THE 'FIGHTING WORDS' DOCTRINE: OFF THE FIRST AMENDMENT CANVAS AND INTO THE IMPLIED FREEDOM RING?

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I INTRODUCTION

In its 2004 decision in *Coleman v Power*,[1] ('*Coleman*') the High Court overturned the criminal conviction of a prominent Queensland political activist. Patrick Coleman was convicted under s 7(1)(d) of the *Vagrants, Gaming and Other Offences Act 1931* (Qld) for using 'threatening, abusive, or insulting words to any person' in a public place. Coleman was arrested and charged for his conduct whilst protesting in a Townsville shopping mall against members of the local police force whom he considered corrupt. To this end, he was 'distributing pamphlets which contained charges of corruption against several police officers'[2] and, when the respondent asked to see a pamphlet, Coleman pushed him and 'said loudly: "This is Constable Brendan Power, a corrupt police officer"'.[3]

In a four to three decision, the High Court found that s 7(1)(d) was either invalid for offending the implied constitutional freedom of political communication[4] ('implied freedom') or must be given a narrow construction – which did not criminally proscribe the appellant's conduct – to ensure its compatibility with the implied freedom.[5] The three judges who gave s 7(1)(d) a narrow reading to ensure conformity with the implied freedom – Gummow, Hayne and Kirby JJ – said that:

> in the context of this provision 'abusive' and 'insulting' should be understood as those words which, in the circumstances in which they are used, are so hurtful as either they are intended to, or they are reasonably likely to provoke unlawful physical retaliation. *Only* if 'abusive' and 'insulting' are read in this way is there a public purpose to the regulation of what is said to a person in public.[6]

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1 (2004) 209 ALR 182.

2 Ibid 184 (Gleeson CJ).

3 Ibid.

4 Ibid 193–4 (McHugh J).

5 Ibid 227 (Gummow and Hayne JJ), 238 (Kirby J).

6 Ibid 229 (Gummow and Hayne JJ), 246–7 (Kirby J).

In doing so they invoked the First Amendment 'fighting words' doctrine for the purpose of demonstrating 'that there are certain kinds of speech which fall outside concepts of freedom of speech'.[7]

In this article I will make the argument that the invocation of the 'fighting words' doctrine in *Coleman* was neither prudent nor necessary. My argument has four parts. First, I question the prudence of invoking a First Amendment doctrine whose practical application 'has been reduced to vanishing point'[8] by the United States Supreme Court. And even if done for comparative purposes only – which seems the primary reason for its invocation in the judgment of Gummow and Hayne JJ – it is ill-suited for this task as the 'fighting words' doctrine now bears little resemblance to that principle as originally articulated. Second, I argue that, notwithstanding the Gummow and Hayne JJ qualification that '[t]he United States decisions about so-called 'fighting words' find no direct application here',[9] its invocation in Australian law is still problematic. The free speech values that underpin the 'fighting words' doctrine are anachronistic, dubious and at odds with those of the implied freedom. Third, I suggest that, even if it is the original manifestation of the 'fighting words' doctrine that Gummow, Hayne and Kirby JJ favour, its application in Australian free speech law will not be straightforward or without controversy. Finally, I argue that the invocation of the 'fighting words' doctrine by Gummow, Hayne and Kirby JJ in *Coleman* was also unnecessary to reach their otherwise perfectly reasonable construction of s 7(1)(d).

II THE DIMINISHED STATUS OF THE 'FIGHTING WORDS' DOCTRINE IN FIRST AMENDMENT LAW

A Doctrine

As Gummow and Hayne JJ noted in *Coleman*, the genesis of the 'fighting words' doctrine in First Amendment law was the unanimous opinion of the United States Supreme Court ('Supreme Court') in *Chaplinsky v New Hampshire*[10] ('*Chaplinksy*'):

> it is well understood that the right of free speech is not absolute at all times and under all circumstances. 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 by which their very utterance inflict injury or tend to incite an immediate breach of peace*. It has been well observed that such utterances are no essential part of any exposition of

7 Ibid 228 (Gummow and Hayne JJ).

8 Eric Barendt, 'Importing United States Free Speech Jurisprudence?' in Tom Campbell and Wojciech Sadurski (eds), *Freedom Of Communication* (1994) 57, 60.

9 *Coleman* (2004) 209 ALR 182, 228 (Gummow and Hayne JJ).

10 315 US 568 (1941).

> ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.[11]

Their Honours noted that it 'has since been adopted and applied in a number of cases'.[12] But this statement has the potential to mislead. It suggests that the doctrine *as defined in Chaplinsky* has been consistently endorsed and applied by the Supreme Court. The only consistency, however, in these post-*Chaplinsky* decisions and the American freedom of speech jurisprudence more generally is the Supreme Court's diminution of those 'well-defined and narrowly limited classes of speech'[13] (including the 'fighting words' doctrine) not 'thought to raise any Constitutional problem'.[14]

The Supreme Court, for example, no longer considers that 'lewd' or 'profane' speech falls outside the protection of the First Amendment.[15] And 'libelous' speech – at least when the target is a public figure – now enjoys constitutional protection.[16] Even '"obscenity" has been redefined, so that it refers in effect only to hard-core pictorial pornography'.[17] The Court, moreover, has significantly tightened the scope of the 'fighting words' doctrine itself. First Amendment protection is now denied only to 'inflammatory speech *intended* to bring about *imminent* violence'.[18] This development led Rodney Smolla to write that the Supreme Court has

> 'restated' the fighting words doctrine of *Chaplinsky*, superimposing upon it the requirements of a rigorous clear and present danger test … In this sense, the 'fighting words doctrine' is not a free-standing doctrine at all, but merely a specific application of the general clear and present danger test.[19]

The doctrine was limited even further in *RAV v St Paul*.[20] In this 1992 decision, the Supreme Court held that, even within the 'fighting words' category – which is prima facie outside the protection of the First Amendment – it is impermissible for a law to discriminate on the grounds of the message or viewpoint contained in the 'fighting words'. Justice Scalia, delivering the opinion of the Court, wrote that:

> Fighting words are … analogous to a noisy sound truck … both can be used to convey an idea; but neither has, in and of itself, a claim upon the First Amendment. As with the sound truck, however, so also with fighting words: the government

11 *Coleman* (2004) 209 ALR 182, 227–8 (Murphy J), citing *Chaplinsky*, 315 US 568, 571–2 (1942).
12 *Coleman* (2004) 209 ALR 182, 228.
13 *Chaplinsky*, 315 US 568, 571 (1942).
14 Ibid 572.
15 See *Cohen v California*, 403 US 15 (1971) where the Supreme Court held that the expression 'Fuck the Draft' written on the back of a jacket worn in the public area of a Los Angeles court were not 'fighting words' and were entitled to First Amendment protection.
16 See *New York Times v Sullivan*, 376 US 254 (1964).
17 Barendt, above n 8, 60, referring to the cases of *Roth v United States*, 354 US 476 (1957) and *Miller v California*, 413 US 15 (1973).
18 Ibid. See *Brandenburg v Ohio*, 395 US 444, 447 (1969), where the Supreme Court stated that the imminent violence test is met only where 'the advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action'.
19 Rodney Smolla, *Free Speech in an Open Society* (1992) 161–2.
20 505 US 377 (1992).

> may not regulate use based on hostility – or favoritism – towards the underlying message expressed.[21]

The problem – at least for American legislators wishing to proscribe such speech – is compounded by the Supreme Court's rigorous application of the interpretive concepts of vagueness and overbreadth when reviewing putative 'fighting words' statutes.[22] In a series of cases involving speech that would clearly meet the original 'fighting words' threshold, the Court has invalidated the statutes and quashed the relevant convictions where the wording of the *Chaplinsky* formula was not precisely replicated in the impugned law.[23] In this regard, the scope of the 'fighting words' doctrine as a practical matter cannot be divorced from or understood without recourse to these concepts. This is significant, for vagueness and overbreadth analysis have no analogues in Australian implied freedom jurisprudence.[24] As noted below, it also suggests a need for caution before one too readily imports a principle – even if only for comparative purposes[25] – considering the distinctive context, history and values that underpin the respective free speech rights.[26]

It was these doctrinal developments that led Eric Barendt to conclude that 'the "fighting words" category, at issue in the *Chaplinsky* case, has been reduced to vanishing point'.[27] It probably explains why no conviction for 'fighting words'

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21 Ibid 386.

22 On the application of overbreadth analysis to 'fighting words' statutes see Lawrence Tribe, *American Constitutional Law* (2nd ed, 1988) 850–3.

23 See, eg, *Gooding v Wilson*, 405 US 518, 519 (1972), in which the Supreme Court invalidated a statute that made it a crime for '[a]ny person who shall, without provocation, use to or of another, and in his presence ... opprobrious words or abusive language, tending to cause a breach of the peace'. The Court said the statute was on its face unconstitutionally vague and overbroad – it did not proscribe only words that were likely to produce imminent violence from the person to whom they were addressed – and set aside the appellant's convictions without considering the content of the words spoken. The appellant said to a police officer: 'White son of a bitch, I'll kill you'; 'You son of a bitch, I'll choke you to death'; 'You son of a bitch, if you ever put your hands on me again, I'll cut you all to pieces'. Justice Brennan, writing for the Court, said: 'It matters not that the words appellee used might have been constitutionally prohibited under a narrowly and precisely drawn statute': *Gooding v Wilson*, 405 US 518, 520 (1972). On overbreadth analysis in the First Amendment context, see Tribe, above n 22, 1022–61.

24 For example, the main concern of overbreadth analysis is to guard against the chilling effect on legitimate speech occasioned by overbroad statutes, even when the relevant litigant's speech is not in fact constitutionally protected. In this regard, it is best understood as a liberal standing rule in First Amendment cases.

25 See *Coleman* (2004) 209 ALR 182, 228 (Gummow and Hayne JJ), finding that:

> The point to be drawn from the United States experience is important but limited. It is that there are certain kinds of speech which fall outside concepts of freedom of speech … The Australian constitutional and legal context is different from that of the United States. The United States decisions about so-called 'fighting words' find no direct application here. But the United States references to 'narrowly limited' definitions of speech which can be proscribed find echoes in the application of well-established principles of statutory construction to the Vagrants Act.

26 On this point in the context of the implied freedom see generally Barendt, above n 8; Tom Campbell, 'Democracy, Human Rights and Positive Law' (1994) *Sydney Law Review* 195, 206–7; Gerald Rosenberg and John Williams, 'Do Not Go Gently into that Good Right: The First Amendment in the High Court of Australia' (1997) *Supreme Court Review* 439, 448–56, 458–64.

27 See Barendt, above n 8, 60.

has been upheld by the Supreme Court since *Chaplinsky*.[28] In any event, one may query the extent to which the 'fighting words' doctrine – or what remains of it – can shed any light on the free speech issues that will arise in the context of Australian constitutional, statutory and common law. For it is clear enough that the construction of s 7(1)(d) given by Gummow, Hayne and Kirby JJ – that '"abusive" and "insulting" should be understood as those words which, in the circumstances in which they are used, are so hurtful that they are either intended to, or are reasonably likely to, provoke unlawful physical retaliation'[29] – proscribes a significantly wider class of speech than is permissible under the 'fighting words' doctrine as now understood and applied by the Supreme Court.

This disjuncture, moreover, cannot be assumed away by Gummow and Hayne JJ finding that it is unnecessary to examine 'the details of the limitations that have been set in the United States to the application of the principle'.[30] Some of the decisions that have most diminished the doctrinal status of the 'fighting words' doctrine are cited by their Honours as examples of the Supreme Court adopting and applying the original 'fighting words' doctrine.[31] In this regard the 'fighting words' category is an inapt and potentially misleading comparator for the purpose of identifying the class of speech which Gummow, Hayne and Kirby JJ consider that s 7(1)(d) can proscribe without curtailing the fundamental right of free speech.

B Free Speech Values

In addition to its diminished doctrinal status, the 'fighting words' doctrine embodies and animates anachronistic and dubious free speech values, at odds with those that underpin the implied freedom. As Charles R Lawrence III writes:

> The subordinated victims of fighting words … are silenced by their relatively powerless position in society … The fighting words doctrine presupposes an encounter between two persons of relatively equal power who have been acculturated to respond to face-to-face insults with violence: The fighting words doctrine is a paradigm based on a white male point of view. It captures the 'macho' quality of male discourse. It is accepted, justifiable, and even praiseworthy when 'real men' respond to personal insult with violence.[32]

When the victims of 'fighting words' are women, the powerless or members of minority groups – as they so often are – they 'correctly perceive that a violent response … will result in a risk to their own life and limb. *This risk forces targets*

28 See *Coleman* (2004) 209 ALR 182, 228 (Gummow and Hayne JJ), citing Erwin Chemerinsky, *Constitutional Law – Principles and Policies* (2nd ed, 2002) § 11.3.3.2.

29 *Coleman* (2004) 209 ALR 182, 229 (Gummow and Hayne JJ), 246 (Kirby J).

30 Ibid 228.

31 Ibid fn 149, where Gummow and Hayne JJ cite six decisions where they say the 'fighting words' doctrine has been adopted and applied by the Supreme Court: *Terminiello v Chicago*, 337 US 1 (1949); *Cohen v California*, 403 US 15 (1971); *Gooding v Wilson*, 405 US 518 (1972); *Lewis v City of New Orleans*, 415 US 130 (1974); *RAV v St Paul*, 505 US 377 (1992); *Virginia v Black*, 538 US 343 (2003). Then, four of those six decisions (*Terminiello*, *Lewis*, *RAV* and *Virginia*) are cited in relation to the 'limitations' and 'difficulties' with the American doctrine which their Honours say need not be examined: ibid fn 151.

32 Charles R Lawrence III, 'If He Hollers Let Him Go: Regulating Racist Speech on Campus' in Mari Matsuda et al (eds), *Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* (1993) 53, 69.

to remain silent and submissive'.[33] The same response is also preferred or chosen by the significant proportion of men that do not fall within the male paradigm as described by Lawrence. In this regard, the real threat posed to freedom of speech by the 'fighting words' category is not its capacity to trigger violence (and close dialogue) but to engender fear, intimidation and then silence. As Sadurski notes:

> The interest in values promoted by a general regime of free speech is minimal when speech consists of targeted verbal assaults. The aim of 'fighting words' is not to open a discussion, invite counter-arguments, advocate a view, or to convince one's audience.[34]

The 'fighting words' doctrine is underpinned by an aggressive, male concept of discourse that, if taken seriously, 'is clearly counter-productive from the viewpoint of promoting self-control and the discouragement of violence'.[35] These are important democratic values in their own right. And they also serve to promote an environment where citizens feel secure to proffer and exchange information and ideas in a manner that is free and robust.

This insight is significant for the implied freedom. It exists to secure the effective operation of the system of representative and responsible government established by the *Constitution*.[36] And that system 'cannot operate without the people and their representatives communicating with each other about government and political matters'.[37] The implied freedom then guarantees the free and uninhibited flow of political and governmental communication necessary to enable 'the people to exercise a free and informed choice as electors'.[38] That freedom is meaningful only if the citizenry and their representatives feel secure to engage in an open and robust political dialogue. These values are the bedrock of the implied freedom. The *Chaplinsky* principle – and its capacity to intimidate and silence – is, in my view, hostile to these free speech values.

But in rejecting the speech values that underpin the 'fighting words' doctrine and their compatibility with the implied freedom, I do not mean to suggest that Gummow, Hayne and Kirby JJ were wrong in quarantining from protection those 'threatening, abusive or insulting words' of a sufficiently serious and menacing nature. To the contrary and, as Sadurski notes above, the kinds of communication that fall within the 'fighting words' category do little (if anything)[39] to advance the values of freedom of speech.[40] Their proscription is appropriate and

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33 Ibid (emphasis added). A similar point was made by Gleeson CJ in *Coleman* (2004) 209 ALR 182, 186.

34 Wojciech Sadurski, *Freedom of Speech and Its Limits* (1999) 114.

35 Ibid.

36 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 561.

37 *Coleman* (2004) 209 ALR 182, 206 (McHugh J).

38 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 560.

39 It is worth noting here that in *RAV v St Paul*, 505 US 377, 384–5 (1992), Scalia J stated that:

> It is not true that 'fighting words' have at most a 'de minimus' expressive content, or that their content is in all respects 'worthless and undeserving of constitutional protection,'; sometimes they are quite expressive indeed. We have not said that they constitute 'no part of the expression of ideas,' but only that they constitute 'no essential part of any exposition of ideas.' (footnotes omitted)

40 Sadurski, above n 34, 112–14.

commendable in my view. But I would reject that part of their Honours reasoning in *Coleman* which stated that:

> Making criminal the use of certain kinds of words *to* another can be explained only by reference to the effect on, or the reaction of, the person to whom the words are directed. It can be explained only by the provocation offered.[41]

As suggested above, another reason for proscribing this category of words – and one more compatible with the values that underpin the implied freedom – is to create so far as possible a public domain where citizens feel secure to exercise their freedom to (politically) communicate in an open and robust manner. This would reflect a distinct conception of and commitment to free speech, one that recognises the values of individual dignity, equality and non-violence. There was an opportunity in *Coleman* for Gummow, Hayne and Kirby JJ to fashion a home-grown speech principle – one informed by the implied freedom and the silencing capacity of such words – to provide a compelling justification for their construction of s 7(1)(d) without the need to invoke an anachronistic and normatively suspect principle of First Amendment law.[42]

III THE APPLICATION OF THE 'FIGHTING WORDS' DOCTRINE IN AUSTRALIAN FREE SPEECH LAW

As noted, Gummow, Hayne and Kirby JJ consider that, in the context of section 7(1)(d), '"abusive" and "insulting" should be understood as those words which, in the circumstances in which they are used, are so hurtful as either they are intended to, or they are reasonably likely to provoke unlawful physical retaliation'.[43] This faithfully reflects the original 'fighting words' doctrine and not how it is now understood and applied by the Supreme Court. But, as Kent Greenawalt notes in the First Amendment context, the application of one part of the original *Chaplinsky* formula ('words likely to cause an average addressee to fight') is problematic in important respects:

> The first ambiguity concerns the persons to be counted among potential addressees: everyone, only people to whom a phrase really 'applies,' or all those likely to be angered by having the label applied to them? Someone of French origin reacts differently to being called a 'Polack' than someone of Polish origin … Another

41 *Coleman* (2004) 209 ALR 182, 229 (Gummow and Hayne JJ) (emphasis in the original), 247 (Kirby J) employing similar reasoning.

42 It is interesting to note here that two of the three dissenting judges in *Coleman* recognised amongst other things the silencing capacity of the kinds of words that s 7(1)(d) proscribed: ibid 186 (Gleeson CJ), 265–6 (Heydon J). For a more detailed discussion on this point, see Adrienne Stone and Simon Evans, 'Developments: Freedom of Speech and Insult in the High Court of Australia', *International Journal of Constitutional Law* (forthcoming).

43 *Coleman* (2004) 209 ALR 182, 229 (Gummow and Hayne JJ), 247 (Kirby J) employing similar reasoning; see also 186 (Gleeson CJ), which provides an alternative and reasonable construction of s 7(1)(d) which recognises that:

> It is open to parliament to form the view that threatening, abusive or insulting speech and behaviour may in some circumstances constitute a serious interference with public order, even where there is no intention, an no realistic possibility, that the person threatened, abused or insulted, or some third person, might respond in such a manner that a breach of the peace will occur.

> ambiguity is how an 'average addressee' is to be conceived … [And], [c]an the same remark be punishable if directed at the one person able to respond and constitutionally protected if directed at people not able to match the speaker physically?[44]

So, even if one favours the proscription of the kinds of speech that fall within the 'fighting words' category, it is worth noting that if the original *Chaplinsky* formula is invoked to identify those words, its application in Australian free speech law will not be straightforward or without controversy.

IV WHY THE INVOCATION OF THE 'FIGHTING WORDS' DOCTRINE BY GUMMOW, HAYNE AND KIRBY JJ WAS UNNECESSARY IN *COLEMAN*

I have so far argued that the invocation of the 'fighting words' doctrine by Gummow, Hayne and Kirby JJ in *Coleman* was imprudent. My final point is that is was also unnecessary. As the judgment of Gummow and Hayne JJ itself suggests, in the implied freedom and the common law statutory presumption 'that fundamental rights are not to be cut down save by clear words',[45] they already had at their disposal the constitutional and interpretive tools to deliver the same judgment.[46] Indeed, once the words uttered by Patrick Coleman to Constable Power were characterised as political communication,[47] then no s 7(1)(d) conviction could logically follow. For it was a provision lacking the unmistakable legislative clarity required to infringe the fundamental freedom of persons to communicate on matters of government and politics.[48] It did not meet the principle of legality. If it did – so that some species of political communication were proscribed – then of course the compatibility or otherwise of such a law with the implied freedom would need to be assessed.[49]

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44 Kent Greenawalt, 'Insults and Epithets: Are They Protected Speech?' (1990) 42 *Rutgers Law Review* 287, 296–7.

45 *Coleman* (2004) 209 ALR 182, 228.

46 Ibid 229 (Gummow and Hayne JJ), stating that: 'These conclusions are reinforced by considering the principles established in Lange'.

47 It was conceded by the respondents in *Coleman* that the appellant's expression was 'political communication' for the purpose of the implied freedom: ibid 202 (McHugh J).

48 I am not overlooking the fact that the implied freedom is negative in nature and not a source of individual rights: *Mulholland v Australian Electoral Commission* (2004) 209 ALR 582, 614 (McHugh J). But as a fundamental (constitutional) freedom it would seem that it too can be limited only when the parliament expresses its intent to do so in clear and unambiguous statutory language. In this regard, the combination of the implied freedom and the principle of legality can operate to provide robust protection of individual freedom of speech.

49 See *Coleman* (2004) 209 ALR 182, 230 (Gummow and Hayne J), 247 (Kirby J), where their Honours considered that their construction of s 7(1)(d) saved it from being invalidated by the Lange test.

V CONCLUSION

This article has questioned the prudence and necessity of Gummow, Hayne and Kirby JJ invoking the 'fighting words' doctrine in the course of delivering their judgments in *Coleman*. It represents an inapt and potentially misleading comparator for the class of speech they wish to quarantine from legal protection, as the 'fighting words' category originally articulated in *Chaplinsky* 'has been reduced to vanishing point'.[50] The values that underpin the doctrine are anachronistic, dubious and at odds with those that animate the implied freedom. And, in any event, their Honours' (perfectly reasonable) construction of s 7(1)(d) was available without its invocation.

My analysis points to the need for caution before one too readily imports a foreign principle into Australian free speech law. Even if done for comparative purposes only, the speech values that underpin the principle inevitably gain a domestic interpretive foothold. This is fine, so long as those values are compatible with the indigenous framework of free speech history, law and principle. But my analysis suggests that this is not the case regarding the 'fighting words' doctrine. Moreover, as Eric Barendt has warned, '[w]hen one legal system contemplates adopting concepts and perspectives from another, it should be aware that these ideas are very likely contested in the latter'.[51] And, while I have argued that it was unnecessary to involve the 'fighting words' doctrine in *Coleman*, there was nevertheless an opportunity for Gummow, Hayne and Kirby JJ to excise a similar category of words from legal protection in Australia through the development of a home-grown free speech principle that recognises the silencing capacity of this menacing species of public expression.

50 Barendt, above n 8, 60.
51 Ibid 72.