FIGHTING WORDS, AND THE FIRST AMENDMENT: ITS TIME TO TAKE THE PUNCH OUT OF THEIR PROTECTION

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Illinois Courts Continue To Misapply The Fighting Words Doctrine When Police Officers Are Subjected To Verbally Offensive Speech.

Introduction

Since the fighting words doctrine formation in 1942 (1), The United States Supreme Court has never sustained or affirmed a conviction based on the doctrine. Likewise, Illinois courts continue to apply the wrong test when police officers are confronted with "fighting words." The result is an unsettled area of constitutional law which requires a re-examination of the fighting words doctrine and suggestions for reform. This article examines the history and development of the fighting words doctrine, and traces its application by Illinois courts. Finally, I will discuss proposed solutions to the problem and urge a return to the original application of the fighting words doctrine.

Constitutional Guaranty to Free Speech is Not Absolute

Although the United States Constitution guarantees the right to free speech, this guarantee is not absolute. Justice Holmes qualified his well-known and often quoted assertion that the highest truth is reached by the "free trade of ideas" when he added a caveat near the end of the phrase which strips the absoluteness and honor of free speech if it "so imminently threaten[s] immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country."(2) Through the ongoing evolution of constitutional law, the Court has determined that various forms of speech are unprotected, such as speech which produces a clear and

present danger (3), obscenity(4), libel(5), and fighting words(6).

History and Development of the Fighting Words Exception

The United States Supreme Court gave birth to the "fighting words" doctrine in Chaplinsky v. New Hampshire (7). In Chaplinsky, a Jehovah's Witness denounced certain religions and caused a crowd to become restless and angry. After being warned by the City Marshall about the crowd's restlessness, Chaplinsky stated to the Marshall, "'You are a God damned racketeer' and 'a damned Fascist and the whole government of Rochester are Fascists or agents of Fascists'..." The police arrested him for violating a New Hampshire statute which prohibited the use of "offensive, derisive, or annoying words[s] to any other person...with intent to deride, offend or annoy him..." (8)

In affirming Chaplinsky's conviction, the Court defined "fighting words" as those words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace." Further, the Court defined offensiveness as that which was "'what men of common intelligence would understand would be words likely to cause an average addressee to fight'...Such words, as ordinary men know, are likely to cause a fight...'" (9) Thus, the Court created the fighting words doctrine which was essentially composed of three requisite elements: 1) the words must inflict injury or incite am immediate breach, 2) the words must be addressed to an individual, and 3) whether or not the words are offensive is determined by a **"reasonable man" objective standard.**

Using this analysis, the court determined that Chaplinsky's remarks to the City Marshall were fighting words, and in contravention of the statute prohibiting offensive speech. Even though the words

were directed to a police officer, the court applied an objective standard. It seems the court correctly applied their newly formed doctrine.

Change in Fighting Words Definition

A significant change in the doctrine came in the decision of Gooding v. Wilson in 1971 (10). In Gooding, a subject was arrested for violating an opprobrious words and abusive language statute after she said to two 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." (11) Although the Court focused on the overbreadth of the statute, the opinion contained language that effectively emasculated the objective standard set forth in Chaplinsky and severly restructured the original fighting words doctrine.

Writing for the majority, Justice Brennan rejected the objective standard and stated, "[t]his definition makes it a 'breach of peace' merely to speak words offensive to some who hear them, and so sweeps too broadly." (12) On the other hand, Justice Blackmun, in dissent, appropriately noted that the Chaplinsky doctrine should remain good law, and stated, "I feel that by [this decision], the court is merely paying lip service to Chaplinsky." (13) The Court struggled with its decision.

Nevertheless, the Court, in subsequent decisions, continued to employ the newly formed **subjective** analysis in the context of "fighting words." In Lewis v. City of New Orleans, (14), the Court reversed the conviction of a mother who called police officers "god-damn mother fucking police." In his concurrence, Justice Powell set forth the

apparent crux of the argument in favor of subjective review.

> If these words had been addressed by one citizen to another, face to face and in a hostile manner, I would have no doubt that they would be 'fighting words.' But the situation may be different where such words are addressed to a police officer trained to exercise a higher degree of restraint than the average citizen. It is unlikely...that the words here would have precipitated a physical confrontation between the middle-aged woman who spoke them and the police officer in whose presence they were uttered. The words may well have conveyed anger and frustration without provoking a violent reaction from the police officer. (15)

As recent as 1987, Justice Brennan writing for the majority, stated "the freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state." (16) In spite of the Court's position, a significant number of lower courts refused to follow this reasoning. (17)

Lower Court Interpretation of Doctrine

Lower courts have interpreted the fighting words doctrine in a variety of different ways. Many states chose to apply the objective average addressee standard originally set forth in Chaplinsky. (18) Alternatively, many states, such as Illinois, chose the path created by the Court's injection of a subjective standard into the original doctrine by its decisions in Gooding and Lewis.(19) The result is a nationwide inconsistency in judicial opinions between the states, and in some cases, inconsistency within the state itself.

Illinois uses Subjective Standard

Illinois courts subscribe to the subjective standard when faced with cases involving "fighting words" directed to police officers. In doing so, they incorrectly assert that the formation of the fighting words doctrine occurred in Lewis v. New Orleans where Justice Powell's

concurrence warped the objective standard into subjective review. See People v. Ellis, 141 Ill.App.3d 632, 491 N.E.2d 61, 96 Ill.Dec. 242 (5th Dist. 1986); People v. Kellstedt, 29 Ill.App.3d 83, 329 N.E.2d 830 (3rd Dist. 1975). As will be discussed, these references to Lewis are misplaced, since the Supreme Court has never expressly overruled the doctrine as set forth in Chaplinsky.

The often quoted decision in Oratowski v. Civil Service Comm'n seems to best reflect the opinion of Illinois Courts:

> An officer of the law must exercise the greatest degree of restraint in dealing with the public...[W]ords addressed to an officer in an insolent manner do not without any other overt act tend to breach the peace because it is the sworn duty and obligation of the officer not to breach the peace...He has an obligation to exercise a great degree of restraint in dealing with the public and should not permit abusive statements to so arouse him that he will commit a breach of the peace. (20)

Although Oratowski is a First District opinion, its teachings are referenced in many other Illinois decisions. (14)

No Second District Appellate Court decision addresses the fighting words issue as it applies to police officers, but those districts that do subscribe to subjective interpretation do so in a variety of different factual contexts. All share in one theme: Police officers may not be victimized by "fighting words" alone". For example, in City of Chicago v. Blakemore, 15 Ill.App.3d 994, 305 N.E.2d 687 (1st Dist. 1973) the words at issue were "pig" and "son of a bitch." In People v. Trester, 96 Ill.App.3d 553, 421 N.E.2d 959, 52 Ill.Dec. 96 (4th Dist. 1981), the defendant told the police officer to take off his badge and gun at which time he would punch him in the nose and they would fight.

Illinois' courts' position also partially rests upon the intent

of the legislature in drafting the disorderly conduct statute. "[T]he drafters deemed the gist of the offense to be unreasonable conduct by the accused 'which he knew or should have known would tend to disturb, alarm or provoke others.'" People v. Trester, 96 Ill.App.3d 553, 555, 421 N.E2d at 960, 52 Ill.Dec. at 97 (4th Dist. 1981).

Finally, the Illinois Supreme Court has stated, "[the reasonableness of actions or words constituting disorderly conduct] must always depend upon the particular case and therefore must be left to determination on the facts and circumstances of each situation as it arises." City of Chicago v. Wender, 46 Ill.2d 20, 24, 262 N.E.2d 470, 472 (1970). Even though the Wender opinion dealt with fighting words which were directed to the public, the court set a tone of subjective review in prosecutions for Disorderly Conduct.

The Case Against Subjective Review

As previously discussed, the fighting words doctrine promulgated in 1942 has never been overruled. The progeny of cases that followed (specifically Gooding and Lewis) seriously muddied the waters of the doctrine and its objective application. Those Illinois courts that declared that the Lewis decision gave birth to the doctrine did so in error. Unfortunately, they compounded their error when they simultaneously employed the subjective, actual addressee standard.

In addition to Illinois courts' false premise, other Illinois statutes governing conduct directed at police officers are in direct conflict with the reasoning of Illinois Courts and legislators. For example, the offenses of Assault and Battery are upgraded to Aggravated Assault and Aggravated Battery simply by virtue of the victim being a police officer. (21) These statutes are directly inopposite to the

position that a police officer must exhibit a greater restraint against aggression. We, as a society deem it a more serious offense if an otherwise simple assault or battery is directed to a police officer, instead of a citizen. To change to rules in the context of fighting words is inconsistent, if not illogical.

Finally, the result of the inconsistency and confusion with a subjective standard can be seen within one appellate district within Illinois. In People v. Ellis, (22) the Fifth District Appellate Court upheld the conviction of the defendant for violating the Disorderly Conduct statute. In doing so, the court once again inaccurately referenced the formation of the fighting words doctrine to Lewis (subjective standard used) and then went on to say, "[t]his court believes that Defendant's actions...would alarm or scare any reasonable person in the proximity of the defendant." (23) Thus, the court quoted the Supreme Court's decision which used **subjective** reasoning, applied to the facts, and the employed **objective** reasoning to uphold the conviction for Disorderly Conduct. To be sure, Illinois is not alone in its conflicting decisions within the state and appellate districts. (24)

Consistency With Objective Approach

As the above discussion reflects, the Court's decision in Gooding and Lewis has muddied the waters of the fighting words doctrine. "The Court has painted itself into a corner from which it, and the States, can extricate themselves only with difficulty." (25) By incorporating an actual addressee standard, the focus is on the listener, not the speaker. A speaker is not permitted to hurl insults at the strong and able-bodied, but may victimize the weak, handicapped, or

self-restrained without recourse. Indeed, scholars recognize the time is here to take the 'Chaplinsky social value principle and fighting words doctrine seriously once again." (26)

Conclusion

The current fighting words standard advocated by the Supreme Court and followed by Illinois Courts has produced unthinkable results. Although the fighting words doctrine has never been expressly overruled, its application has resulted in constitutionally permissible phrases such as "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." (27)

Illinois courts and especially courts within the Second District should employ the objective standard when faced with a "fighting words/police officer" issue. The objective standard offers consistency and equal protection to everyone from being attacked by verbally abusive language. Justice Jackson captured the idea when he said, "[t]he choice is not between order and liberty. It is between liberty with order and anarchy with either. There is danger that, if the Court does not tempter its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact." (28) Practical wisdom beckons Illinois courts to resurrect the original fighting words doctrine.

Footnotes

1. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942)
2. Abrams v. United States, 250 U.S. 624, 629 (1919)
3. Schenk v. United States, 249 U.S. 47 (1919)
4. Roth v. United States, 354 U.S. 476 (1957)
5. Beauharnais v. Illinois, 3443 U.S. 476 (1952)

6. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942)
7. Id.
8. Id. at 569
9. Id. at 573
10. 405 U.S. 518 (1971)
11. Id. at 519-20, n1
12. Id. at 527
13. Id. at 536-7 (Blackmun J., dissenting)
14. 415 U.S. 130 (1974) (5-4 decision), revg 263 La. 809, 269 So.2nd 450 (1972)
15. Id. at 135 (Powell J., concurring)
16. City of Houston v. Hill, 482 U.S. 451 (1987)
17. The author's research reveals the following states with reported decisions on the fighting words issue and that use an objective standard: Arizona, Arkansas, Colorado, Connecticut, Georgia, Indiana, Kansas, Massachusetts, Montana, Nebraska, Ohio, Wisconsin.
18. Id.
19. The author's research reveals the following states with reported decisions on the fighting words issue and that use a subjective standard: Alabama, Hawaii, Illinois, Louisiana, Maryland, North Carolina, New Mexico, Washington.
20. 3 Ill.App.2d 551, 123 N.E.2d 146, 151 (1st Dist 1954)
21. Illinois Revised Statutes, Chapter 38, Article 12 et. seq.
22. 141 Ill.App.3d 632, 491 N.E.2d 61, 96 Ill.Dec. 247 (5th Dist. 1986)
23. Id. at 633, 491 N.E. 2d at 62, 96 Ill.Dec. at 248
24. The author's research reveals the following states with reported decisions on the fighting words issue and that have conflicting opinions regarding the use of the objective vs. subjective standard: Alabama, Florida, Maine.
25. Gooding v. Wilson, 405 U.S. 533 (Blackmun, J., dissenting)
26. D. Downs, Nazis in Skokie 167 (1985)
27. Gooding v. Wilson 505 U.S. at 519-20, n.1
28. Terminiello v. City of Chicago, 337 U.S. 1, 37 (5-4 decision) (Jackson, J., dissenting) (1949)