Offensive Speech and the Pennsylvania Disorderly Conduct Statute

Thomas M. Place
tmp5@psu.edu

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OFFENSIVE SPEECH AND THE PENNSYLVANIA
DISORDERLY CONDUCT STATUTE

by THOMAS M. PLACE*
offensive language, both courts, in contrast to their earlier holdings, reversed convictions for disorderly conduct either because the offensive words used were not "obscene" as defined by the United States Supreme Court in *Miller v. California*, or because they were directed at a police officer outside the hearing of others and there was no risk that the officer would respond in a violent manner. While not overruling earlier decisions, recent disorderly conduct opinions significantly limit the circumstances in which the public use of offensive speech is punishable as disorderly conduct.

To assess the impact of the recent decisions and, more specifically, to determine when Pennsylvania courts can punish offensive speech as disorderly conduct consistent with the First Amendment, this article begins by reviewing United States Supreme Court decisions concerning offensive speech and the "fighting words" exception to the First Amendment. Part I briefly reviews the development of the "fighting words" doctrine as originally articulated in *Chaplinsky v. New Hampshire* and as redefined by the Court in subsequent decisions. In addition, this Part reviews Supreme Court decisions holding that speech does not lose its protection under the First Amendment because it annoys or offends the sensibilities of listeners. The article notes that although the "fighting words" doctrine today is less expansive than originally set out in *Chaplinsky*, prosecutions based upon offensive speech have been upheld where the breach of peace or disorderly conduct statute has been narrowly limited to apply only to speech that meets the Supreme Court's post-*Chaplinsky* definition of "fighting words."

7. *Kelly*, 758 A.2d at 1288 (holding that words and conduct used were disrespectful, insulting and offensive, but not obscene within the meaning of the statute); *Bryner*, 652 A.2d at 912 (holding that words shouted in a public place, though provocative and annoying, were not obscene within the meaning of the disorderly conduct statute).

8. 413 U.S. 15, 24 (1973). In *Miller*, the court held that the "basic guidelines" for determining whether material is obscene and therefore outside the protection of the First Amendment are

(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest, (b) whether the work depicts or describes, in a potentially offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work taken as a whole, lacks serious literary, artistic, political or scientific value. (citations omitted).

9. *Hock*, 728 A.2d at 947 (holding defendant's profane remark to police officer as she was walking away was not disorderly conduct).


11. *Gooding v. Wilson*, 405 U.S. 518, 528 (1972) (holding Georgia statute prohibiting opprobrious words or abusive language tending to cause a breach of peace directed to or used in the presence of another unconstitutionally vague and overbroad because it was not limited to "fighting words" defined by *Chaplinsky*); *Cohen v. California*, 403 U.S. at 26) (holding that a statute may not make the simple display of a single four letter expletive a criminal offense without a compelling reason).

12. *Street v. New York*, 394 U.S. 576 (1969) (overturning defendant's conviction because it may have been based solely on his own words or both his words and his deeds); *Terminiello v. Chicago*, 337 U.S. 1 (1949) (reversing defendant's conviction under a city ordinance that permitted conviction if defendant's speech "stirred people to anger, invited public dispute, or brought about a condition of unrest").

13. See e.g. *State v. John W.*, 418 A.2d 1097 (Me. 1980); *People v. Chatfield*, 372 N.W.2d 611
Part II begins by discussing the Pennsylvania disorderly conduct statute. It notes that while the statute is based upon the Model Penal Code, the legislature did not adopt the language of the Code that specifically addresses the use of offensive speech. The section then discusses how the Pennsylvania courts have considered offensive speech in the context of applying the disorderly conduct statute. More specifically, Part II examines decisions from the 1980s in which the courts purported to limit the statute to "fighting words." This section argues that the Pennsylvania courts failed to authoritatively construe the statute in a manner consistent with the Supreme Court’s post-Chaplinsky "fighting words" decisions. Part II also analyzes recent decisions reviewing disorderly conduct convictions involving offensive speech under the "obscene" language, "unreasonable noise" and "fighting and threatening" provisions of the statute. Part II concludes that the Pennsylvania courts have limited the disorderly conduct statute by rejecting "fighting words" as a basis for punishing personally insulting speech directed at the police outside the hearing of others.

Part III discusses the provisions of the statute that prohibit "fighting and threatening" and making an "unreasonable noise." This section contends that both provisions remain unconstitutionally vague as applied to offensive

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15. Model Penal Code § 250.2 (ALI 1962). The relevant section of the statute provides:
   (1) Offense Defined. A person is guilty of disorderly conduct if, with purpose to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he: (a) engages in fighting or threatening, or in violent or tumultuous behavior; or (b) makes unreasonable noise or offensively coarse utterance, gesture or display, or addresses abusive language to any person present; or (c) creates a hazardous or physically offensive condition by any act which serves no legitimate purpose of the actor.
17. Pringle, 450 A.2d at 107 ("Even if the words in issue would not be considered obscene, they certainly constituted 'fighting words' . . . ."); Mastrandelo, 414 A.2d at 58 ("It is clear in the instant case that appellant was not exercising any constitutionally protected right; rather, in a loud, boisterous and disorderly fashion, he blurted epithets at the meter maid which we believe fit the Chaplinsky definition of fighting words.").
18. Gooding, 405 U.S. at 528; Cohen, 403 U.S. at 26.
22. See id.
23. Kelly, 758 A.2d at 1288; Bryner, 652 A.2d at 910 (holding that words used may have been provocative and annoying but were not obscene within the meaning of the disorderly statute).
speech. The article argues that because the “unreasonable noise” provision was not intended to criminalize speech, it should be limited solely to prosecutions relating to the volume of speech and not its content. With respect to the provision prohibiting “fighting and threatening,” the article argues that to address the vagueness of the provision when applied to offensive speech, courts need to apply a narrowing construction of the provision. The article contends that the provision should not be given a “fighting words” construction because the legislature evidenced an intent not to prohibit “fighting words” by declining to adopt the language of the Model Penal Code that specifically addresses the use of personally offensive speech. Instead, Part III proposes a narrowing construction of the provision based upon the United States Supreme Court’s decision in Brandenburg v. Ohio. Under such a construction, offensive speech would constitute disorderly conduct if the speaker intends to incite lawless action and it is likely that under the circumstances, imminent lawless action will occur.

I. THE SUPREME COURT AND OFFENSIVE SPEECH

The Supreme Court first considered the constitutional issues concerning state regulation of offensive speech over a half a century ago in Chaplinsky v. New Hampshire. Chaplinsky, a Jehovah’s Witness, was preaching and distributing religious literature on a street corner when he was warned by a city marshal that “the crowd was getting restless” and to “go slow.” Some hours later, the crowd responded violently to Chaplinsky and he was taken to the police station for his own protection. On the way, he encountered the marshal and, apparently resentful that the police had not controlled the crowd, Chaplinsky said to the marshal, “You are a god damn racketeer” and “a damned Fascist and the whole government . . . are Fascists . . .” Chaplinsky was arrested for violating a New Hampshire statute that made it a crime to address “any offensive, derisive or annoying word to any other person . . . [or] call him by any offensive or derisive name . . . .”

Chaplinsky’s conviction was affirmed by the New Hampshire Supreme Court. The court noted that the statute had been construed to apply only where there was danger of physical violence in reaction to the words spoken. The court stated that the statute only prohibited those words which have a “direct tendency to cause acts of violence by the person to whom,
individually, the remark is addressed."\textsuperscript{36} The court added that, as limited, the statute "does no more than prohibit the face-to-face words plainly likely to cause a breach of the peace by the addressee . . . ."\textsuperscript{37}

In upholding Chaplinsky's conviction under the statute as limited by the New Hampshire court, the United States Supreme Court defined "fighting words" as words which "by their very utterance inflict injury or tend to incite an immediate breach of the peace."\textsuperscript{38} The Court held that the use of such words was within a limited class of speech, the "punishment of which has never been thought to raise a Constitutional problem."\textsuperscript{39} The Court concluded that such speech was not protected by the First Amendment because it is not an "essential part of any exposition of ideas, and [is] of such slight social value . . . that any benefit . . . is clearly outweighed by the social interest in order and morality."\textsuperscript{40} The words Chaplinsky uttered, the Court held, were "fighting words" because they were "epithets likely to provoke the average person to retaliation, and thereby cause a breach of the peace."\textsuperscript{41}

The \textit{Chaplinsky} decision rests upon the assumption that offensive speech expressed in a face-to-face setting will trigger a violent response, or cause emotional injury to an average addressee.\textsuperscript{42} The Court did not evaluate the actual likelihood of violence by the marshal employed to keep the peace or take into consideration the political context of Chaplinsky’s speech. Nor did the Court explain what degree of emotional harm would cause speech to lose its protection under the First Amendment.

In its post-\textit{Chaplinsky} cases, the Supreme Court has both clarified and limited when government can punish the use of offensive speech. In \textit{Terminiello v. Chicago},\textsuperscript{43} the Court considered whether a public speech that contained derisive and inflammatory rhetoric was "outside the scope of the constitutional guarantees."\textsuperscript{44} In the trial court, the jury had been charged that it could find a breach of the peace if the speaker "stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a

\begin{itemize}
\item \textsuperscript{36} \textit{Id.}
\item \textsuperscript{37} \textit{Id.} at 762.
\item \textsuperscript{38} 315 U.S. at 572.
\item \textsuperscript{39} \textit{Id.}
\item \textsuperscript{40} \textit{Id.}
\item \textsuperscript{41} \textit{Id.} at 574.
\item \textsuperscript{43} 337 U.S. 1 (1949).
\item \textsuperscript{44} \textit{Id.} at 3.
\end{itemize}
The Supreme Court held that the state’s interest in civility does not permit the punishment of speech that merely offends a listener’s sensibilities. The trial court’s instruction, the Court concluded, swept too broadly. Speech may have “profound unsettling effects” and “may best serve its high purpose when it induces a condition of unrest, creates a dissatisfaction with conditions as they are, or even stirs people to anger.” Speech is not subject to punishment, the Court stated, unless it is “likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance or unrest.” Because Terminiello may have been convicted for speech protected by the First Amendment, his conviction was reversed.

In Street v. New York, the Court rejected the argument that speech contemptuous of the American flag lost its protection under First Amendment because it might have offended “the sensibilities of passers-by” who may have been shocked by Street’s words. The Court held that any shock effect of Street’s speech “must be attributed to the content of the ideas expressed” and that “the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.”

Street was followed by two decisions in the early 1970s involving defendants who had been convicted of breach of the peace for use of offensive speech. In Cohen v. California, the Court considered whether the public use of offensive language not directed at a specific individual is outside the protection of the First Amendment. Cohen was charged with disturbing the peace under a statute that prohibited, in part, “maliciously and willfully disturb[ing] the peace... by tumultuous or offensive conduct” when he wore a jacket in Los Angeles County Courthouse bearing the words “Fuck the Draft” as a protest against the war in Vietnam. In affirming Cohen’s conviction, the California Court of Appeals limited the statute to prohibit “behavior which has a tendency to provoke others to acts of violence or to in turn disturb the peace...” The court found that the state had established that it was “reasonably foreseeable that [Cohen’s] conduct might cause others to rise up to commit a violent act against the person of the defendant.”

45. Id.
46. Id. at 4 (“Speech is often provocative and challenging... that is why freedom of speech, though not absolute, is nevertheless protected against censorship or punishment.”).
47. Id.
48. Id.
49. Id.
50. Id. at 6.
52. Id. at 591.
53. Id. at 592.
54. Id.
55. 403 U.S. 15.
56. Id. at 16.
57. Id.
58. Id. at 17 (emphasis in original).
or attempt to forcibly remove his jacket.”

In reversing Cohen’s conviction, the United States Supreme Court, in an opinion by Justice Harlan, rejected the claim that the case involved conduct rather than speech. The Court held that the case did not fall within one of the categories that government could prohibit, but that the conviction “clearly rest[ed] upon the asserted offensiveness of the words Cohen used.” The case did not involve obscenity, the Court concluded, because the speech was not in any way erotic, nor was the speech punishable because some unwilling listener may have been exposed to the speech. The Court also rejected the argument that Cohen’s speech constituted “fighting words,” which the Court defined as “those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction.” While the Court acknowledged that the term Cohen used is often used in a provocative fashion, here it was “clearly not ‘directed to the person of the hearer’” because “[n]o individual actually or likely to be present could reasonably have regarded the words on his jacket as a direct personal insult.” The Court then turned to the central issue in the case, namely whether the state could “excise . . . one particular scurrilous epithet from the public discourse.” The Court rejected the state’s prevention of violence justification because there was no evidence that there were individuals ready to react violently because their “sensibilities” had been offended by Cohen’s words. Merely because someone might act in such a manner is an insufficient basis to “force persons who wish to ventilate their dissident views into avoiding particular forms of expression.” Nor could the state punish Cohen to maintain “what [it] regard[s] as a suitable level of discourse . . . .” The Court held that the state’s role as arbiter of public standards was “inherently boundless” noting that “one man’s vulgarity is another’s lyric.” Government cannot, therefore, establish clear principles by which some speech is permitted and other words punished. In addition, the Court recognized that speech serves a dual function of expressing both thoughts

59. Id.
60. Id. ("Further, the state certainly lacks the power to punish Cohen for the underlying content of the message the inscription conveyed.").
61. Id. at 18 (emphasis deleted).
62. Id. at 20.
63. Id. at 22.
64. Id. at 20.
65. Id.
66. Id. at 22.
67. Id. at 23.
68. Id.
69. Id.
70. Id. at 25.
71. Id. ("Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual.").
and feelings. The Court expressly stated, "[w]e cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated.

In holding that the words on Cohen's jacket were not "fighting words" or otherwise punishable under the First Amendment, the Court significantly limited the regulation of offensive speech. First, in defining "fighting words," the Court excluded from the definition the infliction of emotional injury as a distinct harm of offensive speech and, instead, referred solely to the harm of reflexive violence. While acknowledging that words on Cohen's jacket may have been offensive to some, this fact alone was not a sufficient basis for government to censor speech. Nor can government "cleanse public debate, because it is not possible to make "principled distinctions among words that might conceivably shock one's sensibilities. Second, Cohen articulates a broader view of the protection of the First Amendment than expressed in Chaplinsky by recognizing that speech conveys not only ideas but also emotions. Finally, the Court's reference to the fact that there was "no showing that anyone who saw Cohen was in fact violently aroused . . . ," and that there was "no evidence that [a] substantial number of citizens [were] standing ready to strike out physically . . ." as a result of Cohen's speech suggests that in contrast to Chaplinsky, the Court will consider the likelihood of violence in response to offensive speech in the context of the actual circumstances of the speech.

Cohen was followed a year later by Gooding v. Wilson. Gooding concerned a federal habeas corpus challenge to a Georgia statute that made it unlawful for "[a]ny person . . . without provocation, [to] use to or of another, and in his presence . . . opprobrious words or abusive language, tending to cause a breach of the peace . . ." Wilson had been convicted under the statute for words he addressed to police officers while being

72. Id. at 26.
73. Id.
75. Cohen, 403 U.S. at 25.
76. Id.
77. 315 U.S. 568, 571-72 (fighting words are neither an "essential part of any exposition of ideas" nor "serve as a step to truth . . .").
78. Greenwalt, Speech, Crime & the Uses of Language, at 282. (Cohen undercut[s] "any assumption that highly emotive communications have no value as expression . . . .")
80. Id. at 23.
arrested during an anti-war demonstration for blocking the entrance to a building used by the Army to process new military recruits.\textsuperscript{83} To one officer Wilson said, “White son of a bitch, I’ll kill you” and to another he said, “You son of a bitch, if you ever put your hands on me again, I’ll cut you all to pieces.”\textsuperscript{84} The lower federal courts had set aside Wilson’s conviction on the grounds that the statute was vague and overbroad.\textsuperscript{85} The issue before the Supreme Court was whether the statute had been authoritatively construed by the Georgia courts to punish only unprotected speech and not be “susceptible of application to speech, although vulgar or offensive ...” that is protected by the First Amendment.\textsuperscript{86} After examining Georgia case law, the Court concluded that the statute had not been construed by the Georgia courts to be limited to words that “have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed.”\textsuperscript{87} Instead, the Court found that the statute had been applied to punish speakers for insulting language, for “words offensive to some who hear them ...”\textsuperscript{88} or for “utterances where there was no likelihood that the person addressed would make an immediate violent response ....”\textsuperscript{89} Because the Georgia courts had failed to limit the application of the statute to “fighting words,” the Court found it unnecessary to decide whether the words Gooding used might have been prohibited under a narrowly and precisely drawn statute.

While there is disagreement among commentators as to whether Gooding changed the focus of the analysis from the average addressee of Chaplinsky to the actual addressee of offensive speech,\textsuperscript{90} there is little doubt that Cohen and Gooding together reflect a view that the words may not be punished if they merely “inflict injury.”\textsuperscript{91} Rather, it is clear from the language of the decisions that the only justification for prohibiting offensive speech is the danger of an immediate violent response where words are used in a face-to-face confrontation. This more limited view of “fighting words” is reflected in the offensive speech cases that came before the Court following Gooding.

In Rosenfeld v. New Jersey,\textsuperscript{92} the defendant had used the word “motherfucking” on four occasions while addressing a public school board

\textsuperscript{83. Id. at 519, n. 1.  
84. Id.  
85. Id. at 520.  
86. Id. (citing Cohen v. California, 403 U.S. at 18-22 (1971)).  
87. Id. at 524 (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942)).  
88. Id. at 527.  
89. Id. at 528.  
90. See e.g., Shea, supra n. 42, at 15 (“In Gooding, the majority found that an essential defect in the statute ... was a failure to require the likelihood of a violent reaction on the part of the actual addressee.”); Gard, supra n. 42, at 554 (“Careful analysis demonstrates that the Supreme Court constantly adheres to the objective standard ...”). See also Greenwalt, Fighting Words at 55 (arguing that the standard should be an objective one); Michael J. Manheimer, The Fighting Words Doctrine, 93 Columbia L. Rev. 1527, 1543 (1993) (analyzing the correctness of Professor Gard’s objectivity theory).  
91. Greenwalt, supra n. 90 at 59; Rutzick, supra n. 42 at 24; Gard, supra n. 42 at 549.  
92. 408 U.S. 901 (1972).}
meeting in which children were in attendance. Rosenfeld was convicted of disorderly conduct under a statute that made it unlawful to utter "loud and offensive or profane or indecent language in any . . . public place . . . ." Prior to Rosenfeld's conviction, the statute had been limited by the New Jersey Supreme Court to apply to words "of such a nature as to be likely to incite the hearer to an immediate breach of the peace or to be likely . . . to affect the sensibilities of a hearer." The Court remanded the case in light of Cohen and Gooding over the objection of the dissenters that Chaplinsky extends to "the willful use of scurrilous language calculated to offend the sensibilities of an unwilling audience."

The Court also remanded Brown v. Oklahoma and Lewis v. New Orleans following the Gooding decision. In Brown, the defendant spoke at a political meeting to which he had been invited and was convicted under a statute that prohibited "any obscene or lascivious language or word in any public place . . . ." Unlike the statute in Rosenfeld, the Oklahoma statute had not been narrowed by the Oklahoma courts. In Lewis, the defendant, whose son was being arrested, intervened and called the arresting officers "'god d[amn] m[other] f[ucking]' police." The ordinance under which she was convicted made it unlawful 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 . . . ." As in Brown, the statute had not been limited by the Louisiana courts. In concurring in the remand, Justice Powell noted that if the words Lewis used had been directed to another citizen in a face-to-face hostile manner, they would constitute fighting words under Chaplinsky. He acknowledged that the "situation may be different" because here the words were directed to police officers trained to exercise restraint.

The Supreme Court followed the remands in the above cases by a summary reversal in an Ohio case for the use of an unidentified offensive word, and a per curium reversal of the expulsion of a graduate student for distributing an underground newspaper with a headline containing an

94. Rosenfeld, 408 U.S. at 904 (Powell, J., dissenting).
95. Id. (citing State v. Profaci, 266 A.2d 579, 583-84 (N.J. 1970)).
96. Id. at 905.
97. 408 U.S. 914 (1972).
98. 408 U.S. 913 (1972). Lewis was remanded solely in light of Gooding.
99. Rosenfeld, 408 U.S. at 911 (Rehnquist, J., dissenting); Brown, 408 U.S. at 914.
100. Brown, 408 U.S. at 914.
101. Lewis, 408 U.S. at 913 (Powell, J., concurring).
102. Brown, 408 U.S. at 909-10 (Rehnquist, J., dissenting).
103. Lewis, 408 U.S. at 913 (Powell, J., concurring).
104. Id.
offensive word. In another case, *Hess v. Indiana*, the Court reversed Hess's conviction for disorderly conduct for telling a crowd during an anti-war demonstration, “We'll take the fucking street later.” Although a sheriff who was present in the crowd testified that he was offended by Hess's language, the Court held that the language did not amount to fighting words because the statement “was not addressed to any person or group in particular.”

*Lewis v. New Orleans* returned to the Supreme Court in 1974. The Court concluded that on remand the Louisiana Supreme Court failed to make any “meaningful attempt to limit or properly define — as limited by *Chaplinsky* and *Gooding* . . .” the terms in the ordinance and, therefore, it was immaterial whether the defendant's speech might be punished under a properly limited statute. The statute’s defect, the Court stated, was that it was “susceptible of application to speech, although vulgar or offensive” that is protected by the First Amendment.

Following *Lewis II*, the Court remanded a number of cases involving convictions under statutes and ordinances prohibiting the expression of words variously described as “vulgar,” “rude,” “profane,” “violent,” or “insulting” in light of *Lewis v. New Orleans*. Justice Douglas dissented from the remands, arguing that the Court should reverse the convictions because state courts had consistently failed to narrow their breach of peace or disorderly conduct statutes in light of *Terminiello* and *Gooding*.

Almost twenty years passed before the Supreme Court again addressed the issue of offensive speech. In *R.A.V. v. City of St. Paul*, the defendant was convicted of violating the City's Bias Motivated Crime Ordinance for burning a cross on the lawn of an African-American family. The ordinance provided that it was unlawful to place “on public or private property a symbol, object, appellation, characterization or graffiti (sic), including, but

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109. *Id.* at 107.
110. *Id.*
112. *Id.* at 133.
113. *Id.*
114. *Id.* at 134. See also *id.* at 135-36. In a concurring opinion, Justice Powell noted that apart from the ambiguity of the terms of the statute, whether a speaker has used “fighting words” depended upon the circumstances in which the words were uttered. Justice Powell thought it unlikely that the words used by Mrs. Lewis would have precipitated a physical confrontation with the police officer because a properly trained officer may be expected to exercise restraint in the face of words expressing anger and frustration. *Id.* (Powell, J., concurring).
117. 337 U.S. 1 (1949).
118. 405 U.S. 518 (1972).
120. *Id.* at 379.
not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct . . . .”121 All members of the Court found the ordinance unconstitutional.122 A five member majority accepted the Minnesota Supreme Court’s construction of the ordinance to reach only fighting words within the meaning of Chaplinsky.123 Fighting words, the majority acknowledged are not without expressive content and, like other forms of expression that have been found to be outside the protection of the First Amendment, are nonetheless not “entirely invisible to the Constitution . . . .”124 The ordinance’s defect, the majority held, was that it allowed the state to punish only certain types of “fighting words” while permitting other forms of offensive speech thereby violating the established First Amendment rule that “presumptively places [content-based] discrimination beyond the power of the government.”125 In other words, even though fighting words constitute a class of proscribable speech, government may not regulate their use “based on hostility - or favoritism - towards the underlying message expressed.”126 The defect of the St. Paul ordinance, the majority explained, is that it prohibited expressions of hate speech based upon race, color, creed or gender but not on political affiliation, union membership or sexual orientation.127 Only speech that “communicates messages of racial, gender or religious intolerance” is prohibited, while speech expressing hostility in connection with other ideas is not covered.128 The First Amendment, the majority concluded, “does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects.”129

Concurring only in the judgment, the remaining Justices believed that the ordinance was unconstitutional on overbreadth grounds because as construed, the ordinance makes speech unlawful that causes “anger, alarm or resentment . . . .”,130 thereby reaching beyond fighting words. “The mere fact that expressive activity causes hurt feelings, offense, or resentment does not

121. R.A.V., 505 U.S. at 380 (quoting St. Paul, Minn., Leg. Code § 292.02 (1990)).
122. Id. at 380.
123. Id. at 396.
124. Id. at 383.
126. R.A.V., 505 U.S. at 386.
127. Id. at 391.
128. Id. at 394.
129. Id. at 391.
130. Id. at 413 (White, J., joined by Blackmun, Stevens and O’Connor, JJ., concurring in the judgment) (citing In re Welfare of R.A.V., 464 N.W.2d 507, 510 (1991)).
render the expression unprotected."  
Although the Supreme Court has not overruled Chaplinsky, its more recent decisions make clear that offensive speech statutes are constitutional if written or narrowly construed to reach language spoken in a face-to-face context where the speech creates a likelihood of immediate violence.\footnote{132} Offensive speech that is claimed to cause emotional harm or otherwise offends the sensibilities of listeners is arguably no longer part of the definition of fighting words.\footnote{133} R.A.V. further limits restrictions on offensive speech by holding that even though "fighting words," as a category of speech, are outside the protection of the First Amendment, government is precluded by the Constitution from singling out for punishment what it thinks are particularly egregious forms of offensive speech.\footnote{134}

II. OFFENSIVE SPEECH AND THE PENNSYLVANIA DISORDERLY CONDUCT STATUTE

Pennsylvania, like most states, has sought to regulate offensive speech by means of its disorderly conduct statute. Prior to 1972, the disorderly conduct statute made it unlawful to make any "loud, boisterous and unseemly noise to the annoyance of the peaceable residents nearby . . . ."\footnote{135} In Commonwealth v. Greene,\footnote{136} the Pennsylvania Supreme Court construed "unseemly" as "not fitting or proper in respect to the conventional standards of organized society or a legally constituted community."\footnote{137} Under the statute, courts sustained convictions for disorderly conduct where defendants directed "vile,"\footnote{138} "abusive,"\footnote{139} or "foul"\footnote{140} language toward members of the public or the police.\footnote{141} Although a federal court refused to find the statute unconstitutionally vague,\footnote{142} Justice Cohen, in a concurring opinion in Greene, stated that he was "troubled by the imprecise and vague standards"\footnote{143} in the disorderly conduct statute and suggested that the legislature consider the disorderly conduct provision of the Model Penal Code\footnote{144} in subsequent

\footnote{131. Id. at 414.  
133. Cohen, 403 U.S. at 20; Hess, 414 U.S. at 107-108; see also Greenwalt, supra n. 90 at 59; Gard, supra n. 42 at 549.  
134. R.A.V., 505 U.S. at 386.  
137. Id. at 143.  
143. 189 A.2d at 147 (Cohen, J., concurring).  
144. Id. (referring to § 250.1 Model Penal Code, Tentative Draft No. 13 (1961)).
amendments to the Crimes Code.\footnote{145}

In 1972, the legislature enacted the current Crimes Code. Like other provisions of the Code, the disorderly conduct statute\footnote{146} is based upon the Model Penal Code.\footnote{147} The statute makes it unlawful, if "with intent to cause public inconvenience, annoyance or alarm or recklessly creating a risk thereof"\footnote{148} a person (1) "engages in fighting or threatening, or in violent or tumultuous behavior:"\footnote{149} (2) makes unreasonable noise;\footnote{150} (3) uses obscene language, or makes an obscene gesture;\footnote{151} or (4) creates a hazardous or physically offensive condition by any act which serves no legitimate purpose of the actor."\footnote{152} The term "public" is broadly defined to mean "affecting or likely to affect persons in a place to which the public" has access.\footnote{153} Disorderly conduct may be graded as either a misdemeanor or summary offense depending upon the actor's intent.\footnote{154} While the \textit{mens rea} portion of the statute and subsections (1) and (4) and part of subsection (2) of the statute follow the language of the Model Penal Code, the legislature did not adopt the language of the Model Code that prohibits a person from making an "offensively coarse utterance, gesture or display"\footnote{155} or addressing "abusive language to any person present...."\footnote{156} Instead, as noted above, the disorderly conduct statute in subsection (3) prohibits the use of "obscene language" or gestures. Although the Pennsylvania statute does not expressly prohibit the use of offensive speech, courts have sustained disorderly conduct convictions for offensive speech under the "unreasonable noise"\footnote{157} and "obscene language"\footnote{158} provisions of the statute.\footnote{159}

\begin{itemize}
\item \footnote{145} Greene, 189 A.2d at 147 (Cohen, J., concurring).
\item \footnote{146} 18 Pa.C.S.A. § 5503.
\item \footnote{147} Model Penal Code § 250.2 (ALI 1912).
\item \footnote{148} 18 Pa.C.S.A. § 5503(a).
\item \footnote{149} 18 Pa.C.S.A. § 5503(a)(1).
\item \footnote{150} 18 Pa.C.S.A. § 5503(a)(2).
\item \footnote{151} 18 Pa.C.S.A. § 5503(a)(3).
\item \footnote{152} 18 Pa.C.S.A. § 5503(a)(4).
\item \footnote{153} 18 Pa.C.S.A. § 5503(c).
\item \footnote{154} 18 Pa. C.S.A. § 5503(b).
\item \footnote{155} Model Penal Code § 250.2(1)(b).
\item \footnote{156} Id.
\item \footnote{157} 18 Pa.C.S.A. § 5503(a)(2).
\item \footnote{158} 18 Pa.C.S.A. § 5503(a)(3).
\item \footnote{159} The issue of offensive speech under the current disorderly conduct statute was first considered by the Superior Court in \textit{Commonwealth v. Hughes}, 410 A.2d 1272 (Pa. Super. 1979). It is not clear from the decision what provision of the statute Hughes was charged with violating. Hughes was arrested after she was refused admittance to a party. She subsequently crossed the street and began yelling "obscenities and threats" at the home where the party was being held. When the police arrived, Hughes continued to shout and yell at the officers. In affirming Hughes' conviction, the court held that the lower court could properly find the defendant guilty of disorderly conduct for shouting "threats and obscenities at members of the general public and police.... with reckless disregard of [the] clear risk of public inconvenience, annoyance or alarm...." \textit{Id.} at 1273.
\end{itemize}
A. Offensive Speech as Unreasonable Noise

The constitutionality of the disorderly conduct statute was first considered by the Pennsylvania Supreme Court in 1980 in Commonwealth v. Mastrangelo. Mastrangelo was convicted of obstructing the administration of law and of violating subsection (a)(2) of the disorderly conduct statute by making an "unreasonable noise." Mastrangelo had shouted at a meter maid who had ticketed his illegally parked car, calling her a "fucking pig" and had used similarly offensive language when the meter maid returned the following day. The meter maid testified that bystanders had observed Mastrangelo's conduct and that his actions had frightened her. Other than noting that Mastrangelo shouted at the meter maid, the facts do not reveal the volume at which Mastrangelo addressed his remarks to the meter maid. On appeal, Mastrangelo claimed that the statute was facially invalid on grounds of vagueness because the terms of the statute were imprecise and, in the alternative, the statute was invalid as applied to him.

The Pennsylvania Supreme Court began its analysis by noting that due process requires that penal statutes be drafted with sufficient clarity to provide notice of the conduct prohibited by the statute and that where a defendant claims that a statute is facially vague or overbroad in violation of the First Amendment, the statute is analyzed on its face and not in light of the facts of the defendant's own conduct. Noting that the case presented the first opportunity for the court to examine the constitutionality of the statute, the court stated that it was obligated to "narrow and limit" the statute in light of protections guaranteed by the federal and state constitutions.

160. 414 A.2d 54 (Pa. 1980), appeal dismissed, Mastrangelo v. Pennsylvania, 449 U.S. 894 (1980). Questions about whether provisions of the disorderly conduct statute are unconstitutionally vague and overbroad were initially raised in the context of constitutional challenges to § 5502 of the Crimes Code, 18 Pa.C.S.A. § 5502 which requires disorderly persons to disperse upon official order. In Commonwealth v. Cook, 361 A.2d 274 (Pa. 1976), the Pennsylvania Supreme Court vacated the order of the trial court declaring § 5502 unconstitutional on grounds of vagueness. The court concluded a remand was required because the record contained no facts concerning defendant's alleged violation of § 5502. Concurring in the remand, Justice Pomeroy noted that § 5502 must be read in para materia with the disorderly conduct statute and that the constitutionality of § 5502 depended upon the constitutionality of the incorporated provisions of the disorderly conduct statute. Justice Pomeroy noted that both the "unreasonable noise" and "use of obscene language" provisions of the statute "could give rise to colorable claims that the enforcement of the subsections could infringe on the exercise of the public's First Amendment freedoms..." Id. at 278. See also Commonwealth v. DeFrancesco, 393 A.2d 321 (Pa. 1978). Justice Roberts, dissenting from the Court's decision upholding the constitutionality of § 5502, stated that the provisions of the disorderly conduct "do not draw acceptably 'clear' lines" thus requiring the public to guess at the meaning of the terms in the statute with the result that individuals may "forego constitutionally protected conduct or speech." Id. at 334.

161. Mastrangelo, 441 A.2d at 55.

162. Id. at 56.

163. Id.

164. Id. (quoting Commonwealth v. Heinbaugh, 354 A.2d 244, 245 (1976)).

165. Id. at 57.
The court's narrowing construction of the statute began with the court noting that states "may enact laws to protect the peace" and that the present statute, unlike its predecessor, reaches only conduct where there is an unlawful intent to create a risk of public inconvenience "by making an unreasonable noise." Next, using the definition of "unseemly" from the prior disorderly conduct statute, the court defined "unreasonable noise" as "not fitting or proper in respect to the conventional standards of organized society or a legally construed community." Finally, the court stated that it believed that "a man of common intelligence would understand what is and what is not made criminal under [the] statute, especially after we now make clear that the disorderly conduct statute may not be used to punish anyone exercising a protected First Amendment right." Having so limited the statute, the court held that Mastrangelo's facial attack on the vagueness of the statute was without merit.

The court next turned to whether the statute was constitutionally applied to Mastrangelo. Citing only Chaplinksy, the court concluded that the words Mastrangelo directed to the meter maid in a "loud, boisterous and disorderly fashion" were "fighting words" and that under its "narrow construction" of the statute, there was no merit to the claim that the statute was unconstitutionally invalid as applied to him.

Justice Roberts, concurring and dissenting, argued that there was insufficient evidence to convict Mastrangelo of disorderly conduct because there was nothing in the record to support the finding that the words used produced "unreasonable noise." In Justice Roberts view, the prohibition against "unreasonable noise" was not intended to criminalize speech. Justice Flaherty, in dissent, argued that the statute remained unconstitutionally vague as "one must speculate as to its meaning and application."

A number of issues in Mastrangelo merit comment. First, noticeably missing from the court's analysis of the "unreasonable noise" section of the statute is reference to the Model Penal Code. As noted, the disorderly conduct statute tracks almost verbatim Section 250.2 of the Code. The

166. Id.
167. Id.
168. Id. at 58 (quoting Commonwealth v. Greene, 189 A.2d at 143).
169. Id.
170. Id.
171. Id.
172. Id. (citing Chaplinsky, 315 U.S. at 571-72).
173. Id.
174. Id.
175. Id at 60 (Roberts, J., concurring & dissenting).
176. Id. (Flaherty, J., dissenting).
177. 18 Pa.C.S.A. § 5503(a)(2).
Comment to Section 250.2 makes clear that the “unreasonable noise” provision is “concerned not with the content of speech but with its volume.”180 As Justice Roberts noted, there was nothing in the record to suggest that Mastrangelo’s words produced “unreasonable noise.”181 Clearly, it was what Mastrangelo said to the meter maid and not the volume of his speech that the majority found objectionable. As Justice Roberts correctly concluded, the “unreasonable noise” section of the disorderly conduct statute was “plainly not intended to criminalize speech . . . ”182

Second, the court failed to do what it said it was constitutionally “obligated”183 to do when confronted with a statute that is unconstitutionally vague, namely provide a limiting construction of the statute consistent with controlling Supreme Court precedent.184 The decision does not construe the “unreasonable noise” section of the statute in light of the Supreme Court’s post-Chaplinsky decisions in Cohen185 and Gooding.186 Specifically, the court failed to limit the statute to words “that have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed.”187 Instead, by defining “unreasonable noise” as “not fitting or proper in respect to the conventional standards of organized society,”188 the statute “sweeps too broadly.”189 Post-Chaplinisky Supreme Court cases establish that speech does not lose its protection under the First Amendment merely because it is not “fitting” or “proper.”190 Given the range of speech that is punishable under the court’s definition of “unreasonable noise” in Mastrangelo, there is no doubt that the statute remains “susceptible of application to protected expression”191 and is, therefore, unconstitutional. Moreover, the court’s definition of “unreasonable noise” is as vague as the term it defines, raising issues of both fair notice to speakers of what language is prohibited192 and the danger of arbitrary and discriminatory enforcement of the statute.193

180. Id. at Comment p. 346.
181. Mastrangelo, 414 A.2d at 60 (Roberts, J., concurring & dissenting).
182. Id. It is an accepted principle of statutory construction that a “court may not achieve an acceptable construction of a penal statute by reading into the statute terms that broaden its scope.” Commonwealth v. Booth, 766 A.2d 843, 846 (Pa. 2001); see also Commonwealth v. Fisher, 400 A.2d 1284, 1287 (Pa. 1979).
183. Id. Mastrangelo, 414 A.2d at 57.
184. Id.
187. Id. at 524.
188. Mastrangelo, 414 A.2d at 58 (citing Greene, 189 A.2d at 143).
189. Wilson, 405 U.S. at 527.
190. See e.g. Terminello, 337 U.S. 1; Street v. New York, 394 U.S. 576 (1969); Wilson, 405 U.S. 525; Lewis, 415 U.S. 130.
191. Wilson, 405 U.S. at 522.
193. Morales, 527 U.S. at 56; Kolender v. Lawson, 461 U.S. 352, 357 (1983); Houston v. Hill,
Lastly, the courts’ statement that the statute may not be used to punish speakers exercising rights protected by the First Amendment is not a limiting construction. It offers no guidance to either speakers or those charged with enforcing the statute. Rather, it is simply a restatement of established First Amendment precedent. The fact that the court concludes that the statute, as applied, was not unconstitutional because Mastrangelo’s speech constituted “fighting words” does not cure the vagueness of the statute. A finding that a defendant’s speech is unprotected is not a substitute for a narrowing construction of the statute. As noted above, the Supreme Court has remanded offensive speech cases where the state court failed to narrowly construe the statute and, instead, simply found that the words the speaker used were prohibited. The purpose of permitting a defendant to facially challenge an unconstitutional statute without demonstrating that his speech could not be punished by a properly limited statute is that the “continued existence of the statute in unnarrowed form... tend(s) to suppress constitutionally protected rights.” Notwithstanding the court’s claim in Mastrangelo to have limited subsection (a)(2) of the Pennsylvania statute, the subsection remains unconstitutionally vague requiring speakers to “speculate [as to] its meaning and application.”

The “unreasonable noise” provision of the statute has been considered by the Pennsylvania Superior Court in several post-Mastrangelo cases. In contrast to Mastrangelo, the Superior Court has viewed the provision as regulating the volume and not the content of speech. Although the issue of personally offensive speech as “unreasonable noise” has not been directly considered by the Superior Court and appellants have not challenged the constitutionality of the provision, the court has held that speech can not be punished as “unreasonable noise” merely because it is annoying. The court has emphasized that the disorderly conduct statute “must not be used as a catchall or dragnet for the prosecution of conduct that is uncivil, annoying or

482 U.S. 451, 465 (1986); Coates, 402 U.S. at 616.


195. Coates, 402 U.S. at 616 (“The details of the offense could no more serve to validate this ordinance than could the details of an offense charged under an ordinance suspending unconstitutionally the right of assembly and free speech.”); Gooding, 405 U.S. at 520 (“It matters not that the words appellee used might have been constitutionally prohibited under a narrowly and precisely drawn statute.”).


197. Coates, 402 U.S. at 620 (White, J., dissenting).

198. Mastrangelo, 414 A.2d at 60 (Flaherty, J., dissenting).


200. Gowan, 582 A.2d at 881.
irritating."\textsuperscript{201}

\section*{B. Offensive Speech as Obscene Language}

Following \textit{Mastrangelo}, the constitutionality of the disorderly conduct statute was next considered by the Superior Court in \textit{Commonwealth v. Pringle}.\textsuperscript{202} \textit{Pringle} was charged with violating subsection (a)(3) of the disorderly conduct statute which makes it unlawful to use "obscene language" when she shouted "goddamn fucking pigs"\textsuperscript{203} at police officers whom she believed were using excessive force in arresting a friend of hers. At trial, Pringle argued that the "obscene language" provision of the statute was facially unconstitutionally vague and overbroad. In addition, she claimed that the words she used were not obscene as defined by the United States Supreme Court in \textit{Miller v. California}.\textsuperscript{204} With respect to the vagueness of the statute, the arresting officers were asked at trial how they determined whether language was obscene. In response, one of the arresting officers testified that he defined "obscene language" as "not ordinary words that an ordinary individual would use."\textsuperscript{205} The other officer stated "If I can't use it against the public, then I would assume it is obscene ...."\textsuperscript{206} In affirming Pringle's conviction, the Superior Court rejected her argument that the "obscene language" provision of the statute had not been authoritatively construed to reach only unprotected speech holding that Pringle's claim had been "specifically examined and rejected"\textsuperscript{207} by the Pennsylvania Supreme Court in \textit{Mastrangelo}. The court also held that Pringle's reliance on \textit{Cohen v. California}\textsuperscript{208} and \textit{Hess v. Indiana},\textsuperscript{209} cases in which the United States Supreme Court held that the word "fuck" was not obscene because its use in those cases had nothing to do with sexual conduct, were "completely out of context"\textsuperscript{210} because Pringle's words were directed to police officers. Finally, the court concluded that the words Pringle used were "fighting words" within the meaning of \textit{Chaplinsky}\textsuperscript{211} because "by their very utterance they inflict injury."\textsuperscript{212}

As noted above, \textit{Mastrangelo} concerned section (a)(2) of the disorderly

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\textsuperscript{201} \textit{Gilbert}, 674 A.2d at 287.
\textsuperscript{203} \textit{Pringle}, 450 A.2d at 105.
\textsuperscript{204} 413 U.S. 15 (1973).
\textsuperscript{206} \textit{Id}.
\textsuperscript{207} \textit{Pringle}, 450 A.2d at 106.
\textsuperscript{208} 403 U.S. 15.
\textsuperscript{209} 414 U.S. 105 (1973).
\textsuperscript{210} \textit{Pringle}, 450 A.2d at 106.
\textsuperscript{211} 315 U.S. at 573.
\end{flushright}
conduct statute prohibiting the making of an "unreasonable noise." There is no discussion in Mastrangelo of section (a)(3) of the statute concerning the use of "obscene language." Clearly, Pringle's claims were not considered by the court in Mastrangelo. But even if Mastrangelo could be construed as providing a narrowing construction of the entire disorderly conduct statute, Mastrangelo was decided by the Pennsylvania Supreme Court after Pringle was charged and convicted of disorderly conduct. Consequently, Pringle, the arresting officers, and the trial court did not benefit from the Mastrangelo decision. Finally, the Superior Court's holding that Pringle's speech constituted "fighting words" because they inflicted injury upon the arresting officers ignores the Supreme Court's post-Chaplinsky decisions that exclude injury to an addressee's sensibilities as a permissible basis for punishing speech.

After the Pennsylvania Supreme Court declined to hear her appeal, Pringle sought habeas corpus relief in the federal courts. The district court denied relief holding that although the Pennsylvania courts had not provided the narrowed construction of the "obscene language" provision of the disorderly conduct statute, the provision was not unconstitutionally vague or overbroad. It also held that because Pringle's speech constituted "fighting words," the court was not required to reach the issue of whether the words were obscene.

The Third Circuit, in a per curium opinion, reversed the district court holding that the "obscene language" provision of the statute was unconstitutionally vague at the time of Pringle's conduct and charge and, therefore, her conviction violated her right to due process of law. The court held that even if the Pennsylvania Supreme Court's decision in Mastrangelo constituted a narrowing construction of the entire statute, an issue which the court specifically did not address or resolve, Mastrangelo was

213. The decision in Mastrangelo was rendered on April 28, 1980. Pringle was charged with disorderly conduct on September 28, 1979 and her trial in the Court of Common Pleas of Cumberland County occurred on April 1, 1980.


216. Pringle's petition for a writ of habeas corpus was initially dismissed by the district court on the grounds that a separate appeal of her sentence was pending in state court. Pringle v. Court of Common Pleas of Cumberland County, No. 83-0364 (M.D. Pa. June 30, 1983). The Third Circuit reversed the district court holding that petitioner had exhausted her federal constitutional claims in the Pennsylvania courts and remanded the case to the district court for consideration of the merits of the constitutional claims. Pringle v. Court of Common Pleas, 744 F.2d 297 (3d Cir. 1984).


decided after Pringle's conduct and charge and that the narrowed construction of the statute cannot be applied retroactively.\textsuperscript{219} Disagreeing with the district court, the court concluded that in the absence of a narrowing construction, the plain words of the "obscene language" section of the statute were unconstitutionally vague.\textsuperscript{220} The court concluded that Pringle did not know that at the time of her conduct that the word she used, though not found obscene in \textit{Hess v. Indiana},\textsuperscript{221} was in fact obscene in Pennsylvania if "spoken to cause a public disturbance \textit{and} directed to police officers."\textsuperscript{222} In other words, the statute "did not meet the constitutional requirements of adequate notice."\textsuperscript{223} The court noted that Pringle's claim that the statute remained unconstitutionally vague after \textit{Mastrangelo} and the Superior Court's decision was a matter that would need to be asserted by others in later prosecutions under the statute.\textsuperscript{224}

The issue of whether offensive words directed to the police constituted disorderly conduct was again considered by the Superior Court in \textit{Commonwealth v. Weiss}.\textsuperscript{225} Weiss was charged and convicted of violating subsection (a)(3) of the statute for directing allegedly obscene words to a police officer after the officer entered her home to arrest her husband.\textsuperscript{226} Weiss did not challenge the constitutionality of the statute. Rather, she argued that because the words she used were directed to the officer inside her home, the state failed to prove that her words were uttered with the intent to cause "public inconvenience, annoyance or alarm, or recklessly creating a risk thereof . . . ."\textsuperscript{227} In reversing her conviction on the grounds that the required intent under that statute was not established, the court distinguished \textit{Mastrangelo} and \textit{Pringle} as cases involving speakers who made offensive statements in public settings.\textsuperscript{228} The court further distinguished \textit{Mastrangelo} as a case brought under the "unreasonable noise" and not the "obscene language" provision of the statute.\textsuperscript{229} Even though a neighbor overheard the words Weiss used, the court held that vulgar language, "however distasteful or offensive to one's sensibilities" may not be punished merely because people nearby hear the words.\textsuperscript{220} Finally, the Court rejected an interpretation of the statute that would permit the punishment of offensive speech directed to police officers on grounds that such speech inflicts injury or causes officers to react in a violent manner to the speaker.\textsuperscript{231}

\textsuperscript{219} \textit{Id.} at 1002.
\textsuperscript{220} \textit{Id.}
\textsuperscript{221} 414 U.S. 105 (1973).
\textsuperscript{222} \textit{Pringle}, 778 F.2d at 1003 (emphasis in original).
\textsuperscript{223} \textit{Id.} at 1004.
\textsuperscript{224} \textit{Id.} at 1005 n. 9.
\textsuperscript{226} \textit{Id.} at 854.
\textsuperscript{227} \textit{Id.} at 854-55 (quoting 18 Pa.C.S.A. § 5503(a)).
\textsuperscript{228} Weiss, 490 A.2d at 855-56.
\textsuperscript{229} \textit{Id.} at 855 n. 2.
\textsuperscript{230} \textit{Id.} at 856. (citing \textit{People v. Douglas}, 331 N.E.2d 359, 363 (1975)).
\textsuperscript{231} Weiss, 490 A.2d at 855-56.
The Court found no risk that the officer would respond in a violent manner to Mrs. Weiss' "verbal assault" noting that officers are experienced in dealing with people in "emotionally charged situations . . . ."

The Superior Court returned to the issue of obscene speech as a basis for disorderly conduct in Commonwealth v. Bryner. Like Weiss, Bryner was also convicted of using "obscene language" in violation of subsection (a)(3) of the statute. However, unlike the facts in Weiss, Bryner's language, "go to hell, Betsy" was made in public in the presence of several hundred people. On appeal, Bryner argued that his words were neither obscene nor "fighting words." In reversing Bryner's conviction, the court noted that the word "obscene" had not been defined by the Superior Court in Pringle. Adopting the United States Supreme Court's definition of obscenity in Miller v. California, the court held that because Bryner's words did not "appeal to anyone's prurient interests," they were not obscene within the meaning of subsection (a)(3) of the disorderly conduct statute. The court concluded that it was not necessary to consider whether Bryner's words constituted "fighting words" because the issue involves a "separate and distinct analysis" which it did not have to reach because "subsection (a)(3) of the statute is narrowly drawn to prohibit only obscene words or gestures."

Bryner is significant because it is the first decision of a Pennsylvania court that defines the term "obscene" in the disorderly conduct statute. In addition, the decision makes clear that subsection (a)(3) does not apply to "fighting words" as the court had previously concluded in Pringle. Rather, a prosecution under subsection (a)(3) of the statute is limited solely to words or gestures that meet the Miller definition of obscenity.

232. Id.
233. Id. (quoting Commonwealth v. Bender, 375 A.2d 254, 359 (1977)).
235. Id. at 910-11 (quoting 18 Pa.C.S. § 5503(a)(3)).
236. Bryner, 652 A.2d at 911.
238. Bryner, 652 A.2d at 912 (quoting Miller, 413 U.S. at 24).
239. Id. at 912 n. 4.
240. See e.g. Commonwealth v. Kelly, 758 A.2d 1284 (Pa. Super. 2000) (stating that the court relied on Bryner in finding Kelly's offensive language and gesture directed to a city employee was not "obscene" within the meaning of Section 5503(a)(3)); Broackway v. Sheperd, 942 F. Supp. 1012 (M.D. Pa. 1996) (noting that while the court believed the intent of subsection (a)(3) of the statute was to prevent the use of offensive speech that could anger police officers or encourage others to interfere with their duties, subsection (a)(3) had been interpreted by the court in Bryner to reach only language or gestures that meet the Miller definition of obscenity); United States v. McDermott, 971 F. Supp. 939 (E.D. Pa. 1997) (concluding that the use of words "bullshit" and "fuck," while distasteful to the addressee, were not "obscene" under subsection (a)(3) of the statute because they were not sexual in nature); but see Russali v. Salisbury Township, 126 F. Supp.2d 821, 844-45 (E.D. Pa. 2000) (reviewing issue of qualified immunity determined on basis of case law prior to Hock).
C. Offensive Speech as Fighting or Threatening Behavior

In addition to the "unreasonable noise" and "obscene language" provisions of the statute, offensive speech has also been prosecuted as a violation of subsection (a)(1) of the statute that prohibits "fighting or threatening" behavior. In Commonwealth v. Hock, the Pennsylvania Supreme Court considered the issue of offensive speech directed toward a police officer.

After being questioned by a police officer concerning whether she was driving without a valid driver's license, Hock exited her car and in walking away from the officer who was seated in his vehicle, said to the officer "Fuck you, asshole." The officer exited his vehicle and told Hock that she was under arrest. Hock walked away from the officer and entered her apartment building at which time a struggle ensued causing minor injuries to the officer. Hock was subsequently charged with resisting arrest as well as disorderly conduct. The trial court dismissed the charges concluding that there was no probable cause to arrest Hock for disorderly conduct and, therefore, no basis for the resisting arrest charge.

The Superior Court reversed, finding that the officer had probable cause to arrest Hock for her failure to produce her driver's license and for the offensive remark she addressed to the officer. Even though the court noted that the disorderly conduct charge was not based on the words she addressed to the officer, the court nonetheless concluded that on the basis of Mastrangelo and Pringle, Hock's remark constituted "fighting words." In addition, the court held that her insult and refusal to obey the command of the officer constituted "fighting... behavior" in violation of subsection (a)(1) of the statute. The court's holding was based on the fact that Hock's remark was made in a public place and any violent response by the officer would have affected a passersby thereby creating public alarm. The court rejected the holdings of some state courts that offensive speech directed to police officers does not constitute disorderly conduct because of the training.

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242. 18 Pa.C.S.A. § 5503(a)(1).
243. 728 A.2d 943, 944 (Pa. 1999); see generally Commonwealth v. DeLuca, 597 A.2d 1121, 1123 (Pa. 1991) (concluding that the defendant had engaged in disorderly conduct when he told officers to "Get out of my f____ way" because he had "recklessly created a risk of public alarm, annoyance or inconvenience").
244. Hock, 728 A.2d at 944.
245. Id.
246. Id.
247. Id. at 945 (stating that the disorderly conduct charge was under subsection (a)(4) of the statute for creating a "hazardous or physically offensive condition" based upon Hock's struggle with the officer during the arrest).
248. Id. at 944-45.
250. Id. at 228.
251. Hock, 696 A.2d at 228.
252. Id. (quoting § 5503 (a)(1)).
253. Hock, 696 A.2d at 228.
officers receive and their duty not to retaliate. Finding such an approach not “appropriate for Pennsylvania,” the court concluded that addressing “fighting words” to a police officer has no less legal significance than speech addressed to a layperson. Because the officer had probable cause to arrest Hock for the words she addressed to him, the court concluded that her conduct in resisting arrest was unlawful.

In reversing the Superior Court, the Supreme Court rejected the Commonwealth’s contention that the officer had probable cause to arrest Hock because her offensive speech constituted “fighting words” in violation of subsection (a)(1) of the statute. The court found that Mastrangelo was not controlling because Hock’s speech involved a single epithet delivered in a normal tone of voice which did not alarm the officer and was spoken in a location where others were not present. Noting that in determining whether speech constitutes “fighting words” the circumstances surrounding the use of the words must be considered, the court concluded that Hock’s single comment did not risk an immediate breach of the peace. The court also rejected the Superior Court’s view that Hock’s words were punishable on the grounds that the officer might have reacted in a violent manner. Adopting the position of other state courts, the court held that because the police have a duty to enforce the law “there is reason to presume that they will not violate the law.” Construing the statute narrowly, the court concluded that it may not be used as a “vehicle to protect the police from all verbal indignities, especially under the dubious hypothesis that officers are likely to break the law when affronted.” Finally, the court noted that a per se ban of the words Hock used would “implicate substantial First Amendment concerns.”

In a dissenting opinion, Justice Castille argued that under subsection (a)(1) of the statute a person engages in disorderly conduct if, in a public place, he or she directs vulgar and offensive words to the police. Hock’s speech constituted “fighting words” even though her words were not shouted and others were not present because, if the words had been addressed to a layperson, the words would have had a “direct tendency to incite” an act of

255. Hock, 696 A.2d at 229.
256. Id. at 230.
257. Hock, 728 A.2d at 947.
258. Id. at 946.
259. Id. at 947.
260. Id.
261. Id.
262. Id. at 947 (citing Blakemore, 305 N.E.2d at 689).
263. Hock, 728 A.2d at 947.
264. Id. at 947 n. 4.
violence.\textsuperscript{265} In short, Justice Castille's view is that fighting words directed to a police officer have the same legal significance as those directed to others.

_Hock_ significantly limits the prosecution of offensive speech directed to police officers. While the court in _Hock_ did not limit subsection (a)(1) of the statute to "fighting words" defined by post-_Chaplinsky_ decisions, the decision rejects a central premise of the "fighting words" doctrine as applied to police officers. Specifically, it rejects the idea that the danger of reflexive violence by the officer is, by itself, an acceptable basis to punish the use of offensive speech as disorderly conduct. Moreover, _Hock_ implicitly rejects the view that injury to a police officer's sensibilities is grounds to punish the use of offensive speech under the disorderly conduct statute. Instead, in determining whether offensive speech directed to police officers constitutes disorderly conduct, _Hock_ adopts a fact specific standard that requires consideration of the circumstances surrounding the use of the offensive words including the presence or absence of bystanders and the manner in which the words were delivered.

III. OFFENSIVE SPEECH POST-_BRYNER_ AND _HOCK_ AND A PROPOSAL FOR CONSTRUING THE "FIGHTING OR THREATENING" PROVISION OF THE STATUTE

As the discussion in Part II indicates, the Pennsylvania legislature did not adopt the language of the Model Penal Code that specifically addresses the use of offensive speech when it enacted the current disorderly conduct statute. Nonetheless, courts have sustained convictions for the use of offensive speech under provisions of the statute not intended to prohibit such speech. While courts continue to cite to _Mastrangelo_ for the principle that the statute prohibits the use of "fighting words," the court in _Mastrangelo_ did not narrowly construe the statute's prohibition against "unreasonable noise" to apply to "fighting words" as defined in post-_Chaplinsky_ decisions. Instead, the court simply concluded that, as applied, Mastrangelo's language constituted fighting words. Nor is such a limiting construction found in the _Hock_ decision with respect to subsection (a)(1) of the statute which prohibits "fighting or threatening."

In contrast to subsections (a)(1) and (a)(2) of the statute, subsection (a)(3) of the statute prohibiting the use of "obscene words" has been narrowly construed in _Bryner_ to reach only speech that meets the _Miller_ definition of obscenity. In so limiting subsection (a)(3), _Bryner_ de facto overrules _Pringle_. By requiring the prosecution to prove that the defendant's words meet the _Miller_ definition of obscenity, _Bryner_ effectively ends the use of subsection (a)(3) as a vehicle to punish offensive speech because it is unlikely that the use of vulgar or disrespectful language would ever meet the three-part _Miller_ definition of obscenity.\textsuperscript{266} As a result, it is likely that future

\textsuperscript{265} Id. at 949 (Castille, J., dissenting).

\textsuperscript{266} Miller, 413 U.S. at 24.
offensive speech cases will continue to be prosecuted as violations of either the "unreasonable noise" or "fighting or threatening" provisions of the statute.

A. Unreasonable Noise

Where a speaker is charged with offensive speech under the "unreasonable noise" provision of the statute, a court should, consistent with the intent of the Model Penal Code, limit its consideration to the volume of the speech and not its content. Such an approach is required by both the Crimes Code which states that penal statutes "be construed according to the fair import of their terms..." and the general rule of construction that penal statutes are to be strictly construed. Applying the "unreasonable noise" provision of the statute to punish offensive speech on the basis of content conflicts with both the intent of the provision and the fundamental principle of due process that requires that statutes provide fair notice of conduct proscribed.

Although not in the context of offensive speech, the Superior Court, in a number of post-Mastrangelo cases involving "unreasonable noise," has limited its consideration to the volume and not the content of the speech in question. In Commonwealth v. Gilbert, for example, the defendant was charged with making an "unreasonable noise" when he disagreed with a police officer who intended to tow his neighbor's car. In reversing the conviction, the court found that the defendant's speech was not "especially loud" and did not incite the neighbors, or endanger the police. Addressing the mens rea requirement of the statute, the court held that the Commonwealth had failed to prove that the defendant acted with the "intent to cause or risk a public inconvenience, annoyance or alarm" as required by the statute. Instead, all the Commonwealth proved was that the officer was annoyed by the content of defendant's speech, namely his expression of

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268. 18 Pa.C.S.A. § 105; Commonwealth v. Williams, 579 A.2d 869, 871 (Pa. 1991) (stating that "[w]hen interpreting a provision of the Crimes Code that contains language susceptible to differing constructions, it is proper to consider the purpose of the particular provision involved.").
269. 1 Pa.C.S.A. § 1928(b)(1); United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95 (1820) (stating that "[t]he rule that penal laws are to be construed strictly is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals... ").
270. Connally v. General Construction Co., 269 U.S. 385, 391 (1926) (stating "[t]hat the terms of a penal statute... must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a recognized requirement, consonant with ordinary notions of fair play and the settled rules of law."); see United States v. Powell, 423 U.S. 87, 92 (1975); Commonwealth v. Barud, 681 A.2d 162, 165 (Pa. 1996); Commonwealth v. Aunbaugh, 354 A.2d 244, 246 (Pa. 1976).
272. Id. at 286.
273. Id.
disagreement with the officer’s intention to tow the neighbor’s car. Intent, the court concluded, cannot be inferred from the officer’s annoyance with the content of the defendant speech. In addition, the court found that the defendant’s speech was not “inconsistent with neighborhood tolerance or standards” noting that the prohibition against unreasonable noise is directed at the volume and not the content of speech.

The court employed a similar analysis in Commonwealth v. Gowan in which defendants were charged with making unreasonable noise while preaching in a loud voice in a public park. In reversing the disorderly conduct conviction, the court noted that with respect to the defendant’s speech, there is a “wide range of subjective acceptance or rejection of the message which colors the degree of tolerance people will have of the volume of the delivery.” The court concluded that the treatment of the defendant’s religious speech as “unreasonable noise” in the lower court depended more on the content of their speech and their appearance “than on the actual noise produced.” “Mere annoyance to the public...” on the basis of content, the court held, is insufficient to establish that the defendants made an unreasonable noise. While neither Gilbert nor Gowan involved the use of personally offensive words, the Superior Court’s analysis should be adopted if offensive speech is prosecuted as unreasonable noise: the provision should be construed narrowly to apply only to the volume and not the content of the speech.

B. Fighting or Threatening

Hock is the first case to consider offensive speech under the “fighting or threatening” provision of the statute. The decision provides little guidance to speakers and those charged with enforcing the statute. Hock limits the use of subsection (a)(1) as a means to punish offensive speech directed at a police officer because it rejects the notion that such speech will cause the officer to react violently. The court’s holding that Hock’s speech did not constitute disorderly conduct, however, was based on the specific facts of the case, namely that Hock’s words were said once, in a normal tone of voice to the officer, and not in the presence of bystanders. What is not clear is what change in the Hock facts will make speech subject to punishment as disorderly conduct? If bystanders are present, must the prosecution establish that the bystanders overheard the offensive remark? Is the prosecution required to establish conduct on the part of the bystanders as the result of overhearing the words addressed to the officer and, if so, what type of

274. Id.
275. Id.
276. Id. at 287.
278. Id. at 882.
279. Id. at 883.
280. Id.
281. 18 Pa.C.S.A. § 5503(a)(1).
conduct will cause the speaker to be subject to punishment under the statute? If the defendant repeats the epithet without changing his tone of voice, is the speech proscribable? Finally, Hock was decided in the context of a police officer as addressee and offers no guidance in deciding a subsection (a)(1) case involving offensive speech directed at a layperson.

Subsection (a)(1) of the statute uses the precise language of Section 250.2 (1)(a) of the Model Penal Code. The Commentary to the Code states that the provision was intended to reach various forms of conduct including public brawling, threatening and other generic forms of violent conduct. Nothing in the Commentary suggests that this provision was intended to prohibit the use of “fighting words” or otherwise regulate the use of offensive speech. Because the provision, unlike section (a)(3), has not been given a narrowing construction, charging a speaker with “fighting or threatening” who does no more than use offensive speech in a public setting, presents a substantial question of whether the provision provides fair notice of what speech constitutes disorderly conduct. In response to a challenge that as applied to offensive speech, the “fighting or threatening” provision of the statute is unconstitutionally vague, a court should decline to construe the provision to prohibit “fighting words.” The provision was not intended to prohibit offensive speech and because the legislature, in declining to adopt the language of the Model Code that specifically addresses offensive speech, evidenced an intent not to prohibit “fighting words.” Moreover, a “fighting words” construction would not apply in the case of offensive speech addressed solely to police officers because Hock rejects the central premise of the “fighting words” doctrine, namely that the police will act violently in response to verbal insults. Such a construction would also not provide guidance in determining when offensive speech, addressed in the presence of police, constitutes disorderly conduct.

Instead of a “fighting words” construction of section (a)(1), Hock interprets the statute as prohibiting words only where “they cause or unjustifiably risk a public disturbance.” The court’s focus on the circumstances surrounding the use of the offensive words for the purposes of determining whether the words had a “direct tendency to cause acts of violence,” suggests a narrowing construction of the provision and the statute’s mens rea language based upon the United States Supreme Court’s decision in Brandenburg v. Ohio, the Court’s modern articulation of the clear and present danger test. In Brandenburg, the Court held that the First

282. 18 Pa.C.S.A. § 5503(a)(1); Model Penal Code § 750.2(1)(a) (both stating “engages in fighting or threatening, or in violent or tumultuous behavior”).
284. See Commonwealth v. Spotz, 711 A.2d 580, 590 (Pa. 1998); Krusz v. Maximconis, 70 A.2d 329, 331 (Pa. 1950); In re Hancock, 719 A.2d 1053 (Pa. Super. 1998) (recognizing a principle of statutory construction that a court may not supply omissions in a statute where it appears that the matter may have been intentionally omitted by the legislature).
285. Hock, 728 A.2d at 946.
286. Id. (quoting Lamar v. Banks, 684 F.2d 714, 718 (11th Cir. 1982)).
Amendment does not protect speech "directed to inciting or producing imminent lawless action and is likely to incite or produce such action."\textsuperscript{288} The "directed to" language in \textit{Brandenburg} implies that the speaker's purpose in using the words in question is to produce imminent lawless action.\textsuperscript{289} The \textit{Brandenburg} test takes into consideration both the content of the words used and the circumstances surrounding their use in determining the likelihood of imminent lawless action.\textsuperscript{290} Although the clear and present danger test was developed in the context of the risk of unlawful conduct by persons sympathetic to the speaker's view,\textsuperscript{291} the test clearly has application to offensive speech because in both cases the concern is the commission of unlawful acts.\textsuperscript{292} A \textit{Brandenburg} construction of subsection (a)(1) would apply to offensive speech directed to either the police or members of the public.

Under the proposed construction, a court initially determines whether the offensive words were spoken with intent to provoke an immediate act of violence by examining the circumstances in which the words were used including the actual words spoken, how the words were expressed, the conduct of the defendant at the time the words were spoken, and what, if anything, the speaker said or did before using the words in question. Neither words used to cause "public inconvenience" or "annoyance," nor words uttered out of frustration, disappointment or exasperation, constitute disorderly conduct under the proposed narrowing of (a)(1). Even direct personal insults would not constitute disorderly conduct if the speaker did not use the words to provoke violence. When the required intent is established, the use of offensive speech would constitute disorderly conduct only if it was established that, in light of all the circumstances, it was likely that violence was imminent. Under this prong of the proposed construction, where offensive speech is addressed to a police officer, the focus, in light of \textit{Hock}, would be solely on the imminence of violence on the part of bystanders who overheard the speech in question. When such speech is addressed to a member of the public, the speech would constitute disorderly conduct only if the words were likely to cause the person addressed or others who overheard the remarks to make an immediate violent response.

While such a construction of subsection (a)(1) may result in some offensive speech not being punished that would arguably constitute

\textsuperscript{288} Brandenburg, 395 U.S. at 447.
\textsuperscript{289} See Greenwalt, supra n. 42 at 207.
\textsuperscript{292} See Michael J. Mannheimer, \textit{The Fighting Words Doctrine}, 93 Colum.L.Rev. 1527, 1549 (1993); Lawrence H. Tribe, \textit{The American Constitutional Law} § 12-8, at 838 (discussing relationship between offensive speech and the clear and present danger test).
disorderly conduct under a "fighting words" construction of the provision, the proposed construction provides a constitutional basis to punish offensive speech that does not meet the Supreme Court's post-\textit{Chaplinsky} definition of "fighting words." As an example, offensive speech not addressed in a face-to-face manner would constitute disorderly conduct under the construction if the words were spoken with the intent to provoke violence and there was a likelihood of imminent violence by someone who heard the words in question. Or, in the case of offensive speech directed to a police officer, the speech would constitute disorderly conduct even though the officer is trained not to react violently if the words were likely to incite immediate violent acts on the part of third parties present when the words were spoken. In addition, in light of \textit{Hock}, the proposed construction would obviate the need for separate constructions of (a)(1) depending on whether the addressee is a police officer or a member of the public. Finally, because the focus of the proposed construction is the actual likelihood of imminent violence brought about by the use of offensive speech, it is consistent with what the Pennsylvania Supreme Court has often stated is the "cardinal feature of the crime of disorderly conduct," namely "public unruliness which can or does lead to tumult or disorder."  

CONCLUSION

Shortly after the enactment of the disorderly conduct statute, various members of the Pennsylvania Supreme Court questioned whether the enforcement of the statute infringed upon the exercise of First Amendment rights. Their specific concern was that the statute failed to provide fair notice of what speech was prohibited and, as a result, both the public and the police were left to "guess" as to the meaning of the statute. The same concern remains today. Although Pennsylvania courts have decided a number of cases involving the public use of vulgar or insulting language under the disorderly conduct statute, courts have not addressed the vagueness and overbreadth of the statute by providing a narrowing construction consistent with decisions of the United States Supreme Court.

Uncertainty about the meaning of the statute has resulted in the prosecution of some speakers for the use of offensive language under the statute generally or as a violation of the statute's prohibition against the making of an "unreasonable noise." Others were being charged with using

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\item 293. \textit{See supra} n. 90 (and accompanying text) (noting there is disagreement among commentators over whether post-\textit{Chaplinsky} decisions changed the focus of a "fighting words" inquiry from the average addressee to the actual addressee. If the standard remains an objective one, assuming a properly narrowed statute, offensive words may be punished as "fighting words" without determining whether violence on the part of the actual addressee was, in fact, imminent. This is precisely the determination that must be made under a \textit{Brandenburg} construction of the statute).
\item 295. \textit{E.g. Hock}, 728 A.2d at 947 n. 4.
\item 296. Model Penal Code § 250.2 (1962).
\end{itemize}
"obscene language," or engaging in "fighting or threatening" behavior. While the Pennsylvania Supreme Court in \textit{Hock}, the court's most recent case involving offensive speech, rejected reflexive violence on the part of police officers as a basis upon which to punish the use of such speech, the decision, like earlier decisions, does not address the statute's failure to provide fair notice to speakers of what language is prohibited.

In light of recent post-\textit{Pringle} decisions by the Superior Court limiting the "obscene language" provision of the statute to speech that meets the definition of obscenity in \textit{Miller v. California}, it is likely that future offensive speech cases will come to the courts under the "unreasonable noise" or "fighting or threatening" provisions of the statute, both provisions adopt, verbatim, the Model Penal Code. Based upon the Comments to the Model Penal Code, the "unreasonable noise" provision should be limited solely to a consideration of the volume and not the content of the speech in question. Limiting the "unreasonable noise" provision in this manner and assuming courts will continue to construe the "obscene language" provision to reach only that category of offensive speech that appeals to the prurient interest, will, in time, result in offensive speech in the form of personally insulting words being charged only under the "fighting and threatening" provision of the statute. To constitutionally apply the "fighting or threatening" provision of the statute to offensive speech, a court must narrowly limit the statute. While the provision could be construed to reach only speech that meets the United States Supreme Court's post-\textit{Chaplinsky} definition of "fighting words," the Pennsylvania Supreme Court's decision in \textit{Hock} rejecting "fighting words" as a basis to punish offensive speech directed to a police officer suggests a construction in which offensive speech would constitute disorderly conduct only where the speaker used the words with the intent to provoke an immediate act of violence, and under circumstances in which the words "were likely to incite or produce" violent action. Such a narrowing construction would provide speakers with fair notice of the speech proscribed by the statute and finally resolve the constitutional concerns about the statute first raised more than twenty-five years ago.