NOTES

FIGHTING WORDS AT THE FOUNDING

"God hates you wicked baby killing whores,"[1] "cocksucker,"[2] "fucking cunt,"[3] and "shut your fucking mouth, you bitch"[4] are statements that start fights. In 1791, it was similarly inflammatory to call someone a "drunkard,"[5] "liar,"[6] "puppy,"[7] "blackguard,"[8] "companion for negroes,"[9] or (more ambitiously) a "cuckoldly knave."[10] Modern law labels speech that, in context, tends to provoke immediate violence "fighting words."[11] This kind of expression was proscribable in 1791 and is subject to content-based regulation today.

At the Founding, speakers of fighting words were indictable only if they intended to cause violence.[12] Yet today, Americans who speak fighting words without any intention of causing a fight routinely face criminal sanctions. The Supreme Court has yet to rule definitively on whether the First Amendment requires that the government prove mens rea to punish the speaker of a fighting word. But in the lower courts, nearly every defendant prosecuted for speaking a fighting word faces strict liability: Her interior mental state is irrelevant.[13] That approach breaks with the uniform practice of the common law at the time the nation ratified the First Amendment.

The difference matters. In 2001, Paul Graham was upset with the way police officers had detained a state fair attendee.[14] After calling one of the officers a "bald-headed dick with ears," he was arrested.[15] In 1791, Graham could have argued his words merely "proceed[ed] from sudden heat and passion"[16] and that he lacked intent to fight the policeman.[17] That defense no longer exists, and Graham's conviction stood

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1 Bethel v. City of Mobile, No. CIV.A. 10-0009-CG-N, 2011 WL 1298130, at *2 (S.D. Ala. Apr. 5, 2011).

2 State v. Broadstone, 447 N.W.2d 30, 32 (Neb. 1989).

3 State v. Dugan, 303 P.3d 755, 759 (Mont. 2013).

4 State v. Hammersley, 10 P.3d 1285, 1287 (Idaho 2000).

5 King's Case (1588) 78 Eng. Rep. 345, 345; 1 Cro. Car. 86, 86 (KB).

6 Commonwealth v. Clap, 4 Mass. (3 Tyng) 163, 163 (1808).

7 Commonwealth v. Hart, 29 Ky. (6 J.J. Marsh.) 119, 119 (1831).

8 Rex v. Philipps (1805) 102 Eng. Rep. 1365, 1365; 6 East. 464, 465 (KB).

9 *Hart*, 29 Ky. (6 J.J. Marsh.) at 122.

10 Gobbet's Case (1633) 79 Eng. Rep. 897, 897; Cro. Car. 339, 339 (KB).

11 Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942).

12 *See, e.g.*, State v. Farrier, 8 N.C. (1 Hawks) 487, 489 (1821).

13 *See, e.g.*, *In re* Cesar V., 192 Cal. App. 4th 989, 998–99 (2011); Lamar v. Banks, 684 F.2d 714, 718 (11th Cir. 1982).

14 State v. Graham, No. 2007-105, 2008 WL 2793859, at *1 (Vt. Apr. 1, 2008).

15 *Id.*

16 JAMES SULLIVAN, A DISSERTATION UPON THE CONSTITUTIONAL FREEDOM OF THE PRESS IN THE UNITED STATES 12 (Boston, Joseph Nancrede 1801).

17 *See, e.g.*, *Ex parte* Chapman (1836) 111 Eng. Rep. 974, 974; 4 Ad. & E. 773, 773–74 (KB).

on appeal.[18] Just after noon in late 2009, a young man flashed a Sureño gang sign at a rival Norteño gang member.[19] California indicted him for challenging the Norteño to a fight.[20] In 1791, the defendant could have argued that he had not flashed the sign with intent to cause actual violence: He knew "there was a girl in the car"[21] with the Norteño and figured "there won't be a gang fight when [a] girl [is] present."[22] But today, that argument is worthless. The conviction was affirmed.[23]

The fighting words doctrine lives. In *Counterman v. Colorado*,[24] seven Justices joined opinions observing that the "Court has not upheld a conviction under the fighting-words doctrine in 80 years."[25] But the doctrine's batting average at the Supreme Court is a poor proxy for its practical vitality; most fighting words cases get nowhere near trial, much less the nation's apex tribunal. The doctrine is still good law.[26] Armed with the power to punish insulting speech, prosecutors have descended on misguided and overzealous expression like bees on lavender.[27]

Because the Supreme Court has yet to resolve the issue, the mens rea that the government must show to prosecute the speaker of a fighting word is an open question.[28] This Note argues that if the common law of 1791 is relevant to the scope of the First Amendment, it offers a single simple rule: No speaker can be punished for a spoken fighting word unless he specifically intended to cause violence. Part I describes the

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18 *Graham*, 2008 WL 2793859, at *2.

19 *In re* Cesar V., 192 Cal. App. 4th 989, 991–92 (2011).

20 *See id.* at 993–94.

21 *Id.* at 992–93.

22 *Id.* at 993.

23 *Id.* at 999.

24 143 S. Ct. 2106 (2023).

25 *Id.* at 2116 n.4; *accord id.* at 2131 n.10 (Sotomayor, J., concurring in part and concurring in the judgment) (quoting ERWIN CHEMERINSKY, THE FIRST AMENDMENT 1094 (6th ed. 2019)).

26 *See* Mahanoy Area Sch. Dist. v. B. L., 141 S. Ct. 2038, 2046 (2021) (citing Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)) (relying on *Chaplinsky*'s fighting words holding).

27 Even restricting the inquiry to decisions of the last few decades, there are hundreds of reported cases. *See, e.g.*, David L. Hudson, Jr., Essay, *The Fighting Words Doctrine: Alive and Well in the Lower Courts*, 19 U.N.H. L. REV. 1, 6–17 (2020) (collecting over a dozen cases). *See generally* Kimberly J. Winbush, Annotation, *"Fighting Words" Supporting Charges Under State Disorderly Conduct Laws*, 72 A.L.R.7th Art. 2 (2022) (collecting more than three hundred cases). Fighting words also supply probable cause for initial seizures, *see, e.g.*, Collins v. State, No. 04-00-00585-CR, 2001 WL 1131413, at *1 (Tex. App. Sept. 26, 2001) (citing, inter alia, Sacher v. United States, 341 U.S. 1, 16 (1952) (Black, J., dissenting)), and support qualified immunity defenses against § 1983 suits alleging violations of the First Amendment, *see, e.g.*, Gilles v. Davis, 427 F.3d 197, 205 (3d Cir. 2005) ("[A]re you a bestiality lover[?]").

28 *Compare Counterman*, 143 S. Ct. at 2134 (Barrett, J., dissenting) (citing, inter alia, *Chaplinsky*, 315 U.S. at 572–73) (strict liability), *with id.* at 2116 n.4, 2117 n.5 (majority opinion) (disagreeing obliquely), *with id.* at 2131 n.10 (Sotomayor, J., concurring in part and concurring in the judgment) (disagreeing more squarely), *with* FCC v. Pacifica, 438 U.S. 726, 745 (1978) (plurality opinion) (citing *Chaplinsky*, 315 U.S. at 572) (purpose), *with* Eugene Volokh, *The Freedom of Speech and Bad Purposes*, 63 UCLA L. REV. 1366, 1404 (2016) (negligence). Multiple Justices wondered aloud when the Court heard oral argument in *Counterman*. *See* Transcript of Oral Argument at 7, 47, *Counterman*, 143 S. Ct. 2106 (No. 22-138), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2022/22-138_986b.pdf [https://perma.cc/UX3U-GRAQ].

proscribable categories, the constitutionally mandatory mens reas attached to them, and the uncertainty surrounding the mens rea for fighting words. Part II discusses the wrongful mental states attached to the eighteenth and early nineteenth-century regulations that would today fall within the fighting words doctrine. It finds that all plausible analogues required intent to cause violence. A final section concludes.

I. FIGHTING WORDS AND MENS REA TODAY

A. The Origin of the Proscribable Categories and the Core Definition of Fighting Words

The Supreme Court's decision in *Chaplinsky v. New Hampshire*[29] provides the architecture of the modern proscribable categories[30] and an enduring definition of fighting words. Walter Chaplinsky called a city marshal "a God damned racketeer and a damned Fascist."[31] Arrest followed.[32] On appeal, the Court famously declared that certain categories of speech are unprotected by the First Amendment and that "fighting words" are such a category:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting *or "fighting" words — those which by their very utterance inflict injury*[33] *or tend to incite an immediate breach of the peace*.[34]

The Court then approved the statute of conviction as construed by the New Hampshire Supreme Court, arguing it "does no more than prohibit the face-to-face words plainly likely to cause a breach of the peace by the addressee, words whose speaking constitute a breach of the peace by the speaker."[35]

Chaplinsky has become the skeleton of the modern First Amendment. In 1942, content neutrality simply was not part of speech doctrine.[36] But the seeds had been sown by the dissents and concurrences

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[29] 315 U.S. 568 (1942).

[30] *See, e.g.*, United States v. Stevens, 559 U.S. 460, 468–69 (2010) (citing, inter alia, Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 127 (1991) (Kennedy, J., concurring in the judgment)) (organizing obscenity, defamation, fraud, incitement, and speech integral to criminal conduct as classes proscribable within *Chaplinsky*'s framework).

[31] *Chaplinsky*, 315 U.S. at 569.

[32] *See id.* at 570.

[33] The "inflict injury" prong of *Chaplinsky*'s definition of fighting words was eliminated in *Cohen v. California*. *See* 403 U.S. 15, 20 (1971); John Hart Ely, Comment, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1493 (1975).

[34] *Chaplinsky*, 315 U.S. at 571–72 (emphasis added) (footnote omitted) (citing ZECHARIAH CHAFEE, FREE SPEECH IN THE UNITED STATES 149 (1941)).

[35] *Id.* at 573.

[36] Jud Campbell, *The Emergence of Neutrality*, 131 YALE L.J. 861, 915 (2022).

filed in *Abrams v. United States*,[37] *Gitlow v. New York*,[38] and *Whitney v. California*.[39] Within three decades of *Chaplinsky*, the Court would equate content neutrality with "the Freedom of Speech"[40] itself: "The First Amendment *means* that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[41] Today, because most content-based regulation of non-proscribable speech receives strict scrutiny, the scope of the proscribable categories is often outcome determinative.[42]

B. Mens Reas and the Proscribable Categories

Mens rea requirements provide further protection even within the unprotected categories. The First Amendment often shields speakers who lack a wrongful mental state as to the characteristic that renders their speech proscribable.[43] Thus, a public figure suing for libel cannot recover damages unless the defendant was at least reckless as to the falsity of his statement.[44] The reason for these rules is that ambiguity as to the scope of the proscribable categories chills protected speech. Uncertainty proxies powerfully for state censorship; if a speaker cannot tell whether her words are punishable, she has strong incentives to cover her own mouth.[45] Zones of proscribable and non-proscribable speech are "often separated . . . only by a dim and uncertain line,"[46] so scienter requirements create a buffer at the frontiers of protected expression.[47]

Mens rea requirements correspond to the social value of the proscribable categories.[48] Although requiring a wrongful mental state preserves the vibrancy of protected speech, it also leaves unprotected expression unregulated.[49] The net benefit of mens rea is thus increasing with the speech's proximity to core political expression. The law is organized accordingly. Seditious advocacy borders on political activism and thus cannot be punished without specific intent to cause lawless conduct.[50] Obscenity is more distant from core political speech, so knowledge (or

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37 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

38 268 U.S. 652, 673 (1925) (Holmes, J., dissenting).

39 274 U.S. 357, 372–76 (1927) (Brandeis, J., concurring).

40 U.S. CONST. amend. I.

41 Police Dep't of Chi. v. Mosley, 408 U.S. 92, 95 (1972).

42 *See, e.g.*, United States v. Stevens, 559 U.S. 460, 468–70 (2010).

43 *See, e.g.*, Smith v. California, 361 U.S. 147, 150–51 (1959) (citing Speiser v. Randall, 357 U.S. 513, 528–29 (1958); Near v. Minnesota, 283 U.S. 697, 712–13 (1931)).

44 New York Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964).

45 *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974).

46 Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 66 (1963).

47 *See, e.g.*, Hustler Mag., Inc. v. Falwell, 485 U.S. 46, 52 (1988).

48 *See* Counterman v. Colorado, 143 S. Ct. 2106, 2117–18 (2023).

49 *Id.* (quoting *Gertz*, 418 U.S. at 348).

50 *See* Brandenburg v. Ohio, 395 U.S. 444, 448 (1968) (quoting Noto v. United States, 367 U.S. 290, 297–98 (1961)); *see also* Gitlow v. New York, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting) ("The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result.").

perhaps recklessness) suffices.[51] Child sexual abuse material is still more remote, and the First Amendment requires only recklessness.[52] True threats get the same standard for the same reason.[53]

C. The Requisite Mens Rea for Fighting Words Convictions Is Unclear Under Existing Precedent

Some modern cases imply the government must prove a wrongful mental state to punish the speaker of a fighting word. But other decisions suggest the opposite, and the relevant authority tends to be weak, equivocal, or glancing. Complications abound.

1. Cantwell*,* Chaplinsky*, and* Counterman *Suggest No Mens Rea Requirement. — Cantwell v. Connecticut*[54] suggests the government need not prove a wrongful mental state to regulate the speaker of a fighting word.[55] In discussing common law breach of the peace, the *Cantwell* Court noted "[o]ne may, however, be guilty of the offense if he commit acts or make statements likely to provoke violence and disturbance of good order, *even though no such eventuality be intended*."[56]

These words are unlikely to settle the issue. First, and most obviously, they are dicta. The holding of *Cantwell* is simply that Cantwell's words "raised no such clear and present menace to public peace and order as to render him liable to conviction."[57] Second, *Cantwell* was describing the common law offense, not the Constitution.[58] The Court indicated that the common law crime must lie outside the First Amendment, but it then described the offense as "a common law concept of the most general and undefined nature."[59] Third, at least as of 1791, the *Cantwell* Court was simply wrong about the common law crime it was describing.[60] And fourth, the defendant did not raise his mental state on appeal to the Supreme Court.[61]

Chaplinsky also suggests that fighting words can be punished regardless of mens rea. The Court stated that "the use in a public place of words likely to cause a breach of the peace"[62] is "conduct lying within

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[51] *See* Hamling v. United States, 418 U.S. 87, 123 (1974) (calling a knowledge standard "constitutionally sufficient").

[52] Osborne v. Ohio, 495 U.S. 103, 115 (1990) (citing New York v. Ferber, 458 U.S. 747, 765 (1982)).

[53] *See Counterman*, 143 S. Ct. at 2119 (quoting Elonis v. United States, 575 U.S. 723, 748 (2015) (Alito, J., concurring in part and dissenting in part)).

[54] 310 U.S. 296 (1940).

[55] *See id.* at 309.

[56] *Id.* (emphasis added).

[57] *Id.* at 311.

[58] *See id.* at 308.

[59] *Id.*

[60] *See infra* Part II, pp. 2056–70.

[61] *See generally* Appellants' and Petitioner's Brief, *Cantwell*, 310 U.S. 296 (No. 632) (no discussion of mens rea).

[62] Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942) (citing, inter alia, *Cantwell*, 310 U.S. at 311).

the domain of state power."[63] But, quite like in *Cantwell*, the issues on appeal in *Chaplinsky* were vagueness, truth defenses, and the constitutional status of abusive language.[64] And even on these subjects, subsequent cases have largely erased *Chaplinsky*'s reasoning.[65]

Another reason to doubt *Cantwell* and *Chaplinsky* is that, read literally, they suggest that the government can punish the speaker of a fighting word without even proving negligence. If a person with no command of English repeats words that objectively "tend to incite an immediate breach of the peace,"[66] convicting her seems unjust. Commentators have suggested the First Amendment would bar punishment in this context.[67] But there is exactly nothing in a literal reading of *Cantwell* and *Chaplinsky* to support that proposition.[68] Other scholars have suggested *Cantwell*'s requirement that the speech be "directed to the hearer" constitutes an "implicit" "intent requirement."[69] That is unpersuasive. Whether a speaker directed his words to a specific person is a separate question from whether he thought they would cause violence. Thus, if *Cantwell* and *Chaplinsky* control, the First Amendment tolerates strict liability punishment of fighting words.

The 2023 decision in *Counterman v. Colorado*, viewed through a squinting eye, implies that the First Amendment requires no mens rea for fighting words. In *Counterman*, the Court held that the speaker of a true threat can be punished only if he was at least reckless as to the threatening nature of his speech.[70] To support the broader claim that negligence is an adequate mens rea for true threats, Justice Barrett's dissenting opinion claimed that both obscenity[71] and fighting words[72] lack a mens rea requirement. The Court replied to Justice Barrett's claim about obscenity by simply arguing that obscenity convictions do require scienter.[73] But, perhaps tellingly, it met her fighting words claim by describing the doctrine as marginal and thus "a poor candidate for spinning off other First Amendment rules."[74] Justice Sotomayor's

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[63] *Id.*

[64] *See generally* Appellant's Brief, *Chaplinsky*, 315 U.S. 568 (No. 255), 1941 WL 52756 (no discussion of mens rea).

[65] *See* CHEMERINSKY, *supra* note 25, at 159.

[66] *Chaplinsky*, 315 U.S. at 572.

[67] Volokh, *supra* note 28, at 1404.

[68] For instance, Professor Eugene Volokh argues fighting words cannot be punished without scienter. *See id.* But a Monty Python sketch is his sole authority. *See id.* (citing *The Hungarian Phrasebook Sketch*, MONTYPYTHON.NET, http://www.montypython.net/scripts/phrasebk.php [https://perma.cc/YK9J-8LY5]).

[69] Roger C. Hartley, *Cross Burning — Hate Speech as Free Speech: A Comment on* Virginia v. Black, 54 CATH. U. L. REV. 1, 33 n.211 (2004) (quoting Cantwell v. Connecticut, 310 U.S. 296, 309 (1940)).

[70] Counterman v. Colorado, 142 S. Ct. 2106, 2111–12 (2023).

[71] *Id.* at 2135 (Barrett, J., dissenting) (citing Roth v. United States, 354 U.S. 476, 481 (1957)).

[72] *Id.* at 2134 (citing, inter alia, Chaplinsky v. New Hampshire, 315 U.S. 568, 572–73 (1942)).

[73] *Id.* at 2116 & n.4 (citing, inter alia, Smith v. California, 361 U.S. 147, 151 (1959)).

[74] *Id.* at 2116 n.4.

concurrence took a somewhat similar approach.[75] Perhaps the Court's refusal to state a mens rea for fighting words whispers that intent is irrelevant. But *Counterman* provides (at best) a negative inference drawn from dicta.

2. Garrison*,* Beauharnais*, and* Pacifica *Suggest a Knowledge or Purpose Mens Rea.* — A few cases weakly suggest that the government must prove a wrongful interior mental state as to ultimate violence before it can punish the speaker of a fighting word. *FCC v. Pacifica*[76] provides the friendliest dicta. Citing *Chaplinsky*'s discussion of fighting words, the Court argued that "[t]he government may forbid speech *calculated* to provoke a fight."[77] That definition of fighting words was then cited by *Texas v. Johnson*[78] during a passage addressed to fighting words.[79] *Beauharnais v. Illinois*[80] smiled on regulation of speakers who "incite violence and breaches of the peace *in order to* deprive others of their equal right[s]."[81] And one holding of *Garrison v. Louisiana*[82] is that Louisiana's criminal libel statute could not be upheld as a regulation of fighting words because of "the absence of any limitation in the statute itself to speech *calculated* to cause breaches of the peace."[83]

But the key sentence from *Garrison* has never been followed, and *Pacifica* and *Beauharnais* make sandy foundations. First, the language in the two cases is dicta by any definition. *Pacifica* is about indecency;[84] *Beauharnais* is addressed to libel.[85] Second, in *Pacifica*, Justice Stevens was writing for a plurality of three.[86] And third, neither case is settled precedent. *New York Times Co. v. Sullivan*[87] strangled *Beauharnais*'s "group libel" theory in its infancy.[88] And *Reno v. ACLU*[89] and *Sable Communications of California, Inc. v. FCC*[90] treated *Pacifica* the way bowling balls treat the pins. If *Pacifica* applies only to regulations that

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[75] *See id.* at 2131 n.10 (Sotomayor, J., concurring in part and concurring in the judgment) (quoting CHEMERINSKY, *supra* note 25, at 1094).

[76] 438 U.S. 726 (1978).

[77] *Id.* at 745 (plurality opinion) (emphasis added) (citing *Chaplinsky*, 315 U.S. 568).

[78] 491 U.S. 397 (1989).

[79] *Id.* at 409 (citing, inter alia, *Pacifica*, 438 U.S. at 745 (plurality opinion)).

[80] 343 U.S. 250 (1952).

[81] *Id.* at 261 (emphasis added) (quoting Cantwell v. Connecticut, 310 U.S. 296, 310 (1940)).

[82] 379 U.S. 64 (1964).

[83] *Id.* at 70 (emphasis added).

[84] *See* 438 U.S. at 729 (plurality opinion).

[85] *See* 343 U.S. at 253, 258.

[86] 438 U.S. at 729.

[87] 376 U.S. 254 (1964).

[88] *See, e.g.*, Am. Booksellers Ass'n v. Hudnut, 771 F.2d 323, 331 n.3 (7th Cir. 1985) (Easterbrook, J.) (citing Collin v. Smith, 578 F.2d 1197, 1205 (7th Cir. 1978)); *see also* Nuxoll *ex rel.* Nuxoll v. Indian Prairie Sch. Dist. No. 204, 523 F.3d 668, 672 (7th Cir. 2008) (collecting cases).

[89] 521 U.S. 844 (1997).

[90] 492 U.S. 115 (1989).

are both civil[91] and addressed to the radio,[92] it has near-zero general force.

At bottom, *Cantwell*, *Chaplinsky*, *Counterman*, *Garrison*, *Johnson*, *Beauharnais*, and *Pacifica* add up to just about nothing. Though state and inferior federal courts unanimously apply a strict liability standard,[93] the actual constitutional rule is unclear. Where the law is unsettled, "the government must generally point to historical evidence about the reach of the First Amendment's protections."[94] The next Part puts the government to its proof and finds it wanting.

II. Mens Rea and Fighting Words at the Founding

All plausible Founding-era analogues for modern fighting words offenses required specific intent. In "reasoning by analogy,"[95] the question is "how and why the regulations burden" the relevant right.[96] Thus, the inquiry is limited to Founding-era law that regulated speech because of its "tend[ency] to incite an immediate breach of the peace."[97] History reveals five candidate analogues: breach of the peace, duel challenge, criminal libel, slander, and swearing. This Part considers each potential analogue in turn.

A. The Common Law Offense of Breach of the Peace

Speech that breaks the peace was illegal at common law and is illegal today. But the common law offense was narrower in scope and theory. Today, the law views improper speech as a self-contained breach of the peace. *Chaplinsky*, for instance, describes the statute as punishing words "plainly likely to cause a breach of the peace by the addressee, *words whose speaking constitutes a breach of the peace* by the speaker."[98]

The common law viewed the problem differently. The actual breaching of the peace through violence was a substantive offense.[99] But words that tended to breach the peace were criminal only because they were a method of causing or attempting to cause violence.[100] Because the speaker was ultimately being punished for causing violence, the law required mens rea as to an actual or possible violent result.[101]

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91 *See Reno*, 521 U.S. at 867.

92 *See Sable*, 492 U.S. at 127; *Reno*, 521 U.S. at 870.

93 *See, e.g.*, *In re* Cesar V., 192 Cal. App. 4th 989, 998 (2011) ("[I]t is irrelevant whether the challenger intended to actually cause a fight.").

94 N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2130 (2022) (emphasis omitted) (citing United States v. Stevens, 559 U.S. 460, 468–71 (2010)).

95 *Id.* at 2132.

96 *Id.* at 2133.

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

98 *Id.* at 573 (emphasis added).

99 4 William Blackstone, Commentaries *142.

100 *See, e.g.*, Domina Regina v. Nuns (1713) 93 Eng. Rep. 252, 253; Gilb. Cas. 36, 39 (KB).

101 *See id.*

Here the old authorities are unanimous: Speech tending to breach the peace was illegal as an attempt to cause violence, not simply because the words were themselves inflammatory. In *A Treatise of the Pleas of the Crown*, William Hawkins notes that although "bare quarrelsome Words" "are not punishable at all,"[102] "it is a very high Offence . . . even barely to *endeavor to* provoke another to send a Challenge, or to fight."[103] Blackstone, relying on Hawkins, takes the same approach in the *Commentaries on the Laws of England*.[104] Thomas Starkie's *Treatise on the Law of Slander* observes that "it is immaterial whether [the speaker] directly solicited another to break the law, or effected the same end by means indirect, but equally certain."[105] Lord Coke wrote in the *Institutes* that "if any subject by word, writing, or message challenge[s] another to fight with him, this is also an offence before any combat be performed . . . [f]or when anything is prohibited, everything by which it is achieved is prohibited also."[106]

Treating fighting words prosecutions as prosecutions for the actual or attempted causing of violence had obvious implications for mens rea. Joseph Chitty observes that "[w]hether the words used amount to a serious challenge to fight, or were a mere effusion of passion, is a question for the jury."[107] Starkie requires "attempt to produce disorder."[108] And the English cases required the same.

1. The Common Law of England. — English courts consistently held that words tending to break the peace were not indictable unless spoken with intent to break the peace. The earliest case citing the rule dates to the late sixteenth century, and the doctrine continued unbroken until well after 1791.

The 1588 decision in *King's Case*[109] appears to be the earliest relevant decision. It recognizes a mens rea requirement for words tending to break the peace.[110] The defendant in the action had already been bound to his good behavior.[111] But he ran his mouth anyway, stating that one "Kirton" was "a pelter, and a teller of lies, and a drunkard; and that he would make him a poor Kirton; and that he had entered and

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[102] 1 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 139 (London, E. Richardson & C. Lintot 4th ed. 1762). Insulting speech was, however, illegal if spoken in a church or churchyard. *Id.* at 137–38.

[103] *Id.* at 135 (emphasis added).

[104] BLACKSTONE, *supra* note 99, at *149.

[105] THOMAS STARKIE, A TREATISE ON THE LAW OF SLANDER, LIBEL, SCANDALUM MAGNATUM, AND FALSE RUMOURS 553 (London, W. Clarke & Sons 1813).

[106] EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 158 (London, M. Flesher 1644) (last fourteen words translated from Latin).

[107] 3 JOSEPH CHITTY ET AL., A PRACTICAL TREATISE ON THE CRIMINAL LAW 849 (Springfield, G. & C. Merriam 3d ed. 1836).

[108] STARKIE, *supra* note 105, at 554.

[109] (1588) 78 Eng. Rep. 345; 1 Cro. Car. 86 (KB).

[110] *Id.* at 86; 78 Eng. Rep. at 345.

[111] *Id.* That is, he had been required to post a bond guaranteeing that he would not breach the peace. *Id.*; *see* BLACKSTONE, *supra* note 99, at *249–50.

broke the close of Kirton."[112] The question was whether the words broke the peace and thus breached the recognizance.[113]

The court held that the speaker lacked the interior mental state necessary to breach the recognizance.[114] In Chief Justice Wray's view, "nothing shall be said a breach of the recognisance, but that which sounds to the hurt of another, and *by intendment* may be a breach of the peace."[115] Lord Coke's *Institutes* reads *King* as standing for a distinction between words like "liar" or "drunken knave" and "challenge[s] to fight" or "threat[s] . . . to beat or wound."[116]

In *Domina Regina v. Nuns*,[117] the King's Bench relied on the mens rea requirement in rejecting an indictment for speech tending to break the peace. The defendant had told the justices of the peace at a petty session: "This is not justice of peace's business, you shall not try this, have a care what you do, *I have blood in me if I had you in another place*."[118] The King's Bench admitted the words were "dark"[119] and "look like a challenge."[120] But to be indictable, they would have to "tend to a breach of the peace."[121] And "for words that tend to a breach of the peace, and not such as are only likely to provoke the other to break the peace, *but must shew an intention in the speaker*, and that they were spoken *on purpose to procure a fighting and breach of the peace*."[122]

Ninety-two years later, the King's Bench was still applying the same rule. The defendant in *Rex v. Philipps*[123] wrote to one R.G. Thomas, informing him that "in the whole of the Carmarthenshire election business . . . you have behaved like a blackguard."[124] Ominously, the defendant added that he planned to "punctually attend to any appointment you may think proper."[125] Construing the latter phrase as an oblique attempt to instigate a duel, the Crown indicted the defendant at common law for attempted breach of the peace.[126] A jury convicted.[127]

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112 King's Case, 78 Eng. Rep. at 345; 1 Cro. Car. at 86.

113 *See id.*

114 *See id.*

115 *Id.* (emphasis added). Half the court initially disagreed with Wray, but Lord Coke reports that they adopted his view shortly after the case was heard. *See* EDWARD COKE, THE FOURTH PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 181 (London, E. & R. Brooke 1797).

116 COKE, *supra* note 115, at 181.

117 (1714) 93 Eng. Rep. 252; Gilb. Cas. 36 (KB).

118 *Id.* at 36; 93 Eng. Rep. at 252 (emphasis added).

119 *Id.* at 37; 93 Eng. Rep. at 253.

120 *Id.* at 38; 93 Eng. Rep. at 253.

121 *Id.* at 37; 93 Eng. Rep. at 253.

122 *Id.* at 39; 93 Eng. Rep. at 253 (emphases added).

123 (1805) 102 Eng. Rep 1365; 6 East. 464 (KB).

124 *Id.* at 465; 102 Eng. Rep. at 1365.

125 *Id.*

126 *Id.*

127 *Id.* at 466; 102 Eng. Rep. at 1366.

Finding sufficient intent, the court affirmed.[128] Lord Mansfield reasoned that the character of an alleged act could shift the burden of proof as to intent but could not eliminate the intent requirement.[129] Thus, in some cases "the allegation of intent is . . . [an] inference which the law draws from the act itself," while in others it is a "matter of fact . . . [requiring] specific allegation and proof."[130] But, in either case, the defendant retained the power to provide "evidence on his part, and thereby to have repelled the bad intention" necessary to conviction.[131] *Philipps* would come to symbolize rigid intent requirements in criminal cases.[132]

Related English cases applied the settled rule to fresh subspecies of invective: "You are a rogue and a rascal"[133] and "[you are] a blockhead, or a bufflehead"[134] were both unindictable statements without criminal intent. For at least 203 years prior to the Founding and at least forty-five years after it,[135] the English common law demanded a wrongful mental state as to an ultimate act of violence. Without intent to procure a fighting, unkind words were just that: unkind words.

2. Early American Decisions. — The young Republic followed the English rule.[136] In *State v. Farrier*,[137] a North Carolinian was indicted for challenging a man to an out-of-state duel.[138] His defense was plausible, if formalistic: Because his letter proposed a duel in a different state, it "was not a challenge to violate the peace of *this* State."[139] And "without such intent, the Defendant could not be guilty."[140]

The North Carolina Supreme Court agreed specific intent was an element of the offense, but concluded intent was present. The court said "the offense consists in sending a challenge, either by word, or by letter, *to fight a duel*."[141] It reasoned that intentional challenges to extraterritorial duels were also proscribed by the statute.[142] It noted that "the indictment charges the Defendant with an intention to provoke the

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128 *Id.* at 475–76; 102 Eng. Rep. at 1369–70.

129 *Id.* at 474–75; 102 Eng. Rep. at 1369.

130 *Id.*

131 *Id.* at 475; 102 Eng. Rep. at 1369.

132 *See, e.g.*, State v. Martin 14 N.C. (3 Dev.) 329, 330 (1832) (citing *Philipps*, 6 East. at 472; 102 Eng. Rep. at 1368) (enslaved defendant) (refusing to conclusively infer *intent* to rape from alleged *attempt* to rape); Commonwealth v. Willard, 39 Mass. (22 Pick.) 476, 478–79 (1839) (citing *Philipps*, 6 East. at 464; 102 Eng. Rep. at 1365) (refusing to conclusively infer *intent to induce sale* of alcohol from defendant's *purchase* of alcohol).

133 Regina v. Langley (1728) 90 Eng. Rep. 1261, 1261; 2 Salk. 697, 697 (KB).

134 Queen v. Wrightson (1709) 90 Eng. Rep. 1095, 1096; 2 Salk. 698, 698 (KB); *see also, e.g.*, *Ex parte* Duke of Marlborough (1844) 114 Eng. Rep. 1508, 1508–09; 1 Mer. 720, 720–21 (QB).

135 *See Ex parte* Chapman (1836) 111 Eng. Rep. 974, 974; 4 Ad. & E. 773, 773 (KB).

136 *See* 1 WILLIAM OLDNALL RUSSELL & DANIEL DAVIS, A TREATISE ON CRIMES & MISDEMEANORS 397 (Boston, Wells & Lilly 1824).

137 8 N.C. (1 Hawks) 487 (1821).

138 *Id.* at 489.

139 *Id.*

140 *Id.*

141 *Id.* (emphasis added).

142 *Id.* at 492–93.

prosecutor to fight a duel with pistols."[143] And it found evidence of that intent in the letter,[144] which demanded "revenge[,] . . . that opportunity of redress which one gentleman is bound to render to another."[145]

Nine years earlier, and one state over, a South Carolina defendant had raised an identical defense.[146] Arguing that "it appears perfectly evident, that it was the defendant's *intention to challenge* the prosecutor to fight," the Constitutional Court of South Carolina held that "there is still enough to support the conviction."[147]

American indictments for speech tending to breach the peace asserted that the speaker had a wrongful mental state as to an actual or potential violent act. After David Brown allegedly sent a duel threat by letter to a Dr. John Rust, he was indicted at common law for duel challenge.[148] The court described the English precedent, and Chitty in particular,[149] as "evidences of the Law from which we ought not lightly to depart."[150] The indictment alleged Rust wrote "wickedly and maliciously intending, &c. *not only* to disquiet and terrify the said Rust, *but also* the said Rust maliciously, &c. to kill and murder, &c. afterwards."[151] The last thirteen words would be irrelevant if mens rea as to an ultimate act of violence were not an element of the offense.

Founding-era regulation of speech tending to breach the peace is the most obvious analogue to modern fighting words. In 1791, specific intent to cause violence was an element of the offense.

B. Anti-Dueling Statutes

Statutes banning challenges to duel are analogous to modern regulation of fighting words. Indeed, modern prohibitions on fighting words are just successor statutes built on the old anti-duel laws.[152] During the Founding period, dueling was becoming an increasingly popular method of dispute resolution.[153] Because duel challenges "tend[ed] to incite an immediate breach of the peace,"[154] legislatures drafted new statutes expanding liability beyond the common law's breach-of-peace baseline. Despite the seriousness of the problem and the odiousness of the speech,

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143 *Id.* at 490. The "prosecutor," here, is the injured party. *Id.* at 489.

144 *Id.* at 490.

145 *Id.* at 488.

146 State v. Taylor, 5 S.C.L. (3 Brev.) 243, 243 (1812) ("Another ground taken by the defendant, is, that . . . it was not a challenge to fight in this State, but in the State of Georgia . . . .").

147 *Id.* (emphasis added).

148 Brown v. Commonwealth, 4 Va. (2 Va. Cas.) 516, 517, 519 (1826) (emphasis omitted).

149 *See id.* at 519.

150 *Id.* at 520.

151 *Id.* at 517 (emphasis added).

152 *See* Jeffrey Rosen, *"Fighting Words,"* LEGAL AFFS., May–June 2002, at 16, 17–18.

153 *See* Matthew A. Byron, Crime and Punishment: The Impotency of Dueling Laws in the United States 6 (Aug. 2008) (Ph.D. dissertation, University of Arkansas) (ProQuest) [hereinafter Byron Dissertation].

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

the states consistently refused to punish duel challenges issued without specific intent to cause a duel.

1. Organized Single Combat at the Founding. — English colonists arriving on North American soil brought with them both the common law's prohibitions on dueling[155] and the practice itself.[156] Duels were infrequent between 1620 and 1760,[157] but the custom would soon gain an awful momentum. There were twice as many recorded duels between 1775 and 1800 than in the 150 years prior.[158] By the beginning of the nineteenth century, dueling had become a "positive scourge."[159]

Three points about Founding-era dueling and duel regulation are relevant for First Amendment purposes. First, duel threats tended to be highly ambiguous, especially to an untrained ear. Duels were demanded with equivocal phrases like "I must teach you to proceed with decency,"[160] "I now take the earliest opportunity to require of you a retraction,"[161] and "if therefore your determinations are final . . . Mr. Van Ness is authorized to communicate my further expectations."[162] Second, legislatures viewed dueling as a reprehensible and unchristian practice[163] and attempted repeatedly to discourage it by statute.[164] Finally, third, American duels were not for show. The habit was not to fire at the open sky, nod, and trot home; almost forty-five percent of recorded duels killed a participant.[165] Alexis de Tocqueville observed that "in Europe" one "fights a duel . . . to be able to say that one has done so."[166] But "[i]n America one only fights to kill."[167]

2. The Anti-Dueling Statutes. — Over time, dueling statutes came to embrace heightened penalties and broader liability for surgeons, seconds, messengers, and other adjuncts.[168] But mens rea requirements remained unyielding. In 1719, the Massachusetts General Court passed

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155 C.A. Harwell Wells, Note, *The End of the Affair? Anti-Dueling Laws and Social Norms in Antebellum America*, 54 VAND. L. REV. 1805, 1814 (2001); BLACKSTONE, *supra* note 99, at *149, *199.

156 *See* Wells, *supra* note 155, at 1814–15.

157 *Id.* at 1814.

158 Byron Dissertation, *supra* note 153, at 6.

159 ROBERT BALDICK, THE DUEL: A HISTORY OF DUELLING 116 (1965).

160 State v. Gibbons, 4 N.J.L. 45, 47 (1818).

161 THOMAS S. DUKE, CELEBRATED CRIMINAL CASES OF AMERICA 55 (1910).

162 Letter from Aaron Burr to Alexander Hamilton (June 22, 1804), *reprinted in* THE ESSENTIAL HAMILTON: LETTERS & OTHER WRITINGS 358, 359 (Joanne B. Freeman ed., 2017).

163 *See, e.g.*, *Duelling*, CHRISTIAN WATCHMAN, Apr. 27, 1838, at 68 (extract from the Report of the Joint Committee to the Legislature of Massachusetts) ("[P]rofessing to be a Christian people, we should no longer tolerate customs unworthy even of pagan philosophy.").

164 *See* Byron Dissertation, *supra* note 153, at 23 & n.11 (observing that "nearly every state," *id.* at 23 n.11, had an anti-dueling statute by 1810).

165 *Id.* at 2.

166 BALDICK, *supra* note 159, at 115.

167 *Id.*

168 Byron Dissertation, *supra* note 153, at 25, 31.

what appears to be the earliest anti-dueling statute in the colonies.[169] It provided for two categories of punishable persons, namely those who "fight a duel[l], combat, or engage in a rencounter" with various weapons as well as those who "challenge another to fight a duel[l]."[170]

Less than a decade later, and evidently unsatisfied with results, the general court replaced the 1719 statute with a 1728 statute "for Making Other Provision Instead."[171] The 1728 statute offered a stiffer and more creative set of penalties and made those penalties mandatory.[172] It also broadened the range of punishable actors, placing liability on anyone who "shall any ways abett, prompt, encourage or seduce any person to fight a duel or to challenge another to fight."[173] But the 1719 statute's mens rea requirements remained. Even in the 1728 statute, all liability was preconditioned on the action having been taken "to fight a duel" or to "challenge another to fight."[174]

Pennsylvania's 1794 "Act for the Prevention of Vice and Immorality"[175] reflects the anti-dueling statutes' structure and their emphasis on mens rea. The Act criminalizes "challeng[ing] . . . the person of another to fight."[176] It also criminalizes "*willingly and knowingly* carry[ing] and deliver[ing] any written challenge, or . . . verbally deliver[ing] any message, *purporting to be a challenge*."[177] The statute thus distinguishes a "challenge" from a "message purporting to be a challenge."[178] It follows that a statement can appear objectively to be a challenge yet not in fact be one.[179] The intent of the speaker is the only plausible factor that can distinguish two facially identical statements, rendering one a challenge and the other merely words "purporting to be a challenge."

The distinction between actual and purported challenges tracks ordinary expectations about the interior mental state necessary to support

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169 Act of June 16, 1719, ch. 1, 1719 Mass. Acts 135; *see* Byron Dissertation, *supra* note 153, at 23 & n.12.

170 Act of June 16, 1719, ch. 1, §§ 1–2 (alterations in original).

171 Act of Aug. 27, 1728, ch. 15, 1728 Mass. Acts 516.

172 *Id.* §§ 1–2.

173 *Id.* § 1.

174 *Id.*

175 Act of Apr. 22, 1794, ch. 1746, *reprinted in* 3 LAWS COMMONWEALTH OF PENNSYLVANIA 177 (Philadelphia, John Bioren 1810).

176 *Id.* § X, at 182.

177 *Id.* (emphasis added).

178 In statutes of this nature, courts understood the messenger or abettor's liability and the speaker's liability as entirely separate; the man sending the challenge could not be prosecuted for aiding the delivery of the challenge or vice versa. *See, e.g.*, State v. Gibbons, 4 N.J.L. 45, 55–56 (1818) ("[H]e that abets, prompts, encourages &c. is manifestly, in the contemplation of the statute, a person different from him who either sends or receives such challenge." *Id.* at 55.).

179 "Purport" meant what it means today. *See, e.g.*, Spicer v. Lewis, 7 Mart. (o.s.) 221, 221 (La. 1819) ("This case comes up . . . to prove that an act of sale of the Barilla . . . was not intended, *as it purports*, to convey an absolute property in her to the vendees . . . ." (emphasis added)); State v. Houseal, 4 S.C.L. (2 Brev.) 219, 222 (1807) ("[T]he forged note *purported to be made* by Nathaniel Durkie . . . ." (emphasis added)); *To Purport*, 1 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (London, W. Strahan 1755) ("[T]o tend to show.").

criminal responsibility. The challenger lacks a blameworthy mental state if he did not intend to challenge. The statute therefore does not punish him unless his words were spoken with intent and thus were in fact a "challenge."[180] Likewise, because a mere messenger "deliver[ing]" a challenge would lack mens rea if he had no idea that he was carrying such a message, the statute requires him to have acted "willingly or knowingly."[181] But the messenger who orally delivers a statement "purporting to be a challenge" cannot claim ignorance of its contents.[182] Even if the statement is not in fact a challenge, the messenger has delivered words that he knows full well appear to be a challenge. That is wrongful conduct, and the statute punishes it. Contemporaneous statutes draw the same distinction as the 1794 Pennsylvania Act.[183]

Other statutes were more direct. An 1802 New York statute simply punishes "any citizen of this state who shall by word, writing or otherwise, request or invite any person to meet him, *with intent to fight a duel* . . . and every person knowingly being the bearer of any challenge or message sent *with the intent aforesaid*."[184] The 1790 Pennsylvania Constitution disqualifies "[a]ny person who shall . . . fight a duel, or send a challenge *for that purpose*, or be aider or abettor[185] in fighting a duel" from holding public office.[186]

An 1802 North Carolina statute straightforwardly titled "An Act to Prevent the Vile Practice of Duelling within this State" was drafted

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[180] Act of Apr. 22, 1794, ch. 1758 § X, *reprinted in* 3 LAWS COMMONWEALTH OF PENNSYLVANIA, *supra* note 175, at 182.

[181] *Id.*

[182] *Id.*

[183] *See, e.g.*, Act of May, 1779, *reprinted in* 1 THE PUBLIC STATUTE LAWS OF THE STATE OF CONNECTICUT 31 (Hartford, Hudson & Goodwin 1808) (reproducing 1779 statute "An Act to Prevent the Practice of Duelling"); Act of Dec. 19, 1816, No. 380, ch. 9, § 5, *reprinted in* A COMPILATION OF THE LAWS OF THE STATE OF GEORGIA, PASSED BY THE LEGISLATURE SINCE THE YEAR 1810 TO THE YEAR 1819, INCLUSIVE 564, 593 (Lucius Q.C. Lamar ed., Augusta, T.S. Hannon 1821); 1 Sess. Leg. Council, ch. 50, § 25, *reprinted in* AN EXPOSITION OF THE CRIMINAL LAWS OF THE TERRITORY OF ORLEANS 92, 92 (Lewis Kerr ed., New Orleans, Bradford & Anderson 1806); Act of 1829, ch. 23, § 57, *reprinted in* A COMPILATION OF THE STATUTES OF TENNESSEE, OF A GENERAL AND PERMANENT NATURE, FROM THE COMMENCEMENT OF THE GOVERNMENT TO THE PRESENT TIME 316, 326 (R.L. Caruthers & A.O.P. Nicholson eds., Nashville, James Smith 1836); Act of Jan. 30, 1827, ch. 5, § 45, *reprinted in* THE REVISED CODE OF LAWS, OF ILLINOIS, ENACTED BY THE FIFTH GENERAL ASSEMBLY 124, 131 (Vandalia, Robert Blackwell 1827); Act of Dec. 2, 1799, ch. XIX, § 10, *reprinted in* 1 LAWS OF THE TERRITORY OF THE UNITED STATES, NORTH-WEST OF THE RIVER OHIO 71, 78 (Cincinnati, Carpenter & Findlay 1800); Act of Dec. 13, 1799, ch. CXCII, § 6, *reprinted in* 2 THE STATUTE LAW OF KENTUCKY 284, 285 (William Littell ed., Frankfort, William Hunter 1810).

[184] Act of Apr. 2, 1803, ch. LXXI, § 2, *reprinted in* 3 LAWS OF THE STATE OF NEW YORK 334, 335 (Albany, Charles R. Webster & George Webster 1804) (emphasis added).

[185] At common law, aider-abettor liability could not attach without specific intent to aid the principal's offense. For a famous exposition of the doctrine, and one of the most beautiful opinions in our law, see *United States v. Peoni*, 100 F.2d 401, 402 (2d Cir. 1938) (L. Hand, J.).

[186] PA. CONST. of 1790, art. VI, § X (emphasis added).

similarly.[187] The Act renders actual and would-be duelists ineligible for "any office of trust, honour or profit in this state" and eligible for fines up to 100 pounds upon conviction.[188] And it defines the regulated class as any "person sending, accepting or being the bearer of a challenge *for the purpose of fighting a duel*."[189] All agreed that the Act changed punishment.[190] But its description of proscribable dueling speech was viewed as a restatement of the traditional common law doctrine.[191]

3. The Cases Interpreting Anti-Dueling Statutes. — The cases interpret the statutes to require mens rea, just as the common law had. The defendant in *Commonwealth v. Hart*[192] wrote an ambiguous letter to one "J. Twiman" after the former's deer were spotted on the latter's land.[193] Hart's missive opened with a menacing brand of comedy: Because Twiman was a "puppy, blackguard, and companion for negroes,"[194] the deer would not have ventured onto his land except by accident "if they had that respect for themselves, which I have always endeavored to teach them to have."[195] The letter continues: "I propose that you meet me with your rifle, this evening, precisely at 5 o'clock, . . . on the Georgetown road, and I will try to introduce you to better company than I suspect you have lately been in. I will at least promise to wipe your hands, if not your face."[196]

The Kentucky Supreme Court acknowledged that "[t]he legislature intended, by the act, to suppress the practice of duelling" and that it was the "duty [of the court] to give effect to the intentions of the legislature."[197] But it saw nothing in the statute altering traditional mens rea principles.[198] It wrote that if the jury "should be of opinion" that Hart had spoken "without any intention of challenging to a fight with deadly weapons, although such conduct merits no commendation, he may be acquitted."[199] But if Hart had "intended to bring about a fight with rifles . . . then he has been guilty in the eye of the law."[200]

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187 Act of Nov. 15, 1802, ch. 5, *reprinted in* 2 THE PUBLIC ACTS OF THE GENERAL ASSEMBLY OF NORTH CAROLINA 195, 195 (Francois-Xavier Martin ed., Newbern, Martin & Ogden 1804).

188 *Id.*

189 *Id.* (emphasis added).

190 *See* State v. Farrier, 8 N.C. (1 Hawks) 487, 489 (1821).

191 *See id.* ("The act of 1802, which alters the Common Law punishment, does not change the nature of the offence . . . ."); *see also* RUSSELL & DAVIS, *supra* note 136, at 396.

192 29 Ky. (6 J.J. Marsh.) 119 (1831).

193 *Id.* at 119–20.

194 *Id.* at 122.

195 *Id.* at 120.

196 *Id.*

197 *Id.* at 121.

198 *See id.* at 122.

199 *Id.*

200 *Id.*; *see also* DANIEL DAVIS, A PRACTICAL TREATISE UPON THE AUTHORITY AND DUTY OF JUSTICES OF THE PEACE IN CRIMINAL PROSECUTIONS 359 (Boston, Cummings, Hilliard & Co. 1824) (including in a form indictment for a duel challenge the phrase "intending and

At and around the Founding, across decades and jurisdictions, similar cases were resolved in precisely the same way. In *State v. Gibbons*[201] the Supreme Court of Judicature of New Jersey interpreted statutory text reading "[t]hat if any person shall, by word, message, letter, or any other way, challenge another to fight a duel" to require specific intent.[202] As Chief Justice Kirkpatrick put it: "Whether challenge or not is always a question for the jury, upon the whole evidence . . . for it is principally from these that the true intent and understanding of the parties can be collected."[203] *State v. Strickland*,[204] an interpretation of South Carolina's anti-dueling statute, held that in assessing challenges "[t]he sole question is, was it intended to shed blood in a duel?"[205]

C. Criminal Libel

Criminal libel is not analogous to modern fighting words offenses. Here, the problem is that the law of criminal libel regulated speech in a different way, not that it did so for a different reason. Specifically, while criminal libel laws regulated speech for its tendency to cause breaches of the peace, they only regulated verbal expression. Moreover, even if criminal libel were a proper analogue, it still required mens rea (albeit a more limited form).

1. Why Criminal Libel Regulated Speech. — The courts of England and the early Republic punished criminal libel for the precise reason that fighting words are punishable today.[206] While *civil* libel protected a man's private interest in his reputation, *criminal* libel served the state's interest in preventing violence. In one court's words: "The cause why libellous publications are offences against the state, is their *direct tendency to a breach of the public peace*, by provoking the parties injured, and their friends and families, to acts of revenge . . . ."[207]

2. How Criminal Libel Regulated Speech. — Modern fighting words statutes and Founding-era criminal libel laws regulate speech in entirely different ways. The latter therefore cannot serve as a historical analogue for the former. Today, fighting words must tend to cause genuinely

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designing one E. F., in the peace of the said Commonwealth then and there being, wilfully, maliciously, and of his malice aforethought, to kill and murder").

[201] 4 N.J.L. 45, 45–46 (1818) ("I pronounce your conduct *rascally*." *Id.* at 46.).

[202] *Id.* at 55.

[203] *Id.* at 56.

[204] 11 S.C.L. (2 Nott & McC.) 181 (1819).

[205] *Id.* at 183.

[206] *Compare, e.g.*, Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (defining "fighting words" as "those which . . . tend to incite an immediate breach of the peace" (internal quotation marks omitted)), *with* The King v. Burdett (1820) 106 Eng. Rep. 873, 885; 4 B. & Ald. 95, 127–28 (KB) (Best, J.) ("Why are libels against individuals prosecuted? [B]ecause they have a tendency to provoke the party, to whom they are sent, to a breach of the peace.").

[207] Commonwealth v. Clap, 4 Mass. (3 Tyng) 163, 168 (1808) (emphasis added).

immediate breaches of the peace.[208] As a result, fighting words are almost always spoken, not written, expression.[209] But criminal libel was categorically limited to written or otherwise fixed statements.[210] The Founding generations viewed the spoken-written distinction as "founded in the nature of man," and "therefore a constituent part of the laws of every society."[211] Their view cannot be shrugged off as superstition.

First, the written-spoken distinction proxied for premeditation and deliberation on the part of the speaker. Nine months before the nation ratified the First Amendment, even prosecutors were admitting that "[m]any words may be spoken, such as *rogue*, *villain*, or *rascal*, for which no action at law can be brought. They are considered as words of heat and passion, and are not subject to prosecution."[212] As Justice Sullivan put it, a "distinction is also made between" words that tend to harm a man in his "prospects, business, or profession" and those that merely "proceed from sudden heat and passion; such as calling one a rascal, liar, villain, &c."[213] But the distinction "is lost," Sullivan continued, when "[the words] are committed to paper; because that every act of writing is deliberate."[214]

And second, spoken "[w]ords vanish in air . . . but words written, or signs made[215] to impress the senses, may do a lasting injury."[216] The indelibility of written abuse rendered it more likely to "stimulate [people] to revenge; and thereby endanger the peace of the society."[217]

If anything, the comparative ease with which a libelous message can be written today is a justification for treating many written statements (like texts or direct messages) the way the colonists treated spoken

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[208] *See, e.g.*, Gooding v. Wilson, 405 U.S. 518, 526–27 (1972) (citing, inter alia, Cox v. Louisiana, 379 U.S. 536, 550–51 (1965)).

[209] *Cf., e.g.*, People *ex rel.* R.C., 411 P.3d 1105, 1106, 1111 (Colo. App. 2016) (holding that "a picture of an ejaculating penis," *id.* at 1106, does not tend to cause "an immediate breach of the peace," *id.* at 1111).

[210] *See, e.g.*, CHITTY ET AL., *supra* note 107, at 865 n.A (limiting libel to "a malicious publication, expressed either in printing or writing or by signs and pictures").

[211] SULLIVAN, *supra* note 16, at 12; *see also* Regina v. Langley (1728) 90 Eng. Rep. 1261, 1261; 2 Salk. 697, 697 (KB) ("[T]here are many cases which prove, that the same words when written are actionable, which are not so when spoken."); M'Corkle v. Binns, 5 Binn. 340, 352 (Pa. 1812); M'Gee v. Wilson, 16 Ky. (1 Litt. Sel. Cas.) 187, 188 (1814); Clark v. Binney, 19 Mass. (2 Pick.) 120, 124 n.1 (1824); *Slander and Libel*, 6 AM. L. REV. 593, 594 (1872); Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246, 279–80 (2017).

[212] *Trial for a Libel*, CONCORD HERALD, Mar. 9, 1791, at 2.

[213] SULLIVAN, *supra* note 16, at 12.

[214] *Id.*; *see also* M'Clurg v. Ross, 5 Binn. 218, 219 (Pa. 1812) ("[W]riting requires deliberation, and is therefore more injurious to the character attacked.").

[215] For instance, the "crudely made cross" ignited in *R.A.V. v. City of St. Paul*, 505 U.S. 377, 379 (1992).

[216] SULLIVAN, *supra* note 16, at 12; *see also Slander and Libel*, *supra* note 211, at 594; Campbell, *supra* note 211, at 279–80; *Binns*, 5 Binn. at 352 ("*Litera scripta manet*." (the written word remains)).

[217] SULLIVAN, *supra* note 16, at 13; *see* Tenax, *To the People of Pennsylvania*, FREEMAN'S J.: OR N.-AM. INTELLIGENCER, Oct. 30, 1782, at 1 (arguing that committing spoken slander to writing "increase[s] the injury a thousand fold").

statements. The same change in technology is equally a reason modern spoken statements cannot be treated as the colonists treated written messages. Moreover, as the next two subparts discuss, criminal libel still required mens rea.

3. The Common Law of England. — In criminal libel prosecutions, the English common law required the state prove the defendant wrote with intent to harm the libeled person. But, once that was established, intent to disturb the peace was presumed. In *The King v. Topham*,[218] the King's Bench arrested a libel judgment because the defendant lacked intent to harm the person about whom he had written.[219] The indictment alleged the defendant had published materials claiming George Nassau Clavering, Earl Cowper, "was a person of a vicious and depraved mind and disposition, . . . had led a wicked and profligate course of life," and engaged in "criminal and unmanly vices and debaucheries."[220] The Earl was unlikely to protest; he had died in 1789.[221] But the court argued the words could still implicate the policy behind the prohibition on criminal libel: Written defamation "tends to stir up others of the same family . . . to break the peace" both "to vindicate the memory of the deceased, and to wipe off that stain which the reflections on the ancestor may cast upon them."[222]

Though intent to breach the peace would be imputed from intent to harm Earl Cowper's reputation, the latter intent was still a prerequisite to criminal liability. "[I]f [the speech] be done with a malevolent purpose, to vilify the memory of the deceased . . . then it is done with a design to break the peace, and then it becomes illegal."[223] The trouble for the government was that the indictment failed to allege that the defendant had written with "malevolent purpose."[224] Indeed, the same words could just as easily have been "published in the spirit of a biographer."[225] The judgment therefore could not stand.[226] Subsequent English authority follows *Topham*.[227]

But if an indictment satisfactorily alleged intent to injure the libeled person, the law would presume intent to breach the peace. The authority most often cited for this proposition is Lord Mansfield's opinion in *Rex v. Woodfall*.[228] The defendant had allegedly printed and published

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[218] (1791) 100 Eng. Rep. 931; 4 T.R. 126 (KB).
[219] *Id.* at 933.
[220] *Id.* at 931.
[221] *George Clavering Cowper, 3rd Earl Cowper*, CLEV. MUSEUM ART, https://www.clevelandart.org/art/2022.136 [https://perma.cc/DRC9-WTY7].
[222] *Topham*, 100 Eng. Rep. at 932.
[223] *Id.* at 933.
[224] *Id.*
[225] *Id.* at 931.
[226] *Id.* at 933.
[227] *See, e.g.*, Rex v. Wegener (1817) 171 Eng. Rep. 634, 635; 2 Stark. 245, 246 (NP); The King v. Marsden (1815) 105 Eng. Rep. 796, 797; 4 M. & S. 164, 168 (KB).
[228] (1770) 98 Eng. Rep. 398; 5 Burr. 2661 (KB).

a "seditious libel," signing it "Junius."[229] Though the alleged misconduct was typical of criminal libel prosecutions, the behavior of the jury was anything but. After "a great while, many hours," "the foreman gave [the] verdict in these words — 'Guilty of the printing and publishing only.'"[230] To the crown, this was a conviction; to the defense, it was an acquittal.[231] The King's Bench agreed with the government.[232] Lord Mansfield reasoned that malice would be presumed in criminal libel cases unless rebutted by the defendant.[233] Thus, the jury's failure to find "express malicious intent" was irrelevant.[234]

4. The Courts of the Early Republic. — American courts gave English criminal libel doctrine at most a partial embrace. First, American criminal libel indictments always alleged malice; the courts of the young Republic were, at minimum, no less protective than the *Woodfall*-era King's Bench. Indeed, the tendency was to lay it on thick. A common construction was "wickedly, maliciously and unlawfully minding, contriving and intending . . . to injure, oppress and aggrieve and vilify the good name [of the libeled person]."[235] The conventional definition of libel was "a censorious or ridiculing writing, picture, or sign, made with a *mischievous* and *malicious intent*."[236]

Second, American courts offered a bouquet of excuses, any one of which could defeat the presumption of malice. In general, statements that were both true and offered "in a decent manner" and for valid purposes could not be indicted as libel.[237] Another common rule was a sort of proto-*Noerr-Pennington* doctrine[238]: Even scandalous material was often unindictable if included in a petition to the legislature.[239] Other specifically protected statements included honest criticism of executive officers,[240] candidates for public office,[241] and ministers of the gospel.[242] The general rule was that when the defendant alleged an excuse, "truth is a justification, and may be given in evidence as such under the general

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229 *Id.* at 398.
230 *Id.* at 401.
231 *Id.* at 399.
232 *Id.* at 401.
233 *See id.*
234 *Id.* at 402.
235 State v. Neese, 4 N.C. (Taylor) 691, 691 (1818); *accord* Commonwealth v. Morris, 3 Va. (1 Va. Cas.) 176, 176 (Gen. Ct. 1811); Commonwealth v. Holmes, 17 Mass. (17 Tyng) 336, 336 (1821).
236 State v. Farley, 15 S.C.L. (4 McCord) 317, 321 (1827) (citing People v. Croswell, 3 Johns. Cas. 336, 354 (N.Y. 1804)).
237 Commonwealth v. Blanding, 20 Mass. (3 Pick.) 304, 316 (1825); *see also* Commonwealth v. Clap, 4 Mass. (4 Tyng) 163, 169 (1808).
238 *See* E. R.R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127, 136 (1961); United Mine Workers v. Pennington, 381 U.S. 657, 670 (1965).
239 *See Morris*, 3 Va. at 180.
240 *Blanding*, 20 Mass. at 316–17.
241 *Id.* at 308.
242 *Id.* at 317; *see also* Remington v. Congdon, 19 Mass. (2 Pick.) 310, 314 (1824).

issue."[243] Prosecutors responded by preemptively alleging falsity in indictments and informations.[244] And it was "a principle universally admitted and well understood, that a publication simply denying charges imputed to the author" could not be libel.[245]

Overall, criminal libel cannot support current law for two reasons. First, it was limited to written words and thus is not analogous to modern regulation of fighting words. And second, again unlike modern regulations, it required mens rea.

D. Slander

Civil slander cannot serve as an analogue for fighting words because it did not regulate expression for its tendency to cause violence. Instead, it was a civil tort by which victims could "mend[]" "the wounds of mangled reputation."[246]

Criminal slander cannot serve as an analogue because it did not exist at common law.[247] The bar on criminal slander prosecutions was absolute, unquestioned, and obtained on both sides[248] of the Atlantic. Indeed, the very idea of criminal slander was alien to the founding generation. As the General Court of Virginia put it: "A case of slander may display . . . baseness and malignity of purpose . . . . And yet *none would think of prosecuting it criminally*."[249]

E. Swearing

Swearing was illegal at common law not because it "tend[ed] to incite an immediate breach of the peace" but rather because it was considered a "public affront to religion and morality."[250] It is therefore a poor analogue for modern fighting words prosecutions.

Blackstone categorized swearing as one of the "Offences against God and Religion,"[251] situating it between passages on "*blasphemy* against

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[243] *Morris*, 3 Va. at 180; *accord, e.g.*, Commonwealth v. Clap, 4 Mass. (4 Tyng) 163, 169 (1808); Respublica v. Dennie, 4 Yeates 267, 269 (Pa. 1805).

[244] *See* State v. Avery, 7 Conn. 266, 267 (1828) ("The information averred, that the letter was a false, scandalous and defamatory libel, written and published with intent to injure the reputation of Mrs. *White* . . . ."); Commonwealth v. Sweney, 10 Serg. & Rawle 173, 173 (Pa. 1823); *Blanding*, 20 Mass. at 304.

[245] State v. Farley, 15 S.C.L. (4 McCord) 317, 321–22 (1827).

[246] Brewer v. Weakley, 2 Tenn. (2 Overt.) 489, 490 (1807).

[247] *See, e.g.*, *Slander and Libel*, *supra* note 211, at 594 ("Again, while written defamation is punished by indictment, redress for spoken words is given only by a civil action."); CHITTY ET AL., *supra* note 107, at 865 n.A (limiting libel to "writing or . . . signs and pictures").

[248] *See, e.g.*, EARL OF HALSBURY, 18 THE LAWS OF ENGLAND BEING A COMPLETE STATEMENT OF THE WHOLE LAW OF ENGLAND 605, 609 (1911); Anderson v. Commonwealth, 26 Va. (5 Rand.) 627, 631 (Gen. Ct. 1826).

[249] *Anderson*, 26 Va. at 631 (emphasis added); *cf.* Thorley v. Lord Kerry (1812) 128 Eng. Rep. 367, 369; 4 Taunt. 355, 359 (CP).

[250] BLACKSTONE, *supra* note 99, at *58.

[251] *Id.* at *41.

the Almighty"[252] and "the offence of *witchcraft*."[253] Swearing was a sort of double delinquency, at once injurious to both societal morals and "our national religion."[254] For instance, jurisdiction over swearing was vested concurrently in the ecclesiastical and temporal courts, the former "punishing all sinful enormities for the sake of reforming the private sinner" while the latter policed swearing's effect on the public morals.[255] The American cases are consistent.[256]

Even if swearing were analogous to modern fighting words, it would not support current doctrine because it was not a strict liability offense. Conviction was impossible without intent to vilify or demean the Christian faith. The Pennsylvania Supreme Court called a "general, malicious, and deliberate intent to overthrow Christianity . . . . the line of indication, where crime commences, and the offence becomes the subject of penal visitation."[257]

CONCLUSION

In 2019, the nation's greatest living First Amendment scholar wrote that "[t]he cumulative impact of [the Supreme Court's] decisions is to make it unlikely that a fighting words law could survive."[258] On this view, prosecutions organized under the doctrine are little more than "the still visible beams of an already extinguished star."[259] Yet recent decades have seen hundreds of recorded decisions and surely scores of indictments that never reached the law reports. Nearly all of these cases proceeded under a strict liability rationale relentlessly rejected at the Founding. Modern Americans are in this respect denied a measure of freedom once enjoyed by their forefathers.

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[252] *Id.* at *59.

[253] *Id.* at *60.

[254] *Id.* at *58.

[255] *Id.*

[256] *See, e.g.*, State v. Ellar, 12 N.C. (1 Dev.) 267, 267–68 (1827) ("Drunkenness and profane swearing are placed on the same footing . . . . [W]here the acts are repeated, and so public as to become an annoyance and inconvenience . . . , no reason is perceived why they are not indictable as common nuisances."); State v. Kirby, 5 N.C. (1 Mur.) 254, 254–55 (1809); *see also* Note, *Blasphemy and the Original Meaning of the First Amendment*, 135 HARV. L. REV. 689, 693–94 & n.48 (2021).

[257] Updegraph v. Commonwealth, 11 Serg. & Rawle 394, 406 (Pa. 1824); *see also id.* at 399 ("This verdict excludes every thing like innocence of intention; it finds a malicious intention in the speaker to vilify the Christian Religion . . . .").

[258] CHEMERINSKY, *supra* note 25, at 159.

[259] VLADIMIR NABOKOV, *Breaking the News* (1938), *in* A RUSSIAN BEAUTY AND OTHER STORIES 37, 38 (1973).