59 N.J. 435, 283 A.2d 535 (1971).

11 Rosenfeld v. New Jersey, 408 U.S. 901 (1972). The judgment was vacated and the case remanded for consideration in light of Cohen v. California, 403 U.S. 15 (1971), and Gooding v. Wilson, 405 U.S. 518 (1972).

On the day the Court sent *Rosenfeld* back, it also vacated and remanded two other offensive language cases: Lewis v. City of New Orleans, 408 U.S. 913 (1972), and Brown v. Oklahoma, 408 U.S. 914 (1972). There was a vigorous dissent in *Rosenfeld* to the Court's actions in these three cases, typified by the following:

> 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.

408 U.S. at 902 (Burger, C.J., joined by Blackmun & Rehnquist, JJ., dissenting).

12 State v. Rosenfeld, 120 N.J. Super. 458, 459, 295 A.2d 1, 2 (App. Div. 1972). The court held:

> Based on *Gooding*, we have no alternative but to hold that *N.J.S.A.* 2A:170-29(1), as construed by our Supreme Court in *State v. Profaci*, is overly broad and violative of the First Amendment. *Gooding* states that it matters not that the words used might have been constitutionally prohibited under a narrowly and precisely drawn statute. If the statute is susceptible of application to protected expression, it must be struck down as overbroad.

Id.

13 State v. Rosenfeld, 62 N.J. 594, 596, 303 A.2d 889, 890 (1973).

14 62 N.J. 594, 303 A.2d 889 (1973).

15 *Id.* at 601, 303 A.2d at 893.

moving any judicial interpretation which might be considered overbroad.[16] In *State v. Brown*,[17] the court found that the words used by Brown constituted fighting words and were thus within the reach of the state's police power under the narrow *Rosenfeld* construction.[18] Retroactively applying the statute which *Rosenfeld* had resurrected, the court sustained Brown's conviction.[19]

The "fighting words" concept, as an exception to constitutionally guaranteed speech, originated in *Chaplinsky v. New Hampshire*.[20] The facts therein revealed that a hostile crowd had gathered around Chaplinsky as he was distributing religious literature on a public street. Following a minor disturbance, a police officer began escorting Chaplinsky to the station house. While on the way, they encountered a city marshall who warned the defendant that "the crowd was getting restless." In response, Chaplinsky verbally vented his angry frustration, and a complaint was filed against him.[21] He was subsequently found guilty of having violated New Hampshire's offensive language statute,[22] whereupon he brought appeals which ultimately reached the United States Supreme Court.

The specific issue before the Court was whether New Hampshire's statute contravened the fourteenth amendment by being "so vague and indefinite as to render a conviction thereunder a violation of due process."[23] Examining the state's judicial construction of the statute, the Supreme Court found that the state courts had limited the statute's application to words having " 'a direct tendency to cause acts of violence by the persons to whom, individually, the remark is addressed.' "[24]

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16 *Id.* at 603, 303 A.2d at 894.

17 62 N.J. 588, 303 A.2d 886 (1973).

18 *Id.* at 591, 303 A.2d at 888.

19 *Id.* at 592-93, 303 A.2d at 889.

20 315 U.S. 568 (1942).

21 *Id.* at 569-70. The complaint charged that Chaplinsky

> did unlawfully repeat, the words following, addressed to the complainant, that is to say, "You are a God damned racketeer" and "a damned Fascist and the whole government of Rochester are Fascists or agents of Fascists," the same being offensive, derisive and annoying words and names.

Id. at 569. *See* State v. Chaplinsky, 91 N.H. 310, 312, 18 A.2d 754, 757 (1941).

22 Ch. 378, § 2, [1926] N.H. Laws 1470, *as amended*, N.H. REV. STAT. ANN. § 570:2 (1955), stated:

> No person shall address any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name, nor make any noise or exclamation in his presence and hearing with intent to deride, offend or annoy him, or to prevent him from pursuing his lawful business or occupation.

23 315 U.S. at 574.

24 *Id.* at 573 & n.7. (Although the Court cites State v. Brown, 68 N.H. 200, 38 A. 731 (1895), and State v. McConnell, 70 N.H. 294, 47 A. 267 (1900), as sources for this

Under such construction, the Court held the statute to be narrowly limited to punishing that specific conduct which lies within the police power of the state.[25] It concluded that, since the words used by the defendant were likely to provoke the average person to retaliate, Chaplinsky's language constituted fighting words punishable under the state statute.[26]

In reaching its decision, the Court assumed that certain epithets had an inherent tendency to provoke a fight and "by general consent [were] 'fighting words' when said without a disarming smile."[27] The Court found it unnecessary to consider extrinsic circumstances or the actual imminence of violence, choosing instead to rely on the inherent nature of the utterance in determining the criminality of the language. It broadly stated in dictum that the right to free speech was not absolute, and that there were certain classes of speech whose social value was so slight that their prevention and punishment had never raised a constitutional problem.[28] These included

> 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.[29]

Thus, although the Court sustained Chaplinsky's conviction under what it held to be a sufficiently narrow "fighting words" construction, its sweeping dictum indicated that the mere utterance of certain epithets constituted fighting words which the state could punish without a further showing of some actual threat to the peace.

It was not until *State v. Profaci*,[30] wherein the defendant directed offensive language at a police officer,[31] that the "fighting words" concept was established in New Jersey as a discrete category of proscribable speech.[32] Prior authority in New Jersey had indicated a general judicial

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quotation, close examination of both of these cases fails to reveal the statement quoted by the Court. In fact, the source of this quote appears to be State v. Chaplinsky, 91 N.H. 310, 313, 18 A.2d 754, 757 (1941)).

25 315 U.S. at 573.

26 *Id.* at 574. The Court found it unnecessary to demonstrate that the words used by Chaplinsky, "damned racketeer" and "damned Fascist," were fighting words. *Id.* In effect, these epithets were deemed to be per se fighting words.

27 *Id.* at 573 (quoting from State v. Chaplinsky, 91 N.H. at 320, 18 A.2d at 762).

28 315 U.S. at 571-72.

29 *Id.* at 572 (citing to Z. CHAFEE, FREE SPEECH IN THE UNITED STATES 149 (1941)) (footnote omitted).

30 56 N.J. 346, 266 A.2d 579 (1970).

31 *Id.* at 348-49, 266 A.2d at 581.

32 The offensive language statute enacted at the turn of the century was part of a broader scheme to keep public places clear of loiterers, inebriates, and brawling types:

> 3. Any person or persons who shall loiter or assemble on the streets, at the

posture which interpreted the mere use of loud and offensive or indecent language in a public place as being beyond the protective aegis of the first amendment and susceptible to proscription under the police power of the state.[33] *Profaci* implicitly defined fighting words as loud, public utterances "likely to incite the hearer to an immediate breach of the peace." The court also indicated that the words must be spoken with the intent to have such consequences or with reckless disregard of the probability of such consequences.[34] It crystallized its analysis of those instances in which the state may punish expressions of free speech under the statute:

> corners of the streets, or in the public places of any city, village, borough, or township of this state, being under the influence of intoxicating liquor, or who not being under such influence shall indulge in and utter loud and offensive or indecent language, or shall address or make audible and offensive remarks or comments upon any person passing along such streets or public places . . . shall be deemed and adjudged to be a disorderly person.

Law of June 14, 1898, ch. 239, § 3, [1898] N.J. Laws 943. A later supplement extended the provisions of this law to apply to quasi-public and private property. Law of March 11, 1924, ch. 173, [1924] N.J. Laws 385.

The current law, adopted in 1965, appended "profane" as a category of proscribed speech, but restricted the scope of the act to public areas. N.J. STAT. ANN. § 2A:170-29 (1971).

[33] Some cases specifically examined and rejected the contention that first amendment protections apply to offensive language in public places. *See* Karp v. Collins, 310 F. Supp. 627, 638 (D.N.J. 1970), *vacated on other grounds sub nom.* Kugler v. Karp, 401 U.S. 933 (1971) (N.J. STAT. ANN. § 2A:170-29(1) found not to be unconstitutional on its face); State v. Morgulis, 110 N.J. Super. 454, 461, 266 A.2d 136, 140 (App. Div. 1970) (defendant's chant of verbal obscenities was held not protected by first amendment); State v. Rullis, 79 N.J. Super. 221, 232, 191 A.2d 197, 202-03 (App. Div. 1963) (indecent language not protected by constitutional guarantees, and statute is valid exercise of police power); State v. O'Donnell, 200 A. 739, 741 (N.J. Sup. Ct. 1934) ("rat" and "scum of the earth" found to be clearly offensive epithets outside the limits of first amendment rights, when uttered in a deliberate manner).

Other cases, while not raising first amendment considerations, indicated that the power to proscribe such language is clearly vested in the state. *See* State v. Griffin, 92 N.J. Super. 389, 391, 223 A.2d 633, 635 (App. Div. 1966) (police car was not a "public conveyance" within the meaning of the statute); State v. Taylor, 38 N.J. Super. 6, 28, 118 A.2d 36, 48 (App. Div. 1955) (obscene utterance to policeman); *In re* Kirk, 101 N.J.L. 450, 452, 130 A. 569, 570 (Sup. Ct. 1925) (mere use of term "bootlegger," in reference to a member of the town council, spoken at a public session, held to be flagrantly contemptuous and properly prosecuted); Mullen v. State, 67 N.J.L. 451, 453, 51 A. 461, 461 (Sup. Ct. 1902) (loud language at a public meeting must also be offensive or indecent to sustain a conviction). *Cf.* McCooey v. Megill, 135 N.J.L. 217, 51 A.2d 208 (Sup. Ct. 1947); State v. Burkitt, 120 N.J.L. 393, 200 A. 1005 (Sup. Ct. 1938). *But see* Ruthenbeck v. First Criminal Judicial Dist. Court, 7 N.J. Misc. 969, 970, 147 A. 625, 625 (Sup. Ct. 1929) (not every trivial epithet addressed to another constitutes disorderly conduct).

[34] 56 N.J. at 353, 266 A.2d at 583-84. The court further noted that a speaker could be convicted under the statute where the listener's gender and age were such that the words uttered would be likely to affect his or her sensibilities. *Id.*

> [T]he implicit constitutional purpose of *N.J.S.A.* 2A:170-29(1) is two-fold, *i.e.*, to preserve the peace and to protect the sensibilities of those persons within hearing of the person uttering the language.[35]

Thus, the state established two alternatives under which it might prosecute offensive language.

In adopting the "fighting words" concept, *Profaci* relied extensively on the broad dictum set forth in *Chaplinsky* and impliedly affirmed the position that fighting words are determined by the innate vulgarity of the words spoken rather than by the external circumstances surrounding their utterance. However, the court held that the utterance of the four-letter words toward the police officer by the defendant did not constitute a violation of the statute under the circumstances.[36] Therefore, while ostensibly approving the *Chaplinsky* dictum, *Profaci* narrowly applied the "fighting words" concept in light of controlling circumstances.[37]

In *Cohen v. California*,[38] the Supreme Court effectively restricted the use of the "fighting words" concept to situations in which a fight was imminent. The defendant in *Cohen* had been convicted under an offensive conduct statute for having a vulgar epithet embossed on his jacket.[39] The Court determined that the only conduct which the state sought to punish was communication, and that Cohen's conviction

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35 *Id.* at 353, 266 A.2d at 583.

36 *Id.*, 266 A.2d at 584. The court stated that

> an anlysis [*sic*] of the facts fails to disclose that the language used *under the circumstances* was likely to incite a breach of the peace or to offend the sensibilities of the listener.

Id. (emphasis added). The facts indicate that the defendant was stopped for a routine automobile check. When the officer found that Profaci's driver's license was not signed, defendant became excited and said, "what the f____ are you bothering me for." *Id.* at 348, 266 A.2d at 580-81.

37 Similarly, in State v. Reed, 56 N.J. 354, 266 A.2d 584 (1970), a motorist told a state trooper, "Jesus Christ. I don't give a God damn who the hell you are." *Id.* at 356, 266 A.2d at 585. The court examined the surrounding circumstances and concluded that the words and their effect were not within the contemplation of the offensive language statute. *Id.* at 357, 266 A.2d at 586. In *In re* B.N., 99 N.J. Super. 30, 238 A.2d 486 (App. Div. 1968), the court reviewed the defendant's violent conduct and language and concluded:

> It is difficult to conceive of more inflammatory words than those allegedly uttered by the defendant here, vulgar expressions indicating that the arresting officer was guilty of incest with his mother, uttered in a loud tone of voice in the presence of witnesses.

Id. at 36, 238 A.2d at 489.

38 403 U.S. 15 (1971).

39 *Id.* at 16. Cohen's jacket bore the words "Fuck the Draft." He was observed in a courthouse corridor where women and children were present. *Id.*

amounted to an interference with his right of free speech.[40] It found that since no individual, either actually present or likely to be present, could have taken Cohen's symbolic conduct as a direct personal insult, and since no evidence indicated that anyone was in fact aroused, the mere manifestation of vulgar language did not constitute fighting words.[41] The Court then concluded that the state did not have authority to excise a particular scurrilous epithet from public discourse, either upon the theory that its use was inherently likely to cause violent reaction or upon the more general assertion that the state may do so as guardian of public morality.[42]

Relying in part on *Chaplinsky*, the Court in *Gooding v. Wilson*[43] held that a statute encroached upon constitutionally protected expression if the state's construction failed to limit its application to words having a direct tendency to provoke violent reaction by an addressee.[44] Wilson had been convicted under an offensive language statute[45] which the Georgia judiciary had applied in past decisions to scurrilous language without a showing that such language constituted fighting words.[46] The Supreme Court found that the statute's construction swept too broadly and did not "define the standard of responsibility with requisite narrow specificity."[47] The Court indicated that since such a statute had a chilling effect on the exercise of constitutionally protected expression, its overbreadth may be attacked by any person charged under it—even one whose speech may have in fact constituted fighting words.[48] Unless a state construed its offensive language statute to apply

40 *Id.* at 18. *See also* Leahy, *"Flamboyant Protest," the First Amendment and the Boston Tea Party*, 36 BROOKLYN L. REV. 185 (1970).

41 403 U.S. at 20-21.

42 *Id.* at 23-26. The Court reasoned:

> [W]e cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing *ideas* in the process.

Id. at 26 (emphasis added).

43 405 U.S. 518 (1972).

44 *Id.* at 522-23.

45 Law of August 18, 1919, No. 291, [1919] Ga. Acts 103-04 *and* Law of April 9, 1963, No. 358, [1963] Ga. Acts 455-57, *as amended*, GA. CODE ANN. § 26-2610 (1972). Wilson was one of a group of persons engaged in picketing an army induction headquarters. The group proceeded to block the entrances to the building and a scuffle ensued when police attempted to remove them. In addition to a charge of assault and battery, Wilson was accused of using the language "[w]hite son of a bitch, I'll kill you," and "[y]ou son of a bitch, I'll choke you to death" toward one individual, and "[y]ou son of a bitch, if you ever put your hands on me again, I'll cut you all to pieces," to another person. Wilson v. State, 223 Ga. 531, 534, 156 S.E.2d 446, 449 (1967).

46 405 U.S. at 528.

47 *Id.* at 527. *See* Baggett v. Bullitt, 377 U.S. 360, 375-79 (1964); Cantwell v. Connecticut, 310 U.S. 296, 311 (1940).

48 405 U.S. at 521. The Court stated:

to fighting words explicitly and exclusively, the statute would be deemed void on its face for overbreadth.[49]

Since Rosenfeld's conviction was grounded on language which merely offended the sensibilities of the hearer, *Cohen* required that the conviction be set aside; and *Gooding* necessitated that the statute permitting such a conviction be voided. The New Jersey supreme court, however, interpreted these two cases as allowing states to proscribe the use of words in public places likely to cause breaches of the peace.[50] By thus limiting the statutory construction to *Profaci's* first alternative, preserving the peace, and by eliminating the second alternative, protecting the listener's sensibilities, the court restored the constitutionality of the statute.[51] *Rosenfeld* did not add to the "fighting words" concept, but simply restated the first alternative with continued approval. The state argued that the holding in *Rosenfeld* should have been structured to permit the state to proscribe offensive language which amounts to a public nuisance.[52] The court, however, found that

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> "Although a statute may be neither vague, overbroad, nor otherwise invalid as applied to the conduct charged against a particular defendant, he is permitted to raise its vagueness or unconstitutional overbreadth as applied to others. And if the law is found deficient in one of these respects, it may not be applied to him either, until and unless a satisfactory limiting construction is placed on the statute. The statute, in effect, is stricken down on its face."

Id. (quoting from Coates v. City of Cincinnati, 402 U.S. 611, 619-20 (1971) (White, J., dissenting)). *See* Dombrowski v. Pfister, 380 U.S. 479, 486 (1965); NAACP v. Button, 371 U.S. 415, 432-33 (1963); United States v. Raines, 362 U.S. 17, 21-22 (1960). *But see* Younger v. Harris, 401 U.S. 37, 51 (1971). *See generally* Sedler, *Dombrowski in the Wake of Younger: The View From Without and Within*, 1972 WIS. L. REV. 1.

[49] 405 U.S. at 523. The dissent in *Gooding* disputed this issue of overbreadth. Chief Justice Burger stated:

> It is not merely odd, it is nothing less than remarkable that a court can find a state statute void on its face, not because of its language—which is the traditional test—but because of the way courts of that State have applied the statute in a few isolated cases, decided as long ago as 1905 and generally long before this Court's decision in *Chaplinsky v. New Hampshire* . . . .

Id. at 528-29 (Burger, C.J., dissenting) (citation omitted). *See Id.* at 534 (Blackmun, J., dissenting). *See also* Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 852-53, 892, 894-96 & nn.189 & 190 (1970).

[50] *Rosenfeld*, 62 N.J. at 601-03, 303 A.2d at 893-94.

[51] *Id.* at 603-04, 303 A.2d at 894-95.

[52] *Id.* at 602, 303 A.2d at 894. When *Rosenfeld* came before the United States Supreme Court, Justice Powell, in his dissenting opinion, raised this issue of regulating vulgar speech through nuisance laws:

> I agree with this view that a verbal assault on an unwilling audience may be so grossly offensive and emotionally disturbing as to be the proper subject of criminal proscription, whether under a statute denominating it disorderly conduct, or, more accurately, a public nuisance.

408 U.S. at 906 (Powell, J., joined by Burger, C.J., and Blackmun, J., dissenting). *See* MODEL PENAL CODE § 250.2(1)(a), (b) (Proposed Official Draft 1962).

Offensive or indecent language as a public nuisance has been discussed in Von

the task of instituting explicit nuisance regulations for offensive speech within the constitutional boundaries of *Cohen* and *Gooding* should be left to the legislature.[53] Thus, until the legislature acts, the state, by dint of *Rosenfeld*, may only punish that public language which constitutes fighting words.

In *Brown*, the defendant's language was deemed to be "grossly offensive and highly provocative."[54] Brown argued, however, that even if his speech did constitute fighting words, he could not be constitutionally convicted under a law which had been deemed unconstitutionally broad and, therefore, void at the time of his arrest and conviction. The court held that the *Rosenfeld* construction could constitutionally be applied to Brown retroactively,[55] and that, under the facts, such application would embrace no element of unfairness.[56]

Since the "fighting words" concept now remains the only conduit through which the state may proscribe offensive language, perhaps the court could have redefined that standard more clearly. By merely

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Sleichter v. United States, 472 F.2d 1244, 1257 (supplemental opinion) (D.C. Cir.), *cert. denied*, 409 U.S. 1063 (1972); Williams v. District of Columbia, 419 F.2d 638, 646 (D.C. Cir. 1969). *See* State v. Ceci, 255 A.2d 700 (Del. Super. Ct. 1969). *Cf.* City of St. Paul v. Azzone, 287 Minn. 136, 177 N.W.2d 559 (1970); City of St. Paul v. Morris, 258 Minn. 467, 104 N.W.2d 902 (1960), *cert. denied*, 365 U.S. 815 (1961). *See also* Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 COLUM. L. REV. 391, 393 (1963); Annot., 48 A.L.R. 83, 89 (1927).

[53] 62 N.J. at 602, 303 A.2d at 894.

[54] 62 N.J. at 593, 303 A.2d at 889. Brown's choice of language and the direct manner in which he confronted the officer prima facie fell within the guidelines of *Chaplinsky* and *Profaci*. The epithets were of the type likely to provoke the average person to retaliate (*Chaplinsky*, 315 U.S. at 574) and they were uttered in apparent reckless disregard of the probable consequences (*Profaci*, 56 N.J. at 353, 266 A.2d at 584).

[55] 62 N.J. at 593, 303 A.2d at 888-89. The court relied on peripheral dictum in Dombrowski v. Pfister, 380 U.S. 479, 491 n.7 (1965), to support this retroactive application. Quoting from Justice Brennan's dictum in *Dombrowski*, the New Jersey court stated that

> "once an acceptable limiting construction is obtained, it may be applied to conduct occurring prior to the construction, provided such application affords fair warning to the defendants."

62 N.J. at 592, 303 A.2d at 889 (quoting from Dombrowski v. Pfister, 380 U.S. at 491 n.7) (citations omitted by the court). *See* McGautha v. California, 402 U.S. 183, 259-61 (1971) (Brennan, J., dissenting); Shuttlesworth v. City of Birmingham, 382 U.S. 87, 99 (1965) (Brennan, J., concurring). *See also* Poulos v. New Hampshire, 345 U.S. 395 (1953); Winters v. New York, 333 U.S. 507 (1948). *But see* Ashton v. Kentucky, 384 U.S. 195, 198 (1966).

[56] The court in *Brown* determined that since the defendant must have known his speech to be grossly offensive and highly provocative, the retroactive application embraced no element of unfairness. 62 N.J. at 593, 303 A.2d at 889. This finding ostensibly satisfies the fourteenth amendment element of fair warning which is necessary to render conviction constitutional. *See* Grayned v. City of Rockford, 408 U.S. 104, 108-12 (1972); Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939).

reaffirming *Profaci's* first alternative, *Rosenfeld* and *Brown* implicitly sustained the view, originally promulgated in *Chaplinsky*, that certain expressions per se constitute fighting words.[57] The court did not definitively decide whether external circumstances or inherent vulgarity renders a scurrilous utterance proscribable under the "fighting words" concept. In light of *Cohen's* strong implication that the state cannot predetermine what epithets are fighting words solely by virtue of their vulgarity,[58] *Brown* should have expressly judged the defendant's remarks by a standard which places more stress upon external circumstances and less reliance upon the content of the language.

Cohen demonstrated that unless the facts clearly show that an utterance generates a menace of physical violence, the "fighting words" standard is inapplicable, and the state may not interfere with the speaker.[59] In other words, the factual circumstances and not the words themselves must determine whether the encounter approached the brink of public disorder. The "fighting words" standard should serve as an evidential mechanism to determine the point at which a defendant's language transgresses the limits of free speech and precipitates an imminent breach of the peace.

If the tenor of *Cohen* is to be followed, New Jersey's "fighting

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[57] *Chaplinsky* relied in part on the theory that certain words, as a matter of common knowledge, have an inherent quality to provoke another person to a fight, and that the mere use of such words is sufficient to violate the statute. 315 U.S. at 574.

The presumption that certain utterances have an innate tendency to provoke violence was attacked by Justice Loevinger in his dissenting opinion in City of St. Paul v. Morris, 258 Minn. 467, 480-81, 104 N.W.2d 902, 910-11 (1960), *cert. denied*, 365 U.S. 815 (1961):

> [I]t is quite impossible to determine how offensive any particular expression is. To begin with, curses, oaths, expletives, execrations, imprecations, maledictions, and the whole vocabulary of insults are not intended or susceptible of literal interpretation. They are expressions of annoyance and hostility—nothing more. To attach greater significance to them is stupid, ignorant, or naive. Their significance is emotional, and it is not merely immensurable but also variable. . . . The standards of verbal behavior of those social groups within which judges move are not fairly applicable to the entire population.

Speaking for the majority in *Cohen*, Justice Harlan also observed that

> while the particular four-letter word being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man's vulgarity is another's lyric.

403 U.S. at 25. *See* Linde, *"Clear and Present Danger" Reexamined: Dissonance in the Brandenburg Concerto*, 22 STAN. L. REV. 1163, 1169, 1185 (1970).

[58] 403 U.S. at 23, 25-26.

[59] *Id.* at 18. The Court stated:

> At least so long as there is no showing of an intent to incite disobedience to or disruption of the draft, Cohen could not, consistently with the First and Fourteenth Amendments, be punished for asserting the evident position on the inutility or immorality of the draft his jacket reflected.

Id.

words" construction should be reformulated to require the state to prove two distinct elements in order to prosecute an offender. For the statute to apply prima facie, the state would first have to demonstrate the intrinsic offensiveness and the intentional provocativeness of the language spoken.[60] It would next be required to show that the extrinsic volatility of the circumstances, aggravated by this language, created such an explosive atmosphere that an immediate breach of the peace was likely to erupt.[61] Such a test would invalidate the incorrect assumption, ancillary to the "fighting words" concept, that certain epithets are as a matter of common knowledge inherently likely to provoke a violent reaction. It would, therefore, remove undue emphasis on the innate vulgarity of the language and would compel the prosecution to demonstrate that the exigent circumstances intensified the offensiveness of the words to the level of substantive danger.[62]

The "fighting words" standard does not mean that a speaker's constitutional right of free speech is dictated by the emotional disposition of the hearer, for the first amendment protects a speaker from

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60 *Profaci* established the *mens rea* requisite for a conviction under the offensive language statute:

> The words must be spoken with the intent to have the above effect or with a reckless disregard of the probability of the above consequences.

56 N.J. at 353, 266 A.2d at 584.

The United States Supreme Court has also indicated that scienter is a constitutional requirement in first amendment cases. *See, e.g.*, Ginsberg v. New York, 390 U.S. 629, 643-45 (1968); Mishkin v. New York, 383 U.S. 502, 511 (1966).

61 *See In re* B.N., 99 N.J. Super. 30, 238 A.2d 486 (App. Div. 1968) (court looked at both the circumstances and the words spoken).

62 *See* Whitney v. California, 274 U.S. 357 (1927), wherein Justice Brandeis stated:

> There must be reasonable ground to believe that the danger apprehended is imminent. There must be reasonable ground to believe that the evil to be prevented is a serious one.

Id. at 376 (Brandeis & Holmes, JJ., concurring). Justice Brandeis further reasoned:

> The fact that speech is likely to result in some violence or in destruction of property is not enough to justify its suppression. There must be the probability of serious injury to the State.

Id. at 378.

Although *Whitney* was subsequently overruled in Brandenburg v. Ohio, 395 U.S. 444 (1969), the latter decision served to reinforce the thrust of Justice Brandeis' argument. The Court determined that a state statute which fails to distinguish between mere advocacy of violence and actual incitement to imminent lawless action impermissibly impinges upon the freedoms protected by the first and fourteenth amendments. *Id.* at 448.

One commentator has observed:

> The Court's answer in *Brandenburg* is that *more is needed than content analysis.* The incitement must be to "imminent lawless action" (a condition which itself is unlikely to be satisfied by words spoken or written where no imminent action could follow), and it must be "likely to incite or produce such action."

Linde, *supra* note 57, at 1185 (emphasis added).

state interference where the ideas voiced spark a hostile reaction by the audience.[63] The "fighting words" concept should only apply where there is in fact an intentional provocation personally aimed at another with the probable consequence of eliciting a physical altercation.[64] The inherent offensiveness of the utterance may be gauged by the quality and intensity of emotive speech currently tolerated within the community,[65] whereas the imminence of physical violence must be measured by the probability of physical retaliation by a particular addressee in light of the surrounding circumstances in each case.

If applied to *Brown*, this approach may have led the court to

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63 In Street v. New York, 394 U.S. 576, 592 (1969), the Court said:

> It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.

The distinction must be clearly drawn between hostile reaction by an audience to the ideas promulgated by a speaker, and physical retaliation by an individual addressee to the intentional insults uttered by the provocateur. In the former situation it is generally asserted that

> the existence of a hostile opposition cannot be grounds for cutting off or curtailing expression. Rather it is the constitutional duty of the government to protect the person seeking to exercise the right of expression.

T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 337 (1970). *See* Note, *Freedom of Speech Disturbing the Peace Cases*, 18 LOYOLA L. REV. 403, 405 (1972), where the author stated:

> It must be borne in mind that one may not be arrested for employing his right of free speech simply because what he says arouses the hostility of his listeners. To that extent the use of the "fighting words" rationale is limited.

64 Emerson cautioned that the use of the fighting words concept should be limited to situations of imminent retaliatory violence. In those instances where the provocation takes the form of a face to face insult, then and only then may the "fighting words" concept be utilized.

> Such "fighting words" can be considered the equivalent of knocking a chip off the shoulder—the traditional symbolic act that puts the parties in the role of physical combatants. . . . Unless the speaker singles out specific members of his audience, and addresses insulting or fighting words to them personally, the communication cannot be said to constitute part of action.

T. EMERSON, *supra* note 63, at 337-38.

65 Discussing the diversity of reaction between various social groups to certain epithets, one author stated:

> Deference is being paid to the sensibilities and privacy claims of the prevalent groups in society who happen to find certain kinds of erotic communication or certain kinds of words deeply repulsive, while no comparable concern is shown for minorities who may have no "hang-ups" about *those* particular kinds of communication, but who may be just as deeply offended by different verbal and visual stimuli which few would seriously propose to exclude from the public forum.

Haiman, *Speech v. Privacy: Is There a Right Not To Be Spoken To?*, 67 Nw. U.L. REV. 153, 191 (1972) (emphasis in original). *Cf.* Miller v. California, 413 U.S. ___ (1973) (obscenity decision which relied on state community standards to determine what is obscene).

reach a different outcome. As has been indicated, the fact that the addressee in *Brown* was an officer of the law, rather than an ordinary citizen, would arguably weigh against finding a danger of immediate violence. Since a police officer is trained to maintain order and to resist provocation, the probability of personal reprisal is unlikely.[66] Further, the police officer in *Brown*, having failed to make an arrest at the scene, swore out his complaint the day after the incident. This combination of facts tends to evidence a lack of actual peril.

As the New Jersey offensive language statute now stands, the state may proscribe public utterances only when they constitute fighting words. *Rosenfeld* and *Brown*, however, ostensibly permit the state to prosecute indecent language loudly spoken by one individual to another on the premise that such vulgar language is inherently provocative to the ordinary man. Unless the state judiciary expressly construes the "fighting words" concept to apply primarily to the exigent circumstances surrounding the utterance, rather than to the content of the expression, the advances made by *Cohen* and *Gooding* will have been vitiated.

Antonio Favetta

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[66] *Brown* indicates that the addressee's status as a police officer does not mitigate a threat to the peace. 62 N.J. at 591, 303 A.2d at 888. Authority seems to be divided on this point. In line with *Brown* are Landry v. Daley, 288 F. Supp. 183 (N.D. Ill.), *appeal dismissed sub nom.* Landry v. Boyle, 393 U.S. 220 (1968); Duncan v. United States, 219 A.2d 110 (D.C. Ct. App. 1966); City of St. Petersburg v. Waller, 261 So. 2d 151 (Fla.), *cert. denied*, 409 U.S. 989 (1972); Whited v. State, 256 Ind. 386, 269 N.E.2d 149 (1971); City of St. Paul v. Morris, 258 Minn. 467, 104 N.W.2d 902 (1960), *cert. denied*, 365 U.S. 815 (1961).

Contrary to *Brown* is the MODEL PENAL CODE § 250.1, Comment 4(c) (Tent. Draft No. 13, 1961), which states in pertinent part:

> Insofar as the theory of disorderly conduct rests on the tendency of the actor's behavior to provoke violence in others, one must suppose that policemen, employed and trained to maintain order, would be least likely to be provoked to disorderly responses.

Id. (footnote omitted). *See* Oratowski v. Civil Serv. Comm'n, 3 Ill. App. 2d 551, 123 N.E.2d 146 (1954); City of Columbus v. Guidotti, 81 Ohio L. Abs. 33, 160 N.E.2d 355 (Ct. App. 1958); Lane v. Collins, 29 Wis. 2d 66, 138 N.W.2d 264 (1965). *See also* Lewis v. City of New Orleans, 408 U.S. 913, 913 (1972) (Powell, J., concurring); Sharpe v. State, 231 Md. 401, 408, 190 A.2d 628, 632-33 (Hammond, J., dissenting), *cert. denied*, 375 U.S. 946 (1963).