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CONSTITUTIONAL LAW—FIRST AMENDMENT—NORTH DAKOTA'S DISORDERLY CONDUCT STATUTE: IS IT LIMITED TO FIGHTING WORDS, OR UNCONSTITUTIONALLY OVERBROAD AND VAGUE?*

On the evening of April 10, 1988, Gabriel Nassif telephoned the Bismarck Police Department on 911 about his car being vandalized.[1] Nassif was upset because the police were not investigating the vandalism and threatened the dispatcher, saying that he had a gun and would take the law into his own hands.[2] In response, three officers were sent to Nassif's residence.[3] Seeing the officers arrive, Nassif left the house and confronted them in his front yard.[4] Nassif was very upset, shouted, and became further agitated as the conversation with the officers continued.[5] Finally, one of the officers told Nassif that if they could not help him, they were going to leave.[6] Upon hearing this Nassif shouted: "[Y]ou fucking son of a bitch, I'm going to go back into the house and get my shotgun and blow you bastards away."[7] One of the officers then grabbed Nassif, handcuffed him, and placed him under arrest for disorderly conduct pursuant to Bismarck City Ordinance sec-

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* This comment addresses only subsection three of North Dakota Century Code section 12.1-31-01, North Dakota's disorderly conduct statute. In addition, this comment should be read in light of the recently decided case of City of Bismarck v. Schoppert, Crim. No. 900263 (N.D. May 7, 1991). In *Schoppert*, the North Dakota Supreme Court held that jury instructions allowing for a disorderly conduct conviction for uttering words that merely "inflict injury" upon the addressee, as opposed to words that "incite immediate breach of the peace," violated the defendant's first amendment rights. *Id.* at 8-11. The *Schoppert* court held that only words that "incite an immediate breach of peace" can be constitutionally prohibited. *Id.* at 8.

1. City of Bismarck v. Nassif, 449 N.W.2d 789, 791 (N.D. 1989). Nassif had reported the incident to the police that morning, but the police had not yet acted on the complaint. *Id.*

2. *Id.* Nassif testified at trial that he was heavily sedated at the time of the call as a result of taking medication. Brief for Appellant at 3, City of Bismarck v. Nassif, 449 N.W.2d 789 (N.D. 1989) (No. 89004) (available at the University of North Dakota Thormodsgard Law Library).

3. *Nassif*, 449 N.W.2d at 791. The officers were informed of Nassif's threats when they were dispatched and two of them drew their guns upon arriving at Nassif's residence. *Id.*

4. *Id.* Nassif was not expecting three officers and became nervous and frightened when he saw two of the officers with their guns drawn. Brief for Appellant at 4-5, City of Bismarck v. Nassif, 449 N.W.2d 789 (N.D. 1989) (No. 89004). All three officers traveled in separate patrol cars. *Id.* at 2.

5. *Nassif*, 449 N.W.2d at 791. Nassif had shouted threats and warnings during his telephone conversation with the dispatcher as well. Brief for Appellee at 2, City of Bismarck v. Nassif, 449 N.W.2d 789 (N.D. 1989) (No. 89004) (available at the University of North Dakota Thormodsgard Law Library).

6. *Nassif*, 449 N.W.2d at 791. Testimony at trial revealed that as many as 20 to 25 people had gathered near Nassif's residence, some as close as 75 feet. *Id.* at 795.

7. *Id.* Two officers testified that they felt threatened and were concerned for their safety. *Id.* The other officer was already in the parking lot north of Nassif's residence, but he testified that he also heard Nassif's statement. *Id.* at 795.

tion 6-05-01.[8] In January of 1989, a jury found Nassif guilty of the charge.[9]

On appeal, Nassif raised, *inter alia*,[10] the following issues: (1) whether Bismarck City Ordinance section 6-05-01 (1), (3) is unconstitutionally overbroad and vague on its face in that it infringes on the right of free speech protected by the first amendment;[11] (2) whether the evidence sufficiently indicated that his language constituted "fighting words";[12] and (3) whether the evidence showed that he used the words in a public place.[13] The North Dakota

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8. *Id.* at 791. Nassif was charged alternatively with subsections 1 and/or 3 of section 6-05-01 of the City of Bismarck Code of Ordinances. *Id.* at 792. The ordinance provides in relevant part:

> *Disorderly Conduct*: A person is guilty of an offense if, with intent to harass, annoy, or alarm another person or in reckless disregard of the fact that another person is harassed, annoyed, or alarmed by his behavior that person:
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> 1. Engages in fighting or in violent, tumultuous or threatening behavior;
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> * * *
>
> 3. In a public place, uses abusive or obscene language, or makes an obscene gesture, which language or gesture by its very utterance or gesture inflicts injury or tends to incite an immediate breach of the peace.

BISMARCK, N.D., CODE OF ORDINANCES § 6-05-01(1)(3) (1986). The complaint stated that Nassif had violated this ordinance by using obscene and offensive language and by threatening the officers with bodily harm, or alternatively by telling the officers that he was going to blow them away with his gun. *Nassif*, 449 N.W.2d at 791-92.

9. *Id.* The jury did not state the exact subsection under which it found Nassif guilty. *See id.*

10. *Id.* at 792. Nassif also asserted two other issues: (1) that the trial court erred by not giving his requested jury instruction on entrapment, and (2) that the trial court erred by not inquiring into his waiver of lack of criminal responsibility defense to determine whether he made it competently, intelligently, and voluntarily. *Id.* On the former issue the court held that there was not sufficient evidence to afford Nassif that instruction. *Id.* at 796. The North Dakota Supreme Court reversed and remanded the case on the later issue, holding that the trial court should have inquired into his waiver of lack of criminal responsibility defenses. *Id.* at 798. For further discussion on the foregoing issues see *infra* note 144.

11. *Nassif*, 449 N.W.2d at 792. Nassif asserted that subsection (3) of the ordinance was invalid because it conflicted with state law by prohibiting different conduct than subsection (3) of the state's disorderly conduct statute. *Id.* at 793. However, a city ordinance may not supersede state law. N.D. CENT. CODE § 12.1-01-05 (1985 & Supp. 1989). Therefore, Nassif believed that the Bismarck ordinance must be read in light of state's disorderly conduct statute, which he asserted to be unconstitutionally overbroad and vague. *Nassif*, 449 N.W.2d at 793. The North Dakota Supreme Court construed the state of North Dakota's disorderly conduct statute, section 12.1-31-01 of the North Dakota Century Code, to be consistent with the Bismarck ordinance rather than finding that the ordinance superseded state law. *Id.* at 794.

The constitutionality of subsection (1) was not properly raised at trial and, therefore, was not addressed by the North Dakota Supreme Court. *Id.* at 793 (citing State v. Raywalt, 436 N.W.2d 234, 239 (N.D. 1989); Grand Forks v. Cameron, 435 N.W.2d 700, 702 (N.D. 1989)) (court will not address an issue on appeal when it has not been adequately raised at the trial court level).

12. *Nassif*, 449 N.W.2d at 792. "Fighting words" are defined as words tending to incite immediate breach of the peace, Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942), or words which carry an inherent power to provoke a violent reaction when spoken to an ordinary citizen. Cohen v. California, 403 U.S. 14, 20 (1971).

13. *Nassif*, 449 N.W.2d at 792. A definition of "public place" is conspicuously absent from both the Criminal Offense Title of the Bismarck Code of Ordinances and the North Dakota Century Code Penal Code Title. *See* BISMARCK, N.D., CODE OF ORDINANCES tit. 6 (1987); N.D. CENT. CODE tit. 12.1 (1985 & Supp. 1989).

Supreme Court *held* that Bismarck City Ordinance section 6-05-01(3) was not unconstitutionally overbroad on its face,[14] that Nassif's language constituted "fighting words,"[15] and that the language was used in a public place.[16] *City of Bismarck v. Nassif*, 449 N.W.2d 789 (N.D. 1989).

"Fighting words," as defined by the United States Supreme Court in *Chaplinsky v. New Hampshire*,[17] are "those words which by their very utterance inflict injury or tend to incite an immediate breach of the peace."[18] *Chaplinsky* involved a Jehovah's Witness who caused a disturbance in the streets of Rochester, New Hampshire, by passing out literature and making deprecatory religious remarks.[19] Later, a traffic officer at the scene decided to escort Chaplinsky to the police station because the crowd was disturbed and threatening violence; however, Chaplinsky was not

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14. *Nassif*, 449 N.W.2d at 793. The issue of vagueness was not addressed by the court. *Id.* Perhaps the reason for this omission is that the appellant's brief did not address the vagueness doctrine. *See* Brief for Appellant at 9-11, City of Bismarck v. Nassif, 449 N.W.2d 789 (N.D. 1989) (No. 89004) (discussion of the first issue, but addressing only the overbreadth of the statute and not the vagueness).

15. *Nassif*, 449 N.W.2d at 794-95. The first amendment to the United States Constitution provides:

> *Congress shall make no law* respecting an establishment of religion, or prohibiting the free exercise thereof; or *abridging the freedom of speech* or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. amend. I (emphasis added). The first amendment is incorporated to the states through the fourteenth amendment. *See, e.g.*, Gitlow v. New York, 268 U.S. 652, 666 (1925); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) (the first amendment is applicable to the states through the fourteenth amendment). The fourteenth amendment provides in relevant part: "No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States." U.S. CONST. amend. XIV, § 1. However, "fighting words" are wholly unprotected by the first amendment. *Chaplinsky*, 315 U.S. at 572 (quoting Cantwell v. Connecticut, 310 U.S. 296, 309-10 (1940)).

16. *Nassif*, 449 N.W.2d at 795. The court found that Nassif had used the words in a "public place" because the bystanders who were located on nearby public property could hear Nassif's utterances. *Id.* at 795-96. For further discussion concerning the public place issue see *infra* notes 134-45 and accompanying text, and notes 186-88 and accompanying text.

17. 315 U.S. 568 (1942).

18. Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (dictum) (citing Z. CHAFEE, FREE SPEECH IN THE UNITED STATES 149 (1941)). This dicta has served only to frustrate first amendment freedom of speech and was unnecessary. Gard, *Fighting Words as Free Speech*, 58 WASH U.L.Q. 531, 533 (1980). *See also* Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L. REV. 484, 508-10 (1990) (*Chaplinsky* "inflict injury" language was dictum, and is no longer good law). The Court actually accepted the New Hampshire Supreme Court's definition of "fighting words," as those which are "likely to cause an average addressee to fight." *Chaplinsky*, 315 U.S. at 573. The Court stressed further that no words were forbidden except such as have a direct tendency to cause acts of violence by the person to whom individually, [the words] are addressed." *Id.*

19. *Chaplinsky*, 315 U.S. at 569-70. Chaplinsky was allegedly denouncing religion. *Id.* at 570. A group of citizens had previously complained about Chaplinsky's remarks to the City Marshal. *Id.* The Marshal explained to them that Chaplinsky was lawfully exercising his freedom of speech and then warned Chaplinsky of the group's complaint. *Id.*

placed under arrest.[20] On their way to the station, Chaplinsky and the officer encountered the City Marshal with whom Chaplinsky began to argue, calling him "a God damned racketeer" and "a damned fascist."[21] Chaplinsky was then arrested for disorderly conduct and subsequently found guilty of the charge.[22] On appeal, the United States Supreme Court held that Chaplinsky's words were "fighting words" wholly unprotected by the first amendment.[23] The *Chaplinsky* Court stated that "such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[24] Despite this seemingly expansive lan-

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20. *Id. See also* Notes and Cases, *Prohibition of Offensive Utterances Not Violative of Right of Free Speech*, 2 BILL OF RTS. REV. 224, 225 (1941) (defendant led to police station because of threatened violence from the crowd).

21. *Chaplinsky*, 315 U.S. at 569-70. Chaplinsky alleged that at first he merely asked the Marshal to arrest the members of the crowd who had caused the disturbance. *Id.* at 570. Arguably, the Marshal then cursed him and told him to comply. *Id.* Chaplinsky also denied using the Lord's name in vain, but admitted the other remarks. *Id.*

22. *Id.* at 569. The New Hampshire statute, as it existed when Chaplinsky was convicted, provided:

> 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 prevent him from pursuing his lawful business or occupation.

See Chaplinsky, 315 U.S. at 569 (quoting N. H. P. L. c. 378 § 2 (1926)). Chaplinsky was convicted in the municipal court of Rochester, New Hampshire for violating the statute through the use of his words to the City Marshal. *Id.* After exhausting his appeals in the state courts, Chaplinsky appealed to the United States Supreme Court alleging, *inter alia*, that the statute was invalid as a proscription of free speech, as well as being vague and indefinite. *Id.* at 571.

23. *Id.* at 572. The Supreme Court upheld the conviction, stating that the New Hampshire Supreme Court had narrowly construed the statute under which Chaplinsky was convicted to proscribe only words that had the "characteristic of plainly tending to excite the addressee to a breach of the peace." *Id.* at 573.

Precedent for the Court's decision was Cantwell v. Connecticut, 310 U.S. 296 (1940). *Chaplinsky*, 315 U.S. at 572. Cantwell was a Jehovah's Witness who played a tape to two Catholics that described the Roman Catholic Church in an offensive light. *Cantwell*, 310 U.S. at 300. Cantwell's conviction of inciting a breach of the peace was overturned by the Court because the tape was not directly aimed at the two listeners and a "clear and present danger of riot" was not present. *Id.* at 308-10. The "clear and present danger" language used by the Court in *Cantwell* was taken from the Court's decision in Schenck v. United States, 249 U.S. 47 (1919). *Cantwell*, 310 U.S. at 311. The Court in *Schenck* was analyzing a letter written and circulated by Schenck that opposed the draft when the United States was at war with the German Empire. Schenck v. United States, 249 U.S. 47, 52 (1919). The *Schenck* Court stated that the "question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." *Id.* at 49. The Court believed that even "[t]he most stringent protections would not protect a [person] in falsely shouting fire in a theatre and causing panic." *Id.*

24. *Chaplinsky*, 315 U.S. at 572 (citing Z. CHAFEE, FREE SPEECH IN THE UNITED STATES 149 (1941)). The exact words used by Chafee in his book are as follows:

> The true explanation is that profanity and indecent talk and pictures, which do not form any essential part of any exposition of ideas, have a very slight social value as a step to truth, which is clearly outweighed by the social interests in

guage, the fact that *Chaplinsky* is the only Supreme Court decision to uphold a "fighting words" conviction illustrates that the exception has been narrowly applied.[25]

Indicative of the this narrow application is *Bachellar v. Maryland*,[26] in which the defendants' conviction under Maryland's disorderly conduct statute was reversed.[27] *Bachellar* involved

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order, morality, and the training of the young, and the peace of mind of those who hear and see.

Z. CHAFEE, FREE SPEECH IN THE UNITED STATES 150 (1941).

25. Gard, *supra* note 18, at 534. In the case of Terminiello v. Chicago, 337 U.S. 1 (1949), the Court was presented with the question of whether speech that "stirr[ed] the public to anger, invit[ed] dispute, or [brought] about a condition of unrest, or creat[ed] a disturbance" was nevertheless protected by the first amendment. Terminiello v. Chicago, 337 U.S. 1, 3 (1949). The petitioner in *Terminiello* spoke to a group euphemistically called the Christian Veterans of America. *Id.* at 2-3. Terminiello's speech was violently anti-Semitic, as represented by him asking the group to consider if they had to even wonder why the Jews were persecuted by Hitler. *Id.* at 20 (Jackson, J., dissenting). Allegedly, an extremely violent crowd of 1500 people had gathered outside to protest the speech. *Id.* at 16 (Frankfurter, J., dissenting). Ice picks, stones and bottles were thrown at police officers. *Id.* at 15-16 (Frankfurter, J., dissenting). Terminiello was arrested and convicted under a Chicago breach of the peace ordinance. *Id.* at 2. At trial, the jury was instructed that "breach of the peace" could be behavior that "stirs the public to anger, invites dispute, and brings about a condition of unrest, or creates a disturbance, or if it molests the inhabitants in the enjoyment of peace and quiet by arousing alarm." *Id.* at 3. Finding that instruction overbroad because it encompassed more than "fighting words," the Court ruled the ordinance unconstitutional. *Id.* at 6. The Court stated:

> [Speech] may indeed serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.
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> * * *
>
> It is nevertheless protected unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. . . . There is no room under our Constitution for a more restrictive view.

Id. at 4 (citations omitted).

26. 397 U.S. 564 (1970). The case of Feiner v. New York, 340 U.S. 315 (1951), decided prior to *Bachellar*, illustrates the Court's position that only words tending to cause a violent reaction may be punished. Feiner v. New York, 340 U.S. at 315, 331 (1951) (Douglas, J., dissenting). *Feiner* involved a young college student who made a speech on a street corner in Syracuse, New York, advocating the use of violence by African American people against whites for the purpose of obtaining equal rights. *Id.* at 316-17. The crowd of some eighty people, consisting of both whites and African Americans who were listening to Feiner, began pushing and milling around. *Id.* at 317. After twice warning Feiner to end his speech because of the crowd's reaction, the police arrested him for breach of the peace. *Id.* at 318. On appeal to the United States Supreme Court, after conviction in the state courts, Feiner's conviction was affirmed. *Id.* at 321. Relying primarily on *Cantwell v. Connecticut*, *Chaplinsky's* predecessor, the Court stated:

> It is one thing to say that the police cannot be used as an instrument for the suppression of unpopular views, and another to say that, when as here the speaker passes the bounds of argument or persuasion and undertakes incitement to riot, they are powerless to prevent a breach of the peace.

Id. at 320-21. Although Feiner does not address a pure "fighting words" situation, the Court did reiterate the fact that a person's words may be constitutionally suppressed only when shown to arouse a clear and present danger of unlawful action. Shea, *"Don't Bother to Smile When You Call Me That" — Fighting Words and the First Amendment*, 63 KY. L.J. 1, 11 (1975).

27. Bachellar v. Maryland, 397 U.S. 564, 571 (1970). The statute existing at that time prohibited "acting in a disorderly manner to the disturbance of the public peace, upon any

Vietnam War demonstrators in the streets of Baltimore, Maryland, who carried or wore signs bearing legends such as "Peasant Emancipation, Not Escalation," "Make Love not War" and "Stop in the Name of Love."[28] A crowd had gathered to watch the demonstration, and some of the individuals in the crowd resented the protest.[29] The Court stated that "[c]learly the wording of the placards was not within the small class of 'fighting words' that under *Chaplinsky* are likely to provoke the average person to retaliate and thereby cause a breach of the peace."[30] The Court noted further that under the United States Constitution, public expression of ideas that are merely offensive may not be prohibited.[31]

A unique case in which the Supreme Court narrowed the application of "fighting words" is *Cohen v. California*.[32] The defendant in *Cohen* walked through the Los Angeles County Courthouse corridor wearing a jacket with the words "Fuck the Draft" inscribed on the back, which were meant to convey his deep-seated opposition to conscription during the Vietnam War.[33] Cohen was arrested and convicted of violating a state breach of the peace statute, because the state court believed it was reasonably foreseeable that others might have reacted violently against

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public street . . . in any [Maryland] city . . . ." *Id.* at 564 (quoting MD. ANN. CODE art. 27 § 123 (1967 Repl. Vol.)).

28. *Id.* at 566. Baltimore police and United States Marshals were present for the march because they had been informed of the demonstration in advance. *Id.*

29. *Id.* at 567. One individual objected sharply to receiving a leaflet that the demonstrators were distributing. *Id.* The demonstrators later moved their protest to a recruiting station where they staged a sit-in. *Id.* at 568. At the end of the day when they were asked to leave, the demonstrators refused and as a result were ejected by United States Marshals. *Id.* After being ejected, the demonstrators began to sing anti-war songs and allegedly sat or lay on the ground. *Id.* at 568-69. The testimony conflicted as to whether the demonstrators had been thrown out and held down by the marshals while pending the arrival of police vehicles, or whether the demonstrators were escorted out and willfully sat or lay down. *Id.* at 568. In any event, the reaction of onlookers was virtually the same as when the demonstrator's were marching and handing out leaflets. *Id.* at 569. The demonstrators were subsequently convicted by the City of Baltimore municipal court for violating the disorderly conduct statute, and on appeal, the Special Appeals Court affirmed. *Id.* at 565. The trial judge had instructed the jury that they could find the demonstrators guilty on the grounds of either inciting or offending the crowd through their conduct or by refusing to obey police orders to move. *Id.*

30. *Id.* at 567. The Court reversed and remanded the case, holding that the demonstrators' constitutional rights could have been impinged because the jury may have convicted the demonstrators on the basis of their views concerning the Vietnam War and the impact that view had the spectators, rather than convicting the demonstrators for their conduct. *Id.* at 571.

31. *Id.* (quoting Street v. New York, 394 U.S. 576, 592 (1969)).

32. 403 U.S. 15 (1971). One of the important implications of this case is the fact that obscene language is removed from the "fighting words" exception to free speech. Hess v. Indiana, 414 U.S. 106, 107 (1973).

33. Cohen v. California, 403 U. S. 15, 16 (1971). Cohen did not engage in any violent behavior, threats, or unusual noise. *Id.* at 16-17 (citing People v. Cohen, 1 Cal. App. 3d 94, 97-98, 81 Cal. Rptr. 503, 505 (1959)).

Cohen physically, or by attempting to remove his jacket.[34] Reversing Cohen's conviction, the United States Supreme Court held that the words on Cohen's jacket were not "fighting words," because they were not directed at any specific person, nor could anyone reasonably regard the words to be directed specifically at them.[35] Furthermore, there was no showing of a clear and present danger of violence, and Cohen did not intend to create a disruption.[36] The *Cohen* Court's application of the "fighting words" exception is considered to be the contemporary standard, because it concentrates on both the character of the words spoken and the specific surroundings of the utterance.[37]

This approach was exemplified in *Hess v. Indiana*,[38] in which the defendant, Hess, in an anti-war demonstration on the campus of Indiana University, hollered "[w]e'll take the fucking street later . . . ."[39] Hess was immediately arrested by a sheriff pursuant to Indiana's disorderly conduct statute.[40] Appealing to the United States Supreme Court after exhausting his appeals in the Indiana courts, Hess asserted, among other things, that his conviction

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34. *Id.* at 17. The statute existing at that time prohibited "maliciously and willfully disturb[ing] the peace and quiet of any neighborhood or person by offensive conduct." *Id.* at 16 (quoting CAL. PEN. CODE ANN. § 415 (West 1968)). Cohen was convicted by the trial court and that decision was upheld by the court of appeals. *Id.* However, review was not granted by the Supreme Court of California. *Id.* at 17. Cohen properly invoked the United States Supreme Court's jurisdiction by contending that, as the statute was being applied to him, it was an infringement of his first amendment right to free speech. *Id.* at 18.

35. *Cohen*, 403 U.S. at 20. The state asserted several theories as to why it could suppress Cohen's message, including its interest in guarding morality. *See id.* at 21. Dismissing that argument, the Court noted that oftentimes people are captives when outside the sanctity of their own homes, and when in a public place such as the county courthouse they can "effectively avoid further bombardment of their sensibilities simply by averting their eyes" from the objectionable stimuli. *Id.* at 21-22.

36. *Id.* at 20-21. Therefore, the Court held that the state could not criminalize Cohen's actions notwithstanding use of the "four-letter expletive." *Id.* at 26. Justice Harlan recognized that "while the particular . . . word being litigated here is perhaps more distasteful than most others, it is nevertheless true that one man's vulgarity is another man's lyric." *Id.* at 25. Furthermore, the emotive quality of a word is often the reason compelling the speaker to choose it. *Id.* at 26.

37. L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-10, at 850-51 (2d ed. 1988). California's "fighting words" statute now prohibits any person from using "offensive words in a public place which are inherently likely to provoke an immediate violent reaction." CAL. PENAL CODE § 415 (West 1988).

38. 414 U.S. 105 (1973).

39. Hess v. Indiana, 414 U.S. 105, 107 (1973). The defendant may have hollered, "We'll take the fucking street *again*." *Id.* (emphasis added).

40. *Id.* Indiana's disorderly conduct statute existing at that time provided, in relevant part:

> Whoever shall act in a loud, boisterous or disorderly manner so as to disturb the peace and quiet of any neighborhood or family, by loud or unusual noise, or by tumultuous or offensive behavior, threatening, traducing, quarreling, challenging to fight or fighting, shall be deemed guilty of disorderly conduct . . . .

Id. at 105 n. 1 (quoting IND. CODE § 35-27-2-1 (1971); IND. CODE ANN. § 10-15-10 (West Supp. 1972)).

should be overturned because the statute, as applied to him, was an unconstitutional infringement of free speech.[41] Finding that, at worst, Hess' words amounted to only future advocacy of illegal conduct, the Supreme Court reversed, holding that the words could not withstand "fighting words" scrutiny because they were not directed toward any particular individual or group.[42] In addition, the Court substantiated its position by looking at context, stating that the government's ability "to shut off discourse solely to protect others from hearing it is . . . dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner."[43]

Recently the Supreme Court has considered whether flag desecration, as a form of symbolic expression, falls within the "fighting words" exception to free speech.[44] In *Texas v. Johnson*, the defendant, Johnson, was convicted under Texas' flag desecration statute for burning the United States flag as a means to communicate his contempt for the actions of the Republican Party in renominating Ronald Reagan as a presidential candidate after he had served one term in office.[45] After noting that the only evidence offered by the state was that persons had been offended by Johnson's expression, the Court stated that the expressive conduct was not encompassed by the small class of "fighting words" enunciated in *Chaplinsky*.[46] The Court found it implausible that a reasonable person could consider Johnson's actions to be a direct personal insult or an invitation to engage in personal combat, despite the offensiveness of the conduct.[47]

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41. *Id.* at 105-06. Hess asserted also that the statute was vague and overbroad on its face. *Id.*

42. *Id.* at 107-08 (citing Cantwell v. Connecticut, 310 U.S. 296, 309 (1940); Cohen v. California, 403 U.S. 15, 20 (1971)). The Court noted also that any assertion that the words were obscene would be untenable in the wake of the *Cohen* holding. *Id.* at 107.

43. *Id.* at 108 (quoting Cohen v. California, 403 U.S. 15, 21(1971)). The Court noted further that words must produce imminent disorder before the state could punish Hess. *Id.* at 109.

44. Texas v. Johnson, 491 U.S. 397, 410 (1989); United States v. Eichman, 110 S.Ct.. 2404, 2407 (1990). Symbolic expression exists when there is "an intent to convey a particularized message and . . . [where] the likelihood [is] great that the message would be understood by those who viewed it." Spence v. Washington, 418 U.S. 405, 410-11 (1974).

45. *Johnson*, 491 U.S. 397, 399-400. The Court of Appeals for the Fifth District of Texas affirmed Johnson's conviction whereafter he appealed to the Texas Court of Criminal Appeals where his conviction was reversed. *Id.* at 400. The United States Supreme Court then granted certiori. *Id.* at 402. The court instructed that, to determine whether an action taken with reference to the flag was expressive, consideration must be given to the context in which the action took place. *Id.* With that in mind, the Court found that Johnson's actions were "sufficiently imbued with elements of communication . . . to implicate the First Amendment." *Id.* at 404 (quoting Spence v. Washington, 418 U.S. 405, 409 (1974)).

46. *Id.* at 408. The state conceded that no actual breach of the peace had occurred. *Id.*

47. *Id.* at 409. The constitutionality of the Flag Desecration Act of 1989 was

The foregoing cases exemplify the evolution of the "fighting words" exception to free speech by demonstrating the Supreme Court's shift in emphasis from simply the content of the words spoken, such as in *Chaplinsky*, to an emphasis on both the content and context of the colloquy.[48] This has narrowed the "fighting

considered by the Court in the case of United States v. Eichman, 110 S.Ct. 2404, 2406-07 (1990). The 1989 Act replaced the old flag desecration act which Congress intuitively thought to be unconstitutional in light of *Johnson*. United States v. Eichman, 110 S.Ct. 2404, 2407 n.3 (1990). The appellees in *Eichman* had been convicted under the 1989 Act for setting fire to United States flags in protest to various governmental policies, and for protesting the very passage of the 1989 Flag Protection Act. *Id.* at 2406. The district courts had found the Act unconstitutional as applied to the appellees in the light of the *Johnson* decision. *Id.* The government invited the *Eichman* Court to place flag burning outside the protection of the first amendment, just as was done with "fighting words" in *Chaplinsky*. *Id.* at 2406. Finding that the government's interest in protecting the flag could not justify infringement on first amendment rights, the Court declined the invitation and held the Act unconstitutional as applied because it "suppresse[d] expression without concern for its likely communicative impact." *Id.* at 2408-09 (quoting Boos v. Barry, 485 U.S. 312, 320 (1987)).

The Flag Protection Act of 1989 provides in relevant part:

> (a)(1) Whoever knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon any flag of the United States shall be fined under this title or imprisoned for not more than one year, or both.
>
> (2) This section does not prohibit any conduct consisting of the disposal of a flag when it has become worn or soiled.
>
> (b) As used in this section, the term 'flag of the United States' means any flag of the United States, or any part thereof, made of any substance, of any size, in a form that is commonly displayed.

18 U.S.C.A. § 700 (Supp. 1990).

The holdings in *Johnson* and *Eichman* leave the constitutionality of section 12.1-07-02 of the North Dakota Century Code in serious doubt, it being identical to the old flag desecration Act which Congress repealed in light of the *Johnson* holding. *Compare* N.D. CENT. CODE § 12.1-07-02 (1985) (prohibits a person from "knowingly cast[ing] contempt upon any flag of the United States by publicly mutilating, defacing, defiling, burning, or trampling upon it") *with* 18 U.S.C.A. § 700 (repealed 1990) (prohibited "knowingly casting contempt upon any flag of the United States by publicly mutilating, defacing, defiling, burning, or trampling upon it").

Furthermore, the outcomes of *Johnson* and *Eichman* have created both public outcry and a response by President Bush calling for a constitutional amendment that would protect the flag. *In the Aftermath of Johnson and Eichman: The Constitution Need Not be Mutilated to Preserve The Government's Speech and Property Interests in the Flag*, B.Y.U. L. REV. 577, 579 (1990). However, as one author notes, "it is folly to reach for the heavy artillery of the amending process." Tribe, *Protect It — And Ideas*, New York Times, July 3, 1989, § 1, at 19, col. 1. Tribe suggests that a new statute be created that "extend[s] to anyone who intentionally defaces the flag, in public or in private[,]" without "singling out those occasions when [the flag is] destroyed publicly or in a manner that expresses contempt." *Id.*

48. TRIBE, *supra* note 37, § 12-10, at 852. One author believes that there are now four elements which must be satisfied before words will lose their constitutional protection under the contemporary "fighting words" doctrine. Gard, *supra* note 18, at 536. Gard states that:

> *First*, the utterance must constitute an extremely provocative personal insult, a factor requiring a judicial analysis of the content of the expression. *Second*, the words must have a direct tendency to cause an immediate violent response by the average recipient. *Third*, the words must be uttered face-to-face to the addressee. *Fourth*, the utterance must be directed to an individual, not a group.

Id. (emphasis added). Gard asserts that the doctrine has no place in our present society that is dedicated to the freedom of speech. *Id.*

words" exception to such an extent that the Court often applies the doctrines of overbreadth and/or vagueness to invalidate statutes rather than addressing the "fighting words" issue.[49]

The premise of the overbreadth doctrine is the Supreme Court's concern about the chilling effects overbroad statutes have on the freedom of speech.[50] This premise divorces normal standing requirements and allows litigants to challenge a statute because of judicial conjecture or assumption that the very existence of an overbroad statute may cause others not before the court to forbear from speech that is protected by the first amendment.[51] The Court believes that the chilling effect an overbroad statute has on free speech clearly outweighs the possible harm to society of permitting speech that is unprotected.[52]

The overbreadth doctrine in the context of first amendment freedoms was developed initially by the Supreme Court in *Thornhill v. Alabama*.[53] The Court stated that a statute is overbroad when it "does not aim specifically at evils within the allowable area of state control but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech . . . ."[54] In *Thornhill*, the petitioner, Thornhill, was arrested for loitering and picketing, pursuant to a state code which forbade such actions when intended to influence people from transacting business with an entity.[55] Finding that the statute abridged the liberty of discussion concerning labor disputes

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49. *See, e.g.*, Houston v. Hill, 482 U.S. 451, 467 (1987) (Texas statute proscribing obstruction of a police officer overbroad); Lewis v. City of New Orleans, 415 U.S. 130, 134 (1974) (Louisiana disorderly conduct statute held to be overbroad); Gooding v. Wilson, 405 U.S. 518, 520 (1972) (Court affirmed a finding that Georgia's disorderly conduct statute was unconstitutionally overbroad and vague).

50. Note, *Overbreadth Review and the Burger Court*, 49 N.Y.U. L. REV. 532, 535 (1974). Although the government may have a valid societal interest when enacting an overbroad statute, that interest will not justify an infringement upon first amendment entitlements. *Id.*

51. Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973). The Supreme Court's overbreadth premise has been criticized because it requires belief in "the fiction that people are aware of the context of the statutes under which they live." Note, *supra* note 50, at 546.

52. *Broadrick*, 413 U.S. at 612.

53. 310 U.S. 88 (1940).

54. Thornhill v. Alabama, 310 U.S. 88, 97 (1940). The existence of such a statute causes a continuous and pervasive restraint of free speech. *Id.* at 97-98.

55. *Id.* at 91-92. The statute in question broadly proscribed a person from doing essentially anything to hinder a business entity. *Id.* (quoting ALA. ST. CODE § 3448 (1923)).

Thornhill was a member of the Union which had called a strike at the company in which he was successful in persuading one man to return home. *Id.* at 94. There was no evidence of threats or harsh words. *Id.* at 94-95. Therefore, Thornhill objected to the charge, claiming that the statute was repugnant to the United States Constitution in that it deprived him of, *inter alia*, his freedom of speech. *Id.* at 92-93. After being convicted by the Alabama Supreme Court, the United States Supreme Court granted certiorari because of the important first amendment implications involved. *Id.* at 93.

and that neither a clear and present danger of a breach of the peace nor an invasion of privacy existed, the Supreme Court found no justification for such a sweeping proscription and reversed Thornhill's conviction.[56]

Subsequent to *Thornhill*, the Court failed to articulate a standard that could be used to evaluate a statute on overbreadth grounds, until its decision in *Broadrick v. Oklahoma*.[57] Among the decisions prior to *Broadrick* was *Gooding v. Wilson*,[58] in which the Court held that a Georgia statute, criminalizing the use of opprobrious words or abusive language, was unconstitutionally overbroad, because it was not limited to words that would incite an immediate breach of the peace.[59]

Gooding involved a group of picketers outside Corps Headquarters of the United States Army who were opposing the Vietnam War.[60] Police attempted to move the picketers away from the front door and a scuffle erupted.[61] The defendant, Wilson, then said to one of the officers: "White son of a bitch, I'll kill you. You son of a bitch, I'll choke you to death."[62] Wilson appealed his conviction, asserting that the Georgia statute was unconstitutionally vague and overbroad.[63] The United States Supreme Court found that the Georgia courts had not properly construed the statute, and therefore, held the statute unconstitutional because it was not limited to "fighting words."[64]

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56. *Id.* at 104-06.

57. 413 U.S. 601 (1973). The Court's neglect in setting clear guidelines for application of the overbreadth doctrine has been criticized, in one sense, because it causes institutional tensions through the interventional device of facial scrutiny by the judiciary. Note, *supra* note 50, at 533-34. However, in another sense the doctrine is a catalyst for exercising first amendment freedoms, because it removes the chilling effect of broad legislation and encourages lawmakers to enact carefully written laws when first amendment rights are at stake. *Id.*

58. 405 U.S. 518 (1972).

59. Gooding v. Wilson, 405 U.S. 518, 528 (1972). The statute existing at that time provided: "Any person who shall, without provocation, use to or of another, and in his presence . . . opprobrious words or abusive language, tending to cause a breach of the peace . . . shall be guilty of a misdemeanor." *Id.* at 518-19 (quoting GEORGIA CODE ANN. § 26-6303 (1953)).

60. *Id.* at 519 n.1. The picketers blocked the door so that inductees could not enter. *Id.*

61. *Id.* The police had previously asked the picketers to move. *Id.*

62. *Id.* at 519-20 n.1. Evidence indicated that Wilson assaulted and battered one of the officers. *Id.*

63. *Gooding*, 405 U.S. at 519-20. After exhausting his appeals in the state court system of Georgia, Wilson was granted federal habeas corpus relief in the federal court system, where his conviction was overturned. *Id.*

64. *Id.* at 525-28. The district court found that the statute left the standard of interpretation wide open to improper application, unlike the construction of the New Hampshire statute in *Chaplinsky*, and the Supreme Court agreed. *Id.* at 528. Specifically, the Court noted that definitions of the words "opprobrious" and "abusive" gave them greater range than "fighting words." *Id.* at 525. In effect, the Court substantially narrowed

In the *Gooding* analysis, the Court again failed to articulate a standard to be used in determining statutory overbreadth.[65] In his dissenting opinion, Chief Justice Burger pointed out the Court's lack of proper judicial analysis and guidance, stating that a statute should be invalidated only if it had substantial potential for improper application and thus a significant likelihood that first amendment speech will be deterred.[66] Persuaded by this emphatic dissent,[67] the Court curtailed the scope of the doctrine in its next opportunity to do so.[68]

Broadrick v. Oklahoma,[69] the seminal case in contemporary overbreadth analysis, involved an overbreadth challenge to an Oklahoma statute that proscribed political activity by state civil servants.[70] The servants were charged with engaging in partisan political endeavors among their co-workers.[71] The servants asserted that the statute was overbroad because it could conceivably reach such political activity as the wearing of political paraphernalia and the use of bumper stickers.[72] Distinguishing between statutes which regulate only speech and those which regulate both speech and conduct, the Court stated that the latter have been subjected to less exacting overbreadth scrutiny.[73] The Court held that when a statute that regulates both speech and conduct is challenged, its overbreadth must be real and substantial.[74] Applying this standard, the Court found that the statute as construed was not substantially overbroad, and therefore not unconstitutional, since the alleged chilling effect it had on free speech, *i.e.*, proscribing the wearing of political buttons and the displaying

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the definition of "fighting words" to its actual holding in *Chaplinsky*, rather than allowing a conviction based on the *Chaplinsky* dictum. Strossen, *supra* note 18, at 509.

65. *See Gooding*, 405 U.S. at 534 (Burger, C.J., dissenting) (mechanical application of overbreadth doctrine by majority).

66. *Id.* at 530-31 (Burger, C. J., dissenting). Chief Justice Burger also joined Justice Blackmun in dissent. *Id.* at 534 (Blackmun, J., dissenting). Both were upset about the majority's significant reliance on a 66-year-old Georgia decision that was decided thirty-odd years before *Chaplinsky*. *Id.* at 535. They felt the Georgia statute was being condemned simply because Georgia courts had not yet had a chance to adjust to modern day overbreadth analysis. *Id.* at 535-36.

67. *See* Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 859 (1970) (calling for a substantial overbreadth requirement).

68. Note, *supra* note 50, at 536. Despite the Court's move to a substantial overbreadth requirement, *Gooding* still preserves its vitality in the context of "fighting words." *See* Lewis v. City of New Orleans, 415 U.S. 130, 133 (1974) (reaffirming *Gooding*).

69. 413 U.S. 601 (1973).

70. Broadrick v. Oklahoma, 413 U.S. 601, 602 (1973). The Oklahoma statute is similar to the Federal Hatch Act which proscribes political activity by federal civil servants. *See id.*

71. *Id.* at 610. The servants conceded that, as applied to them, the statute was constitutional. *Id.*

72. *Id.* at 609-10.

73. *Id.* at 615-16.

74. *Broadrick*, 413 U.S. at 615.

of bumper stickers, was outweighed by the state's interest in regulating political activity in an evenhanded way.[75]

In *Lewis v. City of New Orleans*,[76] decided just one year after *Broadrick*, the Court had before it a challenge to a City of New Orleans ordinance that regulated pure speech, as opposed to the *Broadrick* statute that regulated both speech and conduct.[77] *Lewis* involved a confrontation between a black woman and a police officer after the woman's son had been arrested and was being taken to the police station.[78] Although the litigants' versions of the conversation contradicted sharply, the evidence revealed that Mrs. Lewis was upset that the police had her son, and yelled "You god damn m.f. police — I am going to [the Superintendent of Police] about this."[79] The Louisiana Supreme Court affirmed Lewis' conviction under the ordinance, stating that "[t]he [ordinance's] proscriptions are narrow and specific — wantonly, cursing, reviling, and using obscene and opprobrious language" and were thus limited to "fighting words."[80] On appeal, the United States Supreme Court held that, as construed by the Louisiana Supreme Court, the New Orleans Ordinance violated the first amendment.[81] The Court stated that nothing in the Louisiana Supreme Court's opinion limited the words in the ordinance to "fighting words" which "by their very utterance inflict injury or

75. *Id.* at 616-18. The Court formed this conclusion by analyzing the Oklahoma State Personnel Board's construction of the statute and the Oklahoma Attorney General's Opinion, which interpreted the relevant language of the statute. *Id.* The requirement of substantial overbreadth is also applied to "pure speech." New York v. Ferber, 458 U.S. 747, 770-71 (1982). *Ferber* involved the conviction of a bookstore owner for violation of a New York statute proscribing the distribution of material depicting sexual performances of children under the age of 16. *Id.* at 751-52. The Court found that only a "tiny fraction" of material protected by the Constitution was proscribed and, therefore, upheld the conviction over a facial challenge to the statute. *Id.* at 773-74.

76. 415 U.S. 130 (1974).

77. *See* Lewis v. City of New Orleans, 415 U.S. 130, 132-34 (1974). The ordinance provided:

> 'It shall be unlawful and a breach of the peace for any person wantonly to curse or revile or to use obscene or opprobrious language toward or with reference to any member of the city police while in the actual performance of his duty.'

Id. at 132 (quoting NEW ORLEANS, LA., ORDINANCES 828 M.C.S. § 49-7 (1972)).

78. *Lewis*, 415 U.S. at 131 n.1. Mr. Lewis and his wife were following the patrol car transporting their son when they were intercepted by another patrol car and pulled over. *Id.*

79. *Id.* Lewis denied the officer's version of the conversation but the Municipal Judge did not believe her. *Id.* Lewis' husband testified that the officer's first words were "[L]et me see your god damned license. I'll show you that you can't follow the police all over the streets." *Id.* Lewis alleged that she did not direct any profanity at the officer. *Id.*

80. City of New Orleans v. Lewis, 263 La. 809, 269 So.2d 450, 456-57 (1972). The United States Supreme Court had previously remanded the case for reconsideration in light of the its holding in *Gooding*. Lewis v. City of New Orleans, 408 U.S. 913 (1972), *remanded*, 269 So.2d 450 (La. 1972), *prob. juris. noted*, 412 U.S. 926 (1973), *rev'd*, 415 U.S. 130 (1974).

81. Lewis v. City of New Orleans, 415 U.S. 130, 131-32 (1974).

tend to incite an immediate breach of the peace."[82] Thus, the Court found the ordinance to be facially invalid on overbreadth grounds because it could be applied to protected speech.[83]

Justice Powell wrote a concurring opinion in *Lewis*, in which he suggested that a higher standard for "fighting words" should be applied when an officer of the law is the object of the speech.[84] In particular, he stated that a police officer is trained and expected to "exercise a higher degree of restraint" than a normal citizen and would not likely respond contentiously to "fighting words."[85] For example, Justice Powell thought it highly unlikely that, in the present case, a physical confrontation would have broken out between a police officer and a middle-aged woman.[86] Justice Powell also noted that, as to the ordinance in question, an officer could easily abuse his authority to arrest, and the arrestee could be convicted by a court believing the officer's version of the incident over the arrestee's.[87]

In the recent *City of Houston v. Hill* case,[88] the Supreme Court recognized Justice Powell's concerns as the basis for its decision in finding a Houston, Texas ordinance substantially overbroad.[89] The ordinance essentially prohibited any speech that would hinder a police officer while executing his duties.[90] Hill, the

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82. *Id.* at 133 (quoting *Gooding*, 405 U.S. 518, 525 (1971), quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)).

83. *Id.* at 134. In reaching their conclusion, the Court reaffirmed its decision in *Gooding*. *Id.* at 132-33.

84. *Id.* at 134-35. Justice Powell also wrote a concurring opinion when the court remanded the case for reconsideration. Lewis v. City of New Orleans, 408 U.S. 913 (1972), *remanded*, 269 So.2d 450 (La. 1972), *prob. juris. noted*, 412 U.S. 926 (1973), *rev'd*, 415 U.S. 130 (1974). In that concurrence, Justice Powell wrote:

> [The] issue in a case of this kind is whether "fighting words" were used. Here a police officer . . . was called a 'g-- d--- m----- f-----' police.
>
> 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.

Id. at 913-14 (Powell, J., concurring) (city MODEL PENAL CODE § 250.1 comment 14 (Tent. Draft No. 13, 1961)).

85. *Lewis*, 415 U.S. at 135 (quoting Lewis v. City of New Orleans, 408 U.S. 913 (1972)).

86. *Id.* This argument is consistent with the Court's holding in *Cohen* where it concentrated on both the content of the words and the surrounding circumstances. *See* Cohen v. California, 403 U.S. 15, 21 (1971); TRIBE, *supra* note 37, § 12-10, at 850-51.

87. *Lewis*, 415 U.S. at 135. Justice Powell intimated that police officer's might use the ordinance to create facts that would allow the officers to arrest the individual. *See id.*

88. 482 U.S. 451 (1987).

89. City of Houston v. Hill, 482 U.S. 451, 466-67 (1987).

90. *Id.* at 455. The city argued that the ordinance did not inhibit speech but rather banned "core criminal conduct." *Id.* at 459. However, language in the ordinance making it illegal to "strike" or "assault" a police officer had been stricken and, therefore, as it remained the ordinance made it "unlawful for any person to . . . in any manner oppose, molest, abuse or interrupt any policeman in the execution of his duty." *Id.* at 460-61

appellee, observed two Houston police officers talking to one of his friends.[91] In an attempt to sidetrack the officers, Hill shouted, "[W]hy don't you pick on someone your own size?"[92] When asked by one of the officers if Hill was interrupting him in his capacity as a police officer, Hill responded that he was.[93] Hill was arrested pursuant to the ordinance for "wilfully or intentionally interrupt[ing] a city policeman . . . by verbal challenge during an investigation."[94]

Applying the *Broadrick* substantial overbreadth requirement, the Court found that the ordinance "criminalize[d] a substantial amount of constitutionally protected speech, and afford[ed] the police unconstitutional discretion in enforcement."[95] The ordinance had not been narrowly written or construed to prohibit only "fighting words."[96] The Court recognized that the First Amendment protects "a significant amount of verbal criticisms and challenges at police officers . . . ."[97] The Court noted further that "[t]he 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."[98] The *Hill* Court also reaffirmed its policy of invalidating laws that grant police open-ended discretion to arrest individuals

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(quoting HOUSTON, TX, CODE OF ORDINANCES § 34-11(a) (1984)). Thus, the Court found that the statute prohibited speech directed at an officer during his duties. *Id.* at 461.

91. *Id.* at 453.

92. *Id.* at 454. The incident occurred in a homosexual neighborhood, *id.* at 453, and the Court noted that sexual preference may have motivated the police to arrest Hill. *Id.* at 459 n.7.

93. *Id.*

94. City of Houston v. Hill, 482 U.S. 451, 454 (1987). Hill was acquitted of the offense. *Id.* He subsequently filed suit in federal district court seeking, *inter alia*, a declaratory judgment that the Houston Ordinance was unconstitutionally vague and overbroad on its face and as it had been applied to him. *Id.* at 455. The district court found that the ordinance was not vague because the word "interrupt" was sufficiently understood to mean stopping or causing one to pause. *Id.* at 456.

95. *Id.* at 466.

96. *Id.* at 465. The Court was urged to abstain from using overbreadth to find the ordinance unconstitutional because limiting constructions were "readily available" that would limit the ordinance's application. *Id.* at 467. However, the Court refused to abstain, noting its strong position against overbroad statutes that infringe on the freedom of speech. *Id.* at 467-68.

The North Dakota Supreme Court was presented with an issue almost identical to *Hill* in City of Grand Forks v. Cameron. 435 N.W.2d 700 (N.D. 1989). The court had before it a Grand Forks City Ordinance that provided: "Every person who wilfully delays or obstructs a public officer in the discharge or attempt to discharge any duty of his office, shall upon conviction thereof, be punished as herein provided." *Id.* at 701 (quoting GRAND FORKS, N.D., CITY CODE § 9-0205 (1987)). An issue presented was whether the foregoing statute was unconstitutional in light of the *Hill* decision. *Id.* at 701-02. However, the court did not address the constitutional question because it was not properly preserved at trial. *Id.* at 702. The court did construe the ordinance to be consistent with a state law that prohibited only physical obstruction of a police officer. *Id.* at 702.

97. *Hill*, 482 U.S. at 461.

98. *Id.*

for using words that simply annoy or offend them.[99] Thus, if such a statute or ordinance is neither written nor construed to be limited to "fighting words," it will invariably be held unconstitutional on an overbreadth doctrine challenge.[100]

The similar yet distinct doctrine of vagueness may also be used to challenge a statute and render it unconstitutional.[101] A statute is found to be vague when it "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application . . . ."[102] A statute that is vague carries the same risk of suppressing free speech as does a statute that is overbroad.[103] This is true in the first amendment context, not because the statute invades protected speech by language that sweeps too broadly, as in the case of overbreadth, but rather, because a person of common intelligence is not fairly notified of what speech is proscribed or permitted.[104] Because of this infringement on first amendment rights, litigants are allowed to raise the vagueness question of a statute even though, as applied to their expressions, the statute may not be vague.[105] Also, vague and indefinite statutes permit police officers, prosecutors and other government employees to arbitrarily and injudiciously pursue their individual predilections, which is the predominant reason the Supreme Court of the United States voids statutes for vagueness.[106] Furthermore, although the

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99. *Id.* at 465. In effect, the ordinance granted the Houston police discretion to make arrests based on the content of the speech. *Id.* at 465 n.15. The Court found such discretion to be repugnant to the freedom of speech, particularly because it tempted the officer to arrest the speaker rather than correct what the speaker was upset about. *Id.*

100. *See, e.g., Hill*, 482 U.S. at 467 (statute not authoritatively construed to be limited to "fighting words" or other unprotected speech, and therefore, unconstitutionally overbroad); *Lewis*, 415 U.S. at 134 (same); *Gooding*, 405 U.S. at 528 (statute as construed not limited to fighting words, and therefore, unconstitutionally overbroad and vague). *But cf. Chaplinsky*, 315 U.S. at 573 (statute as construed was limited to "fighting words," and therefore, valid).

101. *See* Zwickler v. Koota, 389 U.S. 241. 249-50 (1967).

102. Connally v. General Const. Co., 269 U.S. 385, 391 (1926).

103. Coates v. Cincinnati, 402 U.S. 611, 619-20 (1971). A law that is either vague or overbroad can be stricken; both are not required. *Id.*

104. *Cf.* TRIBE, *supra* note 37, § 12-31, at 1034 (first amendment vagueness doctrine not dependent on fair notice).

105. *Coates*, 402 U.S. at 619-20. Comments to the Model Penal Code section on disorderly conduct explain that the distinctions between vagueness and overbreadth often overlap and become blurred in the context of first amendment rights. MODEL PENAL CODE § 250.2 comment 4, at 338-39 n.45 (1980). The overlap necessarily results because a statute which is vague will normally be susceptible to overbreadth challenge due to its vagueness. *Id.*

106. Kolender v. Lawson, 461 U.S. 352, 357 (1983) (citing Smith v. Goguen, 415 U.S 566, 574-75 (1974)). "[G]enerally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Id.* In *Kolender*, the Court was presented with the issue of a facial challenge to a disorderly conduct statute that prevented persons from

Supreme Court allows some vagueness in criminal laws, it is less amicable to such laws when they abridge the freedom of speech.[107]

These views are reflected in the aforementioned cases of *Gooding*[108] and *Hill*.[109] In *Gooding*, the words "opprobrious" and "abusive" in Georgia's disorderly conduct statute did not withstand vagueness scrutiny by either their ordinary and common meaning, or by the construction given them by Georgia courts.[110] Therefore, finding that the statute was easily applied to limit more than "fighting words," the Court held it unconstitutional.[111] Similarly, the Court in *Hill* was urged to abstain from holding the Houston ordinance unconstitutionally overbroad because a limit-

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wandering on the street unless they carried a "credible and reliable" source of identification. *Id.* at 353. As it then existed, the statute allowed conviction for persons:

> 'Who loiter[] or wander[] upon the streets or from place to place without apparent reason or business and who refuse[] to identify [themselves] and to account for [their] presence when requested by any peace officer so to do, if the surrounding circumstances are such as to indicate to a reasonable man that the public safety demands such identification.'

Id. at 353 n.1 (quoting CAL. PENAL CODE ANN. § 647(e) (West 1970)). The California Court of Appeals had construed the statute to read that the identification source must be "credible and reliable" and provide "a means for later getting in touch with the person who has identified himself." *Id.* at 356-57 (quoting People v. Solomon, 33 Cal. App. 3d 429, 438, 108 Cal. Rptr. 867, 872-873 (1973)). The Court found that such a construction "furnished a convenient tool for 'harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure.'" *Id.* at 360 (quoting Papachristou v. City of Jacksonville, 405 U.S. 156, 170 (1972), quoting Thornhill v. Alabama, 310 U.S. 88, 97-98 (1940)). In addition, the Court found that, as construed, the statute granted police unrestricted discretion to arrest and charge persons. *Id.* (quoting Lewis v. City of New Orleans, 415 U.S. 130,135 (1974)). These findings compelled the Court to hold the statute unconstitutionally vague because it promoted arbitrary enforcement by prosecutors and police. *See id.* at 362. The Court was particularly emphatic about the full discretion granted to the police by the California Court of Appeals. *Id.* at 360.

107. Rose v. Locke, 423 U.S. 48, 50 n.3 (1975). *See also* Grayned v. City of Rockford, 408 U.S. 104, 109 (1972) (vague law that abuts upon first amendment freedoms operates to inhibit exercise of those freedoms). In *Rose*, the Court was determining whether a Tennessee statute that prohibited "crimes against nature" was unconstitutionally vague. *Rose*, 423 U.S. at 49. The defendant in *Rose* was convicted pursuant to the statute for forcing a woman to submit to oral copulation. *Id.* at 48. On appeal, the United States Supreme Court stated that a statute must reasonably define what it proscribes in order to comply with vagueness standards. *Id.* at 49. Elaborating, the *Rose* Court stated that "[e]ven trained lawyers may find it necessary to consult legal dictionaries, treatises, and judicial opinions before they may say with any certainty what some statutes may compel or forbid." *Id.* at 50. However, the Court in *Rose* stopped short of requiring that standard when a statute threatened the fundamental right of free speech. *Id.* at 50 n.1 (citing Smith v. Goguen, 415 U.S. 566, 572-573 (1974)).

108. Gooding v. Wilson, 405 U.S. 518, 521 (1972) (quoting Coates v. Cincinnati, 402 U.S. 611, 619-20 (1971)).

109. City of Houston v. Hill, 482 U.S. 451, 471 n.22 (1987).

110. *Gooding*, 405 U.S. at 524-25. The Court relied primarily on two Georgia decisions decided before *Chaplinsky*. Note, *Gooding v. Wilson: Where From Here?*, 26 SW. L.J. 780, 785 (1972). A comparison of those decisions with the New Hampshire decisions considered by the Court in *Chaplinsky* indicates that a standard of narrow construction must be applied to statutes restricting the freedom of speech. *Id.*

111. *Gooding*, 405 U.S. at 528. The Court reiterated the fact that a statute that does not give proper notice is vague. *See* Note, *supra* note 110, at 783.

ing construction, placing an intent requirement in the ordinance, might have narrowed its scope.[112] However, the Court refused because such a construction might have caused vagueness, leading to further arbitrary arrests.[113]

In *City of Bismarck v. Nassif*,[114] the North Dakota Supreme Court upheld the arrest and conviction of Gabriel Nassif, and in so doing, took a step in the development of the "fighting words" exception to free speech in North Dakota.[115] In *Nassif*, the court was forced to construe subsection three of the State's disorderly conduct statute, because Nassif contended that subsection three of Bismarck City Ordinance section 6-05-01 was in conflict with subsection three of the state statute, and therefore, invalid.[116] The basis for Nassif's contention was that the language in the Bismarck City Ordinance[117] was limited to "fighting words," but subsection three of the state statute prohibiting speech did not contain such limited language.[118] Thus, Nassif had a plausible argument, and

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112. *See Hill*, 482 U.S. at 467. Justice Powell, in his dissenting opinion, also thought the majority should remand the case to allow for a limiting construction on the ordinance. *Id.* at 481 (Powell, J., joined by O'Conner, J., and joined in Parts I and II by Rehnquist, C.J., concurring in the judgement in part and dissenting in part). Justice Powell thought that a construction requiring proof that a person intended to obstruct an officer would narrow the scope of the ordinance. *Id.* However, he intimated that construing the ordinance might not cure its vagueness. *See id.*

113. *See Hill*, 482 U.S. at 471 n.22. The majority affirmed the court of appeal's finding that the statute was not vague. *Id.* at 456-58. However, the majority noted further that allowing a limited construction such as that asked for by Justice Powell could raise independent vagueness questions because such an intent requirement was not self-evident from the literal reading of the ordinance. *Id.* at 471 n.22.

114. City of Bismarck v. Nassif, 449 N.W.2d 789 (N.D. 1989).

115. *Id.* at 794. Subsection three of North Dakota's disorderly conduct statute provides:

> *Disorderly Conduct.* A person is guilty of a class B misdemeanor if, with intent to harass, annoy, or alarm another person or in reckless disregard of the fact that another person is harassed, annoyed, or alarmed by his behavior, he:
> * * *
> 3. In a public place, uses abusive or obscene language, or makes an obscene gesture.

N.D. CENT. CODE § 12.1-31-01(3) (1985).

116. *Nassif*, 449 N.W.2d at 792-93. For the text of the BISMARCK, N.D., CODE OF ORDINANCES § 6-05-01(3) (1986) see *supra* note 8.

117. *Nassif*, 449 N.W.2d at 793 ("tends to incite an immediate breach of the peace").

118. *Id.* Section 12.1-01-05 of the North Dakota Century Code prohibits a city ordinance from superseding a state defined offense. N.D. CENT. CODE § 12.1-01-05 (1985). The statute provides:

> *Crimes defined by state law shall not be superseded by city or county ordinance or by home rule city's or county's charter or ordinance.* No offense defined in this title or elsewhere by law shall be superseded by any city or county ordinance, or city or county home rule charter, or by an ordinance adopted pursuant to such a charter, and all such offense definitions shall have full force and effect within the territorial limits and other jurisdiction of home rule cities or counties. This section shall not preclude any city or county from enacting any ordinances containing penal language when otherwise authorized to do so by law.

since the court previously had not construed subsection three of the state disorderly conduct statute,[119] it was forced to do so, or in the alternative, rule the Bismarck City Ordinance invalid.[120]

Rather than holding the Bismarck City Ordinance invalid, the North Dakota Supreme Court simply used Nassif's argument as a vehicle to limit subsection three of section 12.1-31-01 of the North Dakota Century Code to the same offense as the Bismarck City Ordinance explicitly defined.[121] The court stated that the language of subsection three of the Bismarck disorderly conduct ordinance clarified the particular words it prohibited and therefore literally expressed what words subsection three of the state disorderly conduct statute is now construed to prohibit.[122]

After judicially repairing the legislative overbreadth of subsection three of the state's disorderly conduct statute, the court next addressed the issue of whether the evidence was sufficient to find that the language Nassif used amounted to "fighting words."[123] During the confrontation with the officers in his front

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Id. Nassif argued that if the ordinance superseded state law it had to be ruled invalid and the offense [The Bismarck City Ordinance] should then be construed to be consistent with the definition provided by the state law. *Nassif*, 449 N.W.2d at 793 (citing BISMARCK, N.D., ORDINANCES § 6-01-02 (1986) (prohibits a city ordinance from conflicting with state law); N.D. CENT. CODE § 12.1-01-05 (1985 & Supp. 1990)). Nassif believed that once the Bismarck City Ordinance was construed to be consistent with the state statute, the ordinance was overbroad and vague just as the state statute, because neither would then have the limited "fighting words" language enunciated by the United States Supreme Court in *Chaplinsky*. *See id.*

119. *See* State v. Miller, 388 N.W.2d 522 (N.D. 1986) (defendant challenged the constitutionality of section 12.1-31-01(3) of the North Dakota Century Code, but had not properly raised the defense at trial, thus precluding him from raising it on appeal).

120. *See Nassif*, 449 N.W.2d at 793-94.

121. *Id.* at 794.

122. *Id.* at 794-95. After noting that the additional language of the Bismarck ordinance immunized it from unconstitutional virus, the court "construe[d] the state statute to prohibit the same offense [which the ordinance prohibited] and limit[ed] it to that offense" because "[the ordinance] literally expresses what the state statute must be construed to include to be constitutional." *Id.* at 795. Thus, as construed, section 12.1-31-01(3) of the North Dakota Century Code now reads:

> *Disorderly Conduct*: A person is guilty of a class B misdemeanor if, with intent to harass, annoy, or alarm another person or in reckless disregard of the fact that another person is harassed, annoyed, or alarmed by his behavior, he:
> * * *
> 3. In a public place, uses abusive or obscene language, or makes an obscene gesture, *which language or gesture by its very utterance or gesture inflicts injury or tends to incite an immediate breach of the peace.*

Nassif, 449 N.W.2d at 792-94 (emphasis added to indicate additional language as construed).

123. *Id.* at 795. The questions of whether there was sufficient evidence to sustain a conviction for use of "fighting words" and whether the act occurred in a public place, pertain specifically to a conviction under the Bismarck disorderly conduct ordinance. *See id.* at 794-95.

Nassif made three contentions regarding this issue: (1) "that the evidence was insufficient to show that his words by their very utterance, inflicted injury or tended to incite immediate breach of the peace;" (2) that causing the officers to be annoyed or

yard Nassif shouted, "You fucking son of a bitch, I'm going to go back into the house and get my shotgun and blow you bastards away."[124]

Relying on the United States Supreme Court decisions in *Chaplinsky* and *Cohen*, the North Dakota Supreme Court held that Nassif's words were "fighting words," defined as "those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to promote violent reaction[125] . . . or [which] tend to incite an immediate breach of the peace."[126] Further, the court recognized that such words are not protected by the first amendment.[127]

The court also discussed whether the fact that Nassif had directed these words to police officers was relevant.[128] The North Dakota Supreme Court acknowledged that Justice Powell, in *Lewis v. City of New Orleans*,[129] had suggested that a police officer is expected to exercise a higher degree of restraint than an ordinary person.[130] Elaborating on that suggestion, the court referred to *City of Houston v. Hill*,[131] and recognized that the first amendment protects criticisms of and challenges to police officers "unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest."[132] Espousing that standard, the North Dakota Supreme Court found that Nassif's threat to get his gun and "blow [the police officers] away" was sufficient to uphold his conviction.[133]

The court next addressed the issue of whether the words were

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offended does not elevate that his words to "fighting words" and (3) that there was no evidence that his words affected the bystanders. *Id.* at 794. Nassif had the burden of proving that the evidence revealed no reasonable inference of guilt when viewed in the light most favorable to the jury's verdict. *Id.* (citing Grand Forks v. Cameron, 435 N.W.2d 700, 702 (N.D. 1989); State v. Lawenstein, 346 N.W.2d 292, 293 (N.D. 1984)).

124. *Nassif*, 449 N.W.2d at 791.

125. *Id.* at 794 (quoting Cohen v. California, 403 U.S. 15, 20 (1971)).

126. *Id.* (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)). Here, the court appears to adopt a more narrow definition of "fighting words" than when it construed subsection three of the state statute to be limited to the same offense as the ordinance, because the ordinance includes the language "inflicts injury" as well as "tends to incite an immediate breach of the peace." *See id.* at 792 (quoting BISMARCK, N.D., ORDINANCES § 6-05-01(3) (1986)).

127. *Id.* at 794.

128. *Id.* at 795. Nassif asserted that police officers should be expected to exercise a higher level of restraint. *Id.*

129. 415 U.S. 130 (1974).

130. *Nassif*, 449 N.W.2d at 795 (quoting Lewis v. City of New Orleans, 415 U.S. 130, 135 (1974) (Powell, J., concurring)).

131. City of Houston v. Hill, 482 U.S. 451, 461 (1987).

132. *Nassif*, 449 N.W.2d at 795 (quoting City of Houston v. Hill, 482 U.S. 451, 461 (1987), quoting Terminiello v. Chicago, 337 U.S. 1, 4 (1949).

133. *Id.*

spoken in a public place, which is a specific element of subsection three of the disorderly conduct offense.[134] Nassif contended that since he was in his own front yard when he spoke the words, the event did not occur in a public place.[135] The North Dakota Supreme Court had not yet had the opportunity to address such an issue.[136]

The court relied on an Iowa Supreme Court case, *State v. Leonard*,[137] for guidance.[138] The *Leonard* court decided what constitutes a public place in relation to a charge of "disturbance of the public peace and quiet."[139] The defendant in *Leonard* telephoned a city clerk from his home and used obscene language.[140] The *Leonard* court found the public place element of the offense satisfied because the main office of the city clerk is a public place and because someone other than the clerk had inadvertently heard the call.[141] Thus, the Iowa Supreme Court believed that the offense occurred at the location where the words were received, not from where they were uttered.[142]

Following that rationale, the North Dakota Supreme Court found particularly relevant that twenty to twenty-five people had gathered near Nassif's residence, some possibly as close as seventy-five feet, that Nassif was being extremely loud and was heard by one of the officers who was standing forty feet away, and that an officer standing in a parking lot immediately north of Nassif's residence heard Nassif's threat.[143] Given these facts, the court found that the evidence, viewed in a light most favoring Nassif's conviction, indicated that the bystanders located on public property must have heard Nassif, and therefore, the act occurred in a public

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134. *Id.* Pursuant to subsection three of North Dakota Century Code section 12.1-31-01, a person is guilty of disorderly conduct if, by his behavior, he: "In a public place, uses abusive or obscene language. . . ." N.D. CENT. CODE § 12.1-31-01(3) (1985).

135. *Nassif*, 449 N.W.2d at 795. A public place is defined as:

> A place to which the general public has a right to resort; not necessarily a place devoted solely to the uses of the public, but rather a place which is in point of fact public rather than private, a place visited by many persons and usually accessible to the neighboring public (*e.g.*, a park or public beach). Also, a place in which the public has an interest as affecting the safety, health, morals, and welfare of the community. A place exposed to the public, and where the public gather together or pass to and fro.

BLACK'S LAW DICTIONARY 644 (5th ed. 1983).

136. *Nassif*, 449 N.W.2d at 795.

137. 255 Iowa 1365, 124 N.W.2d 429 (1963).

138. *Nassif*, 449 N.W.2d at 795.

139. State v. Leonard, 255 Iowa 1365, __, 124 N.W.2d 429, 431-33 (1963).

140. *Id.* at __, 124 N.W.2d at 431.

141. *Id.* at __, 124 N.W.2d at 433.

142. *See id.* at __, 124 N.W.2d at 433.

143. *Nassif*, 449 N.W.2d at 795.

place.[144] Thus, the court adopted the view that the place where the offense occurred is determined by the public or private nature of the place where the words are heard, not from where they are spoken.[145]

Because *Nassif* is the first North Dakota Supreme Court decision to discuss subsection three of section 12.1-31-01 of the North Dakota Century Code, the analysis of the case and construction of the statute provide novel guidance concerning that subsection's application.[146] This is especially significant for those practicing law in such North Dakota municipalities as Fargo, Grand Forks, and Minot, which have disorderly conduct ordinances that are identical to the state disorderly conduct statute.[147] However, the *Nassif* court may have failed to limit subsection three of North Dakota's disorderly conduct statute to prohibit only "fighting

144. *Id.* at 795-96 (the fact that Nassif was on his private property when the incident occurred was irrelevant). The court concluded its analysis by addressing Nassif's claims of entrapment and error by the trial court by not inquiring into his waiver of lack of criminal responsibility. *Id.* at 796-98.

At trial, Nassif had requested an instruction on entrapment, contending that the police had entrapped him by provoking him into a higher state of agitation even though they knew he was in an emotional state. *Id.* at 796. Only "when a law enforcement agent induces the commission of an offense, using persuasion or other means likely to cause normally law-abiding persons to commit the offense" does entrapment occur. N.D. CENT. CODE § 12.1-05-11 (1985). The court found no evidence indicating that the officers caused Nassif's conduct and thus found no error on the part of the trial court concerning this issue. *Nassif*, 449 N.W.2d at 796 (Nassif had contended that three officers arriving at the scene and their refusal to give him their badge numbers had prompted his reaction).

Before trial, the City of Bismarck requested, and was granted, an order that Nassif submit to a mental health examination. *Id.* at 796-97. Nassif then waived his defense of lack of criminal responsibility. *Id.* at 797. On appeal, Nassif contended that it was error for the trial court not to inquire into this waiver to determine whether or not it had been made competently, intelligently, and voluntarily. *Id.* The court reversed and remanded the decision on this issue, finding that before accepting a waiver of a defense that involves a choice that will inevitably have important personal consequences, the trial court must first make an inquiry to determine whether the waiver was in fact made competently, intelligently, and voluntarily. *Id.* at 797-98. The North Dakota Supreme Court appears to have adopted the view that the decision is one for the defendant to make. *See id.* at 797. However, before this decision should be accepted, the trial court must first decide if the defendant is competent to stand trial, and second, it must ascertain that the defendant's choice was made intelligently and voluntarily. *Id.* at 797. An ascertainment such as this can only be made after the defendant has been made aware of all available alternatives and their ramifications, both pro and con. *Id.*

145. *Id.* at 795-96.

146. *See* State v. Miller, 388 N.W.2d 522, 522-23 (N.D. 1986) (defendant's request to narrowly construe North Dakota Century Code section 12.1-31-01(1)(3) was denied because the issue was not properly raised at trial). *See also* State v. Laufenburg, 99 N.W.2d 331 (N.D. 1959) (defendants were arrested under prior law that proscribed wilfully committing an act that grossly disturbs public peace). Section 12.1-31-01 of the North Dakota Century Code consolidates prior statutes that dealt with such matters as public fighting, obscene language, and unreasonable noise. Special Project, *North Dakota Criminal Code Hornbook*, 50 N.D.L. REV. 639, 735 (1974).

147. *See* FARGO, N.D., MUNICIPAL CODE § 10-0301 (1989); GRAND FORKS, N.D., CITY CODE § 9-0201(1987); MINOT, N.D., CODE OF ORDINANCES § 23-15 (1990). Subsection three of each of those ordinances provide:

words,"[148] thus leaving it overbroad and unconstitutional.[149] In addition, subsection three may be void on vagueness grounds as well.[150]

Concerning the overbreadth issue, the court noted Nassif's concession that the language, "tends to incite an immediate breach of the peace," contained in subsection three of the Bismarck ordinance, was limited to "fighting words" and therefore

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> A person is guilty of disorderly conduct if, with intent to harass, annoy, or alarm another person or in reckless disregard of the fact that another person is harassed, annoyed, or alarmed by his behavior, he:
> * * *
> 3. In a public place uses abusive or obscene language, or makes an obscene gesture[.]

FARGO, N.D., MUNICIPAL CODE § 10-0301(3). *See* GRAND FORKS, N.D., CITY CODE § 9-0201(3); MINOT, N.D., CODE OF ORDINANCES § 23-15(3). *See* N.D. CENT. CODE § 12.1-31-01(3) (1985), *infra*, note 164.

148. *Nassif*, 449 N.W.2d at 794 (court was attempting to harmonize the statute with the constitution and provide uniformity in criminal laws throughout the state of North Dakota).

149. *See id.* at 793-94. The North Dakota League of Cities has drafted a model code of ordinances to provide a means by which local governments can properly codify municipal laws throughout the state. MODEL MUNICIPAL ORDINANCE CODE Forward (N.D. League of Cities 1987). The Model Code was developed "to assist governments in North Dakota in bringing about a more systematic, up-to-date, and clearly drafted code of municipal ordinances." *Id.* at Intro. The subsection of the Model's disorderly conduct code prohibiting "fighting words" provides:

> A person is guilty . . . if with intent to harass, annoy or alarm another person or in reckless disregard of the fact that another person is harassed, annoyed or alarmed by his behavior, he:
> * * *
> b. In a public place, uses abusive, insulting or offensive language, or an abusive, insulting or offensive gesture, under circumstances in which such language by its very utterance or gesture, is likely to cause or provoke a disturbance or breach of the peace.

Id. at ch. 13, Art. 4, Div. 2, § 13.0403(1)(b). This subsection appears to track the words that the United States Supreme Court in *Chaplinsky* held could be constitutionally proscribed. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942) (accepting the definition of New Hampshire Supreme court: "Derisive and annoying words can be taken as coming within the purview of the statute . . . only when they have [the] characteristic of plainly tending to excite the addressee to a breach of the peace.").

150. *See* Gooding v. Wilson, 405 U.S. 518, 528 (1971) (statute that purportedly has been narrowly construed by the state's supreme court may still be subject to overbreadth and vagueness challenges if not limited to fighting words). *Cf.* City of Houston v. Hill, 482 U.S. 451, 471 n.22 (1987) (construction of ordinance must be self-evident to avoid vagueness). Although Nassif raised the vagueness question on appeal, the court conspicuously failed to discuss that doctrine as it related to subsection three of the state statute, but rather, simply attempted to construe that subsection to not be overbroad. *Nassif*, 449 N.W.2d at 793-94. The court was careful to note, however, that Nassif had not properly preserved the issue of whether subsection (1) of the statute was unconstitutional. *Id.* at 793-94. The court then failed to carefully consider the vagueness question after having noted in its consideration of whether the issue of subsection (1) had been reserved, that Nassif had stated *"[t]he State Statute is vague."* *Id.* at 792 (emphasis added). However, Nassif failed to discuss the doctrine is his brief. *See* Brief for Appellant at 9-11, City of Bismarck v. Nassif, 449 N.W.2d 789 (N.D. 1989) (No. 89004) (discussing the constitutional aspects of the statute, but addressing only the overbreadth of the statute and not the vagueness).

constitutional.[151] The court then construed subsection three of the state statute to be limited to the same offense as is limited by the ordinance without analyzing the literal reading of the ordinance or the judicially construed reading of the statute.[152] However, the reading of the statute as construed and the literal reading of the ordinance indicate that both allow a disorderly conduct arrest for the use of abusive or obscene words or gestures that merely "inflict injury," as opposed to "incit[ing] immediate breach of the peace."[153] Thus, a complication in the court's analysis exists because the court does not address whether the language "inflicts injury" is overbroad.[154] If the *Nassif* court specifically intended to construe the statute to prohibit only language or gestures that must incite immediate violent reaction, then the overbreadth of the statute may have been cured.[155]

However, language that merely "inflicts injury" is much different from language that creates a violent response from the addressee, and appears to be constitutionally protected.[156] As the United States Supreme Court has articulated, only words that carry the inherent power to provoke violent reaction[157] or that immediately incite a breach of the peace may be suppressed as unprotected "fighting words."[158] Although the *Chaplinsky* Court stated that "fighting words" are those that "inflict injury *or* tend to

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151. *Nassif*, 449 N.W.2d at 793. It does not appear that Nassif conceded, or even mentioned, that the language "inflicts injury" was constitutional. *See id.*

The North Dakota Supreme Court has recognized that the overbreadth doctrine prohibits laws that criminalize constitutionally protected conduct. State v. Tibor, 373 N.W.2d 877, 880 (N.D. 1987). The *Tibor* court also recognized that a litigant need not have standing to challenge a statute on either vagueness, *id.* at 880 n.3, or overbreadth grounds when the statute proscribes freedom of speech. *Id.* at 881.

152. *Nassif*, 449 N.W.2d at 794. It appears that the court may have simply overlooked the fact that the ordinance contained the words "inflicts injury." *See id.* at 793-94.

153. *Id.* at 794 (court construes statute to limit the same offense as the ordinance, but does not specify what type of offense is prohibited by the "inflicts injury" language). *See id.* at 792 (quoting subsection three of Bismarck City Ordinance § 6-05-01, which proscribes language that "inflicts injury or incites immediate breach of the peace").

154. *See Nassif*, 449 N.W.2d at 793-94 (the language "inflicts injury" is not considered in the court's analysis under its constitutionality discussion). The court simply used Nassif's concession that the "fighting words" portion of the ordinance was constitutional, *id.* at 793, and then limited the statute to prohibit the same offense as the ordinance without discussing the "inflicts injury" language. *Id.* at 794.

155. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942). That specific intention, however, is not evident from the court's opinion. *See Nassif*, 449 N.W.2d at 793-94.

156. *See* Gard, *supra* note 18, at 533, 581 (hurt feelings and indignation are not significant enough to proscribe first amendment rights). *See also* Strossen, *supra* note 18, at 509 (laws that restrict "fighting words" must be limited to utterances which will incite immediate violence); TRIBE, *supra* note 37, § 12-10, at 850 n.5 (explaining that the "fighting words" doctrine must be narrowly construed).

157. Cohen v. California, 403 U.S. 15, 20 (1971).

158. *Chaplinsky*, 315 U.S at 572.

incite an immediate breach of the peace,"[159] the "inflict injury" portion of that statement has been undermined by the subsequent cases of *Cohen* and *Gooding*.[160] Thus, although the North Dakota Supreme Court may have been attempting prudently to construe subsection three of the state statute to not be overbroad, further litigation may be needed to confirm that result.[161]

Also, litigation may be necessary to determine whether subsection three of the statute is unconstitutionally vague.[162] The North Dakota Supreme Court has stated that a requirement of the vagueness doctrine is "that the statute provide adequate warning as to the conduct it proscribes."[163] Subsection three of North

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159. *Id.* (emphasis added). *See* Gard, *supra* note 18, at 533 (*Chaplinsky* dicta "bedevils" first amendment).

160. Strossen, *supra* note 18, at 509; MODEL PENAL CODE § 250.2 comment 4(d), at 345 (1980). "Both *Cohen* and *Gooding* are based on the proposition that the prevention of violent response by the addressee is the only acceptable rationale for regulating offensive speech in a public place." *Id.* The commentary points out that North Dakota included a subsection in its disorderly conduct statute similar to the Model Code prohibition of "abusive language." *Id.* at n.79 (citing N.D. CENT. CODE § 12.1-31-01(3)). The commentary then notes that other states have endeavored to limit the breadth of their "fighting words" statutes, so that they specifically and unmistakably "punish only such language as is inherently likely to move the addressee to violence." *Id.* The commentary notes that this is wise in light of constitutional precedents. *Id.* One such statute noted by the commentary is Arizona's. *Id.* at n.80. Subsection (A)(3) of Arizona's statute provides:

> A. A person commits disorderly conduct if, with intent to disturb the peace or quiet of a neighborhood, family or person, or with knowledge of doing so, such person:
> * * *
> 3. Uses abusive language or gestures to any person present *in a manner likely to provoke immediate physical retaliation by such person*[.]

ARIZ. REV. STAT. ANN. § 13-2904(A)(3) (1989) (emphasis added to indicate preciseness of statute). Juxtaposing subsection three of Arizona's statute with subsection three of North Dakota's statute exposes that North Dakota's lacks the necessary preciseness of a statute attempting to limit "fighting words." *Compare* ARIZ. REV. STAT. ANN. § 13-2904(A)(3) (1989), *supra with* N.D. CENT. CODE § 12.1-31-01(3) (1985) ("In a public place, uses abusive or obscene language, or makes an obscene gesture.").

161. *See* Gooding v. Wilson, 405 U.S. 518, 528 (1972) (statute that has been purportedly narrowly construed by the state's supreme court may still be subject to overbreadth challenges if not limited to "fighting words"); *Lewis v. City of New Orleans*, 415 U.S. 130, 133 (1974) (same).

162. *Cf.* City of Houston v. Hill, 482 U.S. 45, 471 n.22 (1987) (construction must be self evident or vagueness could arise).

163. State v. Johnson, 417 N.W.2d 365, 368 (N.D. 1987) (*Johnson* court was not considering a sensitive first amendment issue, but rather, whether the word "explosive" was vague).

In determining whether adequate warning is given, the North Dakota Supreme Court views the statute as if it were a reasonable man who is subjected to its terms. *Johnson*, 417 N.W.2d at 368. In *State v. Woodworth*, the court stated that "[t]he test of definitiveness of a statute is met if the meaning of the statute is fairly ascertainable by reference to similar statutes or to the dictionary, or if the questioned words have a common and generally accepted meaning." 234 N.W.2d 243, 246 (N.D. 1973). By applying that test to subsection three, it appears that the dictionary definitions and general meanings of the words "abusive" or "obscene" do not definitively indicate that they are words that "tend to incite immediate breach of the peace" as the *Nassif* decision has construed them. *Nassif*, 449 N.W.2d at 794 (construing statute to be limited to same offense as Bismarck ordinance). *See* WEBSTER'S NEW WORLD DICTIONARY 6, 981 (2d col. ed. 1980). Webster's New World Dictionary defines "abusive" as "coarse or insulting in language," *id.* at 6, and "obscene" as

Dakota's disorderly conduct statute does not appear to meet this "adequate warning" requirement because, as construed by the *Nassif* court, it proscribes expressions not suggested even remotely by the literal reading of that subsection.[164] Furthermore, by not adequately warning what conduct it proscribes, the statute also may fail to "establish minimal guidelines to govern law enforcement," which the North Dakota Supreme Court also requires of a statute,[165] and which the United States Supreme Court has stated is the most prominent aspect of the vagueness doctrine.[166]

Illustrating that subsection three of the statute may be unconstitutionally vague are recent decisions from New York, the state from which North Dakota's disorderly conduct statute was derived.[167] In the 1990 case of *People v. Blanchette*,[168] subsection three of New York's disorderly conduct statute was held unconstitutional.[169] Although the *Blanchette* decision was enunciated by a New York city court, it was controlled by the case of *People v.*

"offensive to one's feelings, or to prevailing notions, of modesty or decency; lewd . . . disgusting; repulsive." *Id.* at 981. *See generally* N.D. CENT. CODE § 12.1-27.1-01(4) (1985 & Supp. 1989) (defining "obscene material" and "obscene performance," as requiring an "appeal[] to a prurient interest").

164. *Compare* City of Bismarck v. Nassif, 449 N.W.2d 789, 792-94 (N.D. 1989), *supra* note 122 *with* N.D. CENT. CODE § 12.1-31-01(3) (1985) (as it facially exists):

> *Disorderly conduct.* A person is guilty of a class B misdemeanor if, with intent to harass, annoy, or alarm another person or in reckless disregard of the fact that another person is harassed, annoyed, or alarmed by his behavior, he:
> * * *
> 3. In a public place, uses abusive or obscene language, or makes an obscene gesture[.]

N.D. CENT. CODE § 12.1-31-01(3) (1985). *See Hill*, 482 U.S. at 471 n.22 (construction of ordinance must be self-evident to avoid vagueness). *Cf.* TRIBE, *supra* note 37, § 12-29, at 1030 (statute must unambiguously proscribe only speech that is unprotected).

165. *Johnson*, 417 N.W.2d at 368. Since a "person of common intelligence" could easily include both a lay person and a governmental authority such as a police officer, it is not enough to simply find a statute vague, rather it must be determined to whom it is vague. *See* Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 661 (1984).

166. Kolender v. Lawson, 461 U.S. 352, 357-58 (1983) (quoting Smith v. Goguen, 417 U.S. 566, 574 (1974)). The Supreme Court has noted its sensitivity to vague laws that hinder freedom of speech. Rose v. Locke, 423 U.S. 48, 50 n.1 (1975) (citing Smith v. Goguen, 417 U.S. 566, 574 (1974)). The Court's solicitude in this respect is perhaps best expressed in *United States v. Reese*:

> It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of government.

92 U.S. 214, 221 (1876) (*quoted in* Kolender v. Lawson, 461 U.S. 356, 858 n.7 (1983)).

167. *See* Special Project, *supra* note 146, at 735 ("The wording of the New Code and the proposed Federal Code is derived from the New York disorderly conduct statute.").

168. 147 Misc. 2d 50, 554 N.Y.S.2d 388 (N.Y. Sup. Ct. 1990).

169. People v. Blanchette, 147 Misc. 2d 50, __, 554 N.Y.S.2d 388, 390-91 (N.Y. Sup. Ct. 1990) (following People v. Dietze, 75 N.Y.2d 47, 549 N.E.2d 1166, 550 N.Y.S.2d 595 (N.Y.

Dietze,[170] in which the New York Court of Appeals declared subsection two of New York's harassment statute unconstitutional.[171] The *Dietze* court recognized the possibility of curing the statute's constitutional viruses through judicial construction limiting the statute to prohibit only "fighting words."[172] However, in order to exercise that authority, the *Dietze* court felt that the "very language of the statute must [first] be fairly susceptible of such an interpretation."[173] Further, and equally critical, the *Dietze* court stated that "judicial construction might remedy the overbreadth of [the] statute, but only at the expense of rendering it unacceptably vague."[174] Deciding that to construe a statute under those circumstances would be contrary to "prudent judicial construction," the *Dietze* court held subsection two of the statute unconstitutional.[175] The court in *Dietze* properly understood that the

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1989)). The New York disorderly conduct statute that was held unconstitutional in *Blanchette* provided in relevant part:

> [A] person is guilty of disorderly conduct when, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof:
> * * *
> 3. In a public place, he uses abusive or obscene language or makes an obscene gesture[.]

N.Y. PENAL LAW § 240.20(3) (McKinney 1989 & Supp. 1991). *See Blanchette*, 147 Misc. at __, 554 N.Y.S.2d at 390.

170. 75 N.Y.2d 47, 549 N.E.2d 1166, 550 N.Y.S.2d 595 (1989). *See Blanchette*, 147 Misc. at __, 554 N.Y.S.2d at 390-91.

171. People v. Dietze, 75 N.Y.2d 47, __, 549 N.E.2d 1166, 1169, 550 N.Y.S.2d 595, 598 (N.Y. 1989). Although reluctant, the *Blanchette* court found it inescapable that the disorderly conduct statute must be struck down because it was the twin of New York's harassment statute. *See Blanchette*, 147 Misc. at __, 554 N.Y.S.2d at 391. The subsection of New York's harassment statute declared unconstitutional in *Dietze* provided in relevant part:

> [A] person is guilty of harassment when, with intent to harass, annoy or alarm another person:
> * * *
> 2. In a public place, he uses abusive or obscene language, or makes an obscene gesture[.]

N.Y. PENAL LAW § 240.25(2) (McKinney 1989 & Supp. 1990). *Compare id. with* N.D. CENT. CODE § 12.1-31-01(3) (1985), *supra* note 165. By comparing New York's harassment statute with North Dakota's disorderly conduct statute, it is readily ascertainable that the two are virtually identical. *See id.*; N.Y. PENAL LAW § 240.25(2), *supra*. *See also* N.Y. PENAL LAW § 240.20(3), *supra* note 170 (subsection three of New York's disorderly conduct statute).

172. *Dietze*, 75 N.Y.2d at __, 549 N.E.2d at 1169, 550 N.Y.S.2d at 598. The court pointed out that a fair reading of the statute did not even suggest that it was limited to words or gestures that create an immediate violent reaction. *Id.* at __, 549 N.E.2d at 1168, 550 N.Y.S.2d at 598.

173. *Id.* at __, 549 N.E.2d at 1168, 550 N.Y.S.2d at 598.

174. *Id.* at __, 549 N.E.2d at 1168, 550 N.Y.S.2d at 598. Thus, an ordinary person would have had to guess as to its meaning. *Id.*

175. *Dietze*, 75 N.Y.2d at __, 549 N.E.2d at 1169, 550 N.Y.S.2d at 598. The court stated further that if it had construed the statute to be limited to violence-provoking words, "the statutory language would [then have] signif[ied] one thing but, as a matter of judicial decision, would stand for something entirely different. *Id.* at __, 549 N.E.2d at 1169, 550 N.Y.S.2d at 598.

result of such a construction would have chilled free speech and allowed for continued arbitrary arrests by police officers "strictly enforcing the statute's prohibitions."[176]

Although the foregoing discussion illustrates that subsection three of North Dakota's disorderly conduct statute may be constitutionally unsound, the *Nassif* court's analysis does provide some novel guidance for subsequent "fighting words" convictions in North Dakota.[177] Specifically, it appears that the court may have adopted Justice Powell's position in *Lewis v. City of New Orleans*[178] which requires a police officer to exercise a higher degree of restraint when being verbally challenged or criticized by a citizen.[179] The court's opinion appears to evince this requirement; the discussion recognizes first the traditional "fighting words" language used in *Chaplinsky*[180] and *Cohen*,[181] and then, after acknowledging Nassif's contention that police officers are expected to restrain to a higher degree than normal citizens, the court held that Nassif's words were sufficient to produce a "clear

176. *See id.* The Chief Justice of the New York Court of Appeals disagreed with the majority's holding. *Id.* at __, 549 N.E.2d at 1170, 550 N.Y.S.2d at 599 (Walchter, C.J., concurring). He believed that saving constructions should be implicitly read into statutes, and that citizens should be charged with knowledge of such constructions. *Id.* at __, 549 N.E.2d at 1171-72, 550 N.Y.S.2d at 600-01. However, a conflict exists in his logic because he initially stated that the New York Court of Appeals had held that the statute did not apply to such vulgar words as "Fuck." *Id.* at __, 549 N.E.2d at 1170, 550 N.Y.S.2d at 599 (citations omitted). However, in the case the court was deciding, the defendant had been arrested for calling someone a "bitch" and a "pig." *Id.* at __, 549 N.E.2d at 1170, 550 N.Y.S.2d at 599. Thus, the Chief Justice of the New York Court of Appeals was implicitly admitting that the statute was being used for unauthorized arrests of people who were exercising their first amendment rights lawfully under that court's construction of the statute. *Id.* at __, 549 N.E.2d at 170-71, 550 N.Y.S.2d at 599-600. Arbitrary arrests are the predominate reason why vague laws are held unconstitutional. *See* Kolender v. Lawson, 461 U.S. 352, 357-58 (1983) (citing Smith v. Goguen, 415 U.S. 566, 574 (1974)) (vague laws permit arbitrary enforcement by police officers).

Additional evidence indicating that subsection three of North Dakota's disorderly conduct statute is ambiguous and unclear on its face is the recent case of City of Bismarck v. Schoppert, 450 N.W.2d 757 (N.D. 1990), in which the defendant was arrested under the same Bismarck City ordinance as Nassif. City of Bismarck v. Schoppert, 450 N.W.2d 757, 758 (N.D. 1990). Ironically, Schoppert asserted that subsection three of the Bismarck ordinance superseded state law, *id.* at 757, just as Nassif had asserted. *Nassif*, 449 N.W.2d at 793. The North Dakota Supreme Court then explained that the ordinance "literally expresses what the state statute must be construed to include to be constitutional." *Schoppert*, 450 N.W.2d at 758 (quoting Bismarck v. Nassif, 449 N.W.2d 789, 794 (1989)).

177. *See* State v. Miller, 388 N.W.2d 522, 522-23 (N.D. 1986) (defendant's request to narrowly construe section 12.1-31-01 of the North Dakota Century Code was denied because the issue was not properly raised at trial). The *Miller* court denied Miller's request because his argument revealed that he had made a tactical decision at trial not to assert the constitutional issue of the statute, but rather, chose to deny the conduct for which he was charged. *Id.* at 522-23. *See also* State v. Laufenburg, 99 N.W.2d 331, 332 (N.D. 1959) (decision encompassed conduct, not speech).

178. 415 U.S. 130 (1974) (Powell, J., concurring).

179. *Nassif*, 449 N.W.2d at 795 (quoting City of Houston v. Hill, 482 U.S. 451, 461 (1987), quoting Terminiello v. Chicago, 337 U.S. 1, 4 (1949)).

180. *Id.* at 794 (quoting Chaplinsky v. New Hampshire, 315 U.S. 569, 572 (1942)).

181. *Id.* (quoting Cohen v. California, 403 U.S. 15, 19 (1971)).

and present danger of a serious substantive evil."[182] Therefore, although the court fails to expressly adopt Justice Powell's standard, neither does the court expressly deny it.[183] The progressive position that the *Nassif* court may have adopted would be similar to the recent Eighth Circuit Court of Appeals case of *Buffkins v. City of Omaha*[184] which held, as a matter of law, that directing the word "asshole" toward two police officers was not probable cause for a "fighting words" arrest.[185]

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182. *Id.* at 794-95 (quoting City of Houston v. Hill, 482 U.S. 451, 461 (1987), quoting Terminiello v. Chicago, 337 U.S. 1, 4 (1949)).

183. *See Nassif*, 449 N.W.2d at 794-95. If the *Nassif* court did not agree with Justice Powell's position, it could have specifically held that Nassif's words constituted "fighting words" under the traditional standard. *See* State v. Groves, 219 Neb. 382, __, 363 N.W.2d 507, 510 (1985) (specifically rejecting Justice Powell's position); State v. Boss, 195 Neb. 467, __, 238 N.W.2d 639, 643 (1976) (same).

184. 922 F.2d 465 (8th Cir. 1990). Justice Powell's standard has substantial merit and is consistent with other Supreme Court decisions that have held that promoting respect for law enforcement officer's is not justifiable when done at the expense of inhibiting freedom of speech. *See* City of Houston v. Hill, 482 U.S. 451, 467 (1987) (Texas statute proscribing obstruction of a police officer overbroad); Gooding v. Wilson, 405 U.S. 518, 519-20 n.1 (1972) (Court affirmed a finding that Georgia's disorderly conduct statute was unconstitutionally overbroad and vague in context of calling a police officer a "white son of a bitch"). *See also* Gard, *supra* note 18, at 557 (promoting respect for law enforcement can not be justified by proscribing offensive language). A police officer is trained to keep, not breach, the public peace. *Id.* at 556.

185. Buffkins v. City of Omaha, 922 F.2d 465, 472 (8th Cir. 1990). *See also* Duran v. City of Douglas, 904 F.2d 1372, 1377 (9th Cir. 1990) (using obscene gestures and language toward police officer was disgraceful, but not illegal) (citing City of Houston v. Hill, 482 U.S. 451, 461-63 (1987)). *Buffkins* involved a defendant who had her luggage searched by two police officers who suspected the luggage contained cocaine. *Buffkins*, 922 F.2d at 467. After searching the luggage, the officers told Buffkins that she was free to leave and to "have a nice day," to which she responded, "I will have a nice day, asshole." *Id.* The *Buffkins* court recognized that the first amendment protects individuals who are verbally challenging and criticizing police officers, and that the "use of the word 'asshole' could not reasonably have prompted a violent response from the arresting officers." *Id.* at 472 (citing City of Houston v. Hill, 482 U.S. 451, 462 (1987)).

It is ironic that at the same time the "fighting words" exception to free speech is being narrowed to the point of nonexistence, the country is experiencing an increase in the very insults and epithets for which the exception arguably was created. *See* Strossen, *supra* note 8, at 512. These incidents include:

> A flyer proclaiming "open season on Blacks" and referring to blacks as "saucer lips, porch monkeys and jigaboos" is slipped under the door of a dormitory lounge where black students are meeting. A black student hurls anti Semitic insults at a Jewish student, including "dirty Jew," "stupid Jews," and "fucking Jew." The Jewish Student Union at Memphis State University is spray-painted with swastikas and the words "Hitler is God." Asian-American students are harassed and spat on and a member of the Asian Pacific American Law Students Association finds a laundry ticket on that club's bulletin board. Members of a fraternity burst into an African Languages and Literature classroom, yelling racist remarks and disrupting the class. Two white men taunt a black woman student as she walks past a university residence hall, and pour urine on her as they lean out their dormitory room window.

Note, *The Call for Campus Conduct Policies: Censorship or Constitutionally Permissible Limitations on Speech*, 75 MINN. L. REV. 201, 201 (1990) (citations omitted). North Dakota campuses are no exception. *See* Menge, *Gay haters scar campus*, Dakota Student, Oct. 16, 1990, at 1, col.5. On the University of North Dakota campus, anti-homosexual messages such as "all fags deserve to die," "Anti-anal Day," and "Oct. 12, National Back in the Closet Day" were chalked on the sidewalks, apparently responding to the October 11

The *Nassif* opinion also provides a novel and interesting definition of what constitutes a public place in the context of a "fighting words" conviction. In effect, the court adopted the view that the offense occurs at the place where the words are received, not where they are spoken.[186] Therefore, in North Dakota, a person

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National Coming Out Day observed by the Campus' Organization for Alternative Lifestyles. *Id.*

Hate or biased speech is invoked by resentment and hostility against such characteristics as "race, religion, sexual orientation, ethnicity, or national origin." Note, *supra* at 207-08. These types of utterances are similar to traditional "fighting words" characterizations. Greenawalt, *Insults and Epithets: Are They Protected Speech?*, 42 RUTGERS L. REV. 287, 298 (1990); Strossen, *supra* note 18, at 512. Greenawalt notes that broad prohibitions, designed merely to proscribe hurtful or humiliating words, should be judged unconstitutional. Greenawalt, *supra*, at 298. However, he states further that penalties would be in order if contact was initiated with a person specifically to harass her or him, or when the speech is used to preclude a person from experiencing rights which are legally protected. *Id.* at 298-99. Thus, with first amendment principles in mind, many universities are promulgating, or, are on the verge of promulgating, anti-hate or harassment codes. Note, *supra*, at 202 n.9. However, universities enacting such policies must be cautious not to impinge students' first amendment rights, a consideration the University of Michigan became cognizant of when a federal district court permanently enjoined it from enforcing its anti-harassment policy. Doe v. Univ. of Michigan, 721 F. Supp. 852, 863 (E.D. Mich. 1989).

The broad University of Michigan policy considered in *Doe* sanctioned persons who stigmatized or victimized individuals or groups based on such characteristics as, among others, race, religion, sex, sexual orientation, national origin, ethnicity, creed, ancestry, handicaps. *Id.* at 853. Doe, a graduate student in psychology, challenged the statute, fearing that certain discussions concerning topics positing biological differences between the sexes might lead to sanctions under the policy. *Id.* at 858. Asserting that the policy impermissibly chilled open discussion, Doe requested that the district court declare the policy unconstitutional on the grounds of vagueness and overbreadth. *Id.* After reviewing three instances in which university administrators failed to consider the students' first amendment privileges before applying sanctions under the code, the court found it clear that the code was unconstitutionally overbroad and vague, on its face, and as applied. *Id.* at 866. The *Doe* court noted, however, that under certain circumstances, the epithets, slurs, and insults prohibited by the policy might fall within the narrow description of "fighting words" and could then be sanctioned properly by the university. *Id.* at 862. *But see* Strossen, *supra* note 18, at 509-11 ("fighting words" doctrine no longer good law, specifically in context of racial slurs). For an effective illustration of the conflict between regulating hate and/or bias speech in order to promote equality, and allowing such utterances in order to allow freedom of speech, see Lawrence, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L. REV. 431, 434-35 nn.18-21 (1990) and accompanying text.

186. *Nassif*, 449 N.W.2d at 795-96 (bystanders who were located on public property may have heard Nassif, and therefore the offense occurred in a public place). An important point the *Nassif* court did not consider when it relied on State v. Leonard, 255 Iowa 1365, 124 N.W.2d 429 (1963), was that the Iowa Supreme Court found that a person in the main office of the city building had inadvertently overheard an obscene caller's conversation. *Leonard*, 255 Iowa at __, 124 N.W.2d at 433. The distinction between the *Leonard* facts and the facts in *Nassif* is that the 20 or 25 bystanders who overheard what Nassif said, did so intentionally, rather than inadvertently, by *"gather[ing] around* the area of the incident." *Nassif*, 449 N.W.2d at 795 (emphasis added). Therefore, the *Nassif* court has essentially removed the public place element of the offense. *See id.* The court now appears to allow people who want to be bombarded by offensive language to create the "public place" element for the person who is arrested. *See id.* The *Nassif* court could have required those people who eavesdropped willingly on Nassif's business to simply "avert" their ears to further bombardment by walking away, if they found Nassif's language unpalatable. *See* Cohen v. California, 403 U.S. 15, 24 (1971). Requiring this would have been similar to the *Cohen* holding in which the Supreme Court stated that people who were offended by Cohen's "fuck the draft" jacket could merely avoid further bombardment to their sensibilities by averting their eyes. *Id.* at 21. The *Cohen* Court has also stressed that people

located on private property can be arrested for disorderly conduct if his words are heard by someone located on public property who is not the addressee of the words.[187]

Thus, nearly fifty years after the United States Supreme Court defined "fighting words" and found them to be wholly unprotected by the first amendment,[188] the North Dakota Supreme Court has attempted to construe subsection three of North Dakota's disorderly conduct statute to be in accordance with that definition.[189] However, it appears that the court may have failed in its attempt because it construed the statute to prohibit words that merely "inflict injury," rather than those that incite immediate violent reaction from the person to whom they are addressed.[190] In addition, and despite the *Nassif* court's construction, subsection three of the statute may simply lack the explicit wording required of a statute that infringes on the cherished right of free speech.[191] In the future, legislatures and courts intending to proscribe speech that is encompassed by the narrow "fighting words" exception should do so under statutes and ordinances that are drafted and construed precisely to limit only speech that causes immediate violent reaction from the addressee.[192] Only then will the individual's right to free speech be given the full protection guaranteed by the first amendment to our Constitution.[193]

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"are often 'captives' outside the sanctuary of the home and subject to objectionable speech." *Id.* (quoting Rowan v. United States Post Office Dept., 397 U.S. 728, 738 (1970)).

187. *See Nassif*, 449 N.W.2d at 795-96 (Nassif was speaking to police officers but people on sidewalks may have heard him, therefore he committed disorderly conduct in a public place even though he was located on private property).

188. Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

189. *See Nassif*, 449 N.W.2d at 794-95.

190. Gard, *supra* note 18, at 536-37.

191. *See* ARIZ. REV. STAT. ANN. § 13-2904(A)(3) (1989), *supra* note 160 (precisely drawn statute).

192. *See* Strossen, *supra* note 18, at 508-11 (*Chaplinsky* has been narrowed to limit speech that incites immediate breach of the peace); Gard, *supra* note 18, at 533 (*Chaplinsky* prohibits only words that cause violent response).

193. *See* U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech"). However, perhaps the "fighting words" exception to free speech is simply obsolete. *See* Strossen, *supra* note 18, at 510-11 (*Chaplinsky* is no longer good law); Gard, *supra* note 18, at 581 ("fighting words" exception cannot withstand first amendment protections); Shea, *supra* note 27, at 1-2 ("fighting words" are protected speech).