

WTF? FIRST AMENDMENT IMPLICATIONS OF POLICING PROFANITY

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INTRODUCTION

Growing up, parents and teachers alike preached to us the idea that some words are “bad words.” And we naive children, hearing this idea from towering authority figures, accepted their wisdom as law. Until we did not. Until that one daring day, be it at five or fifteen years old, when we first experimented with a “bad word,” and learned that saying something bad can feel so good. After crossing that threshold, and dropping our first f-bomb, the stigma began to fade. We realized that words are just words; we were not going to be thrown in jail for saying “h-e-double hockey sticks.” The parental penal code forbidding them was not a real thing.

The good news is that we were all mostly right: saying bad words is not a one-way ticket to jail. The bad news is, until 2011, North Carolina had a statute saying the opposite: it was a misdemeanor to use “indecent or profane language” in public.¹ The *worse* news, at least for anyone in Virginia, is that the use of profanity in public is *still* a criminal offense.² Fuck that.

As a U.S. citizen in the 21st century, taking free speech for granted is easy. Rewind a few centuries, however, and the foundational First Amendment that we conveniently invoke to protect our opinions and ourselves was not around.³ The fundamental idea⁴ is that “Congress shall make no law

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¹ *State’s Anti-Profanity Law Unconstitutional Rules Superior Court Judge*, ACLU (Jan. 7, 2011), <https://www.aclu.org/news/states-anti-profanity-law-unconstitutional-rules-superior-court-judge>.

² Laura Vozzella, *It’s a Crime in Virginia to Swear in Public. A Lawmaker Says That’s #@!#ing Nuts*, WASH. POST (Dec. 15, 2017), https://www.washingtonpost.com/local/virginia-politics/its-a-crime-in-virginia-to-swear-in-public-a-lawmaker-says-thats-ating-nuts/2017/12/14/59a3760c-e0d9-11e7-8679-a9728984779c_story.html?utm_term=.c4a216e8cb4c.

³ See David Smith & Luc Torres, *Timeline: A History of Free Speech*, GUARDIAN (Feb. 5, 2006, 4:54 PM), <https://www.theguardian.com/media/2006/feb/05/religion.news>.

⁴ See *Amendment I: Freedom of Religion, Speech, Press, Assembly, and Petition*, CONSTITUTIONCENTER.ORG, <https://constitutioncenter.org/interactive-constitution/amendments/amendment-I> (last visited Feb. 8, 2019) (stating that the First Amendment, originally passed in 1789 and ratified in 1791 as part of the Bill of Rights, helps comprise the foundation upon which the modern United States was built).

respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”⁵ Although the drafters were explicit in declaring basic First Amendment freedoms to which all Americans are entitled, they failed to delve deeper and define their terms. The nation “shall make no law . . . abridging the freedom of speech,” because in the aftermath of the Revolutionary War, we valued the idea of speech without consequences.⁶ Unlike other nations, we decided that citizens ought not to be arrested (or worse) for criticizing the government.⁷ In the shadow of this progressive political movement, however, traditional or prudish approaches to profanity restricted just how free speech should actually be.⁸

The First Amendment was not written on a blank slate; profanity was already penalized. “At common law, it [was] an offense to utter obscene words in public”⁹ The common law rule stems from the idea that “upon the foundations of the law of nature and the law of revelation all human laws depend.”¹⁰ Put differently, the common law rules were made to keep man in line, and part of what it meant to be “in line” was to “not offend against the rules of public decency” and instead “keep[] his wickedness to himself.”¹¹ Further, “if [man] makes his vices public . . . it is then the business of human laws to correct them.”¹² These common law rules applied to public profanity because, foundationally, it is indecent to expose “one’s person to the public view,”¹³ and, likewise, “outrageously vulgar and obscene words . . . if uttered in the ear of the public [are no] less likely to shock any one’s sense of decency, and to corrupt the

⁵ U.S. CONST. amend. I.

⁶ U.S. CONST. amend. I; *see also* *Freedom of Expression*, ACLU, <https://www.aclu.org/other/freedom-expression> (last visited Feb. 8, 2019).

⁷ *See, e.g., Freedom of Expression in China: A Privilege, Not a Right*, CONGRESSIONAL-EXECUTIVE COMMISSION ON CHINA, <https://www.cecc.gov/freedom-of-expression-in-china-a-privilege-not-a-right> (last visited Feb. 8, 2019).

⁸ *The History of Free Speech*, FIRE, <https://www.thefire.org/first-amendment-library/timeline/the-history-of-free-speech/> (last visited Feb. 8, 2019).

⁹ 67 C.J.S. *Obscenity* § 11 (2012); *see also* *Bell v. State*, 31 Tenn. 42, 45 (1851).

¹⁰ *Bell*, 31 Tenn. at 44 (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *42).

¹¹ *Id.* (“[P]rovided he keeps his wickedness to himself and does not offend against the rules of public decency, he is out of the reach of human laws.”)

¹² *Id.*; *see also* 4 WILLIAM BLACKSTONE, COMMENTARIES *41, *42 (reasoning, by distinguishing between public and private action, and drawing from English precedent, that “offences against good morals and public decency, if committed in private, belong properly and exclusively to the ecclesiastical courts . . . whenever they become public, so as thereby to become of pernicious example or offensive to public morals and decency, they fall within the proper jurisdiction of the temporal courts”).

¹³ *Bell*, 31 Tenn. at 46 (categorizing nudity as indecent).

morals of society.”¹⁴ Therefore, because expressing profanity “shock[ed] any one’s sense of decency,” profanity violated the common law.¹⁵

Reconciling this common law demand for restricting speech¹⁶ with the Framers’ decision to draft a bill of rights is linear: the First Amendment was a repudiation of the common law. “There is, however, precious little record of what freedom of speech and of the press really meant to the framers.”¹⁷ Despite “insistent demand” for protection of the freedoms enumerated in the Bill of Rights, that demand “was not accompanied by a reasoned analysis of what it meant, how far it extended, and under what circumstances it might be limited.”¹⁸ Thus, the impact of the First Amendment on the common law prohibition against public profanity remains an open question.

What this open question, gap in knowledge, or missing intent means today is that both sides of the argument—over whether the modern law can restrict profane speech—have a legal basis. On the one hand, those against public profanity, can cite to common law principles and analogies that liken saying “fuck” to flashing a stranger.¹⁹ On the other hand, believers in free speech for its own sake can cite to the Bill of Rights.²⁰

Centuries have passed since Blackstone preached public decency,²¹ and we have seen a shift in what we, as a society, consider moral and decent.²² This progressive shift has changed not only what we consider immoral or indecent, but consequently how we interpret the First Amendment: As our moral corset loosens, the First Amendment is given greater room to breathe.²³ Or is that generalization too broad? After all, North

¹⁴ *Id.*

¹⁵ *Id.* (“[W]ere there no analogy to be drawn from any decided case, we hold that, upon the broad principles of the common law which we have stated, this prosecution [for use of obscene language] is most amply sustained. Thus, fortified by sound principles—principles which lie at the foundation of every well-regulated community (and resting on a basis so immutable)—we are the more indifferent as to precedents exactly in point.”).

¹⁶ See generally *id.*

¹⁷ 1 RODNEY A. SMOLLA, SMOLLA & NIMMER ON FREEDOM OF SPEECH: A TREATISE ON THE FIRST AMENDMENT, *Adoption of the Bill of Rights* § 1:7 (2018).

¹⁸ *Id.* (quoting LEONARD W. LEVY, LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY 214–15 (1960)).

¹⁹ *Bell*, 31 Tenn. at 44.

²⁰ See *The Bill Of Rights: A Brief History*, ACLU, <https://www.aclu.org/other/bill-rights-brief-history> (last visited Feb. 8, 2019).

²¹ See generally *Bell v. State*, 31 Tenn. 42 (1851).

²² See Laretta Brown, *Gallup: Majority of Americans Believe the U.S. Is in Moral Decline*, TOWNHALL (May 23, 2017, 4:30 PM) <https://townhall.com/tipsheet/laurettabrown/2017/05/23/gallup-vast-majority-of-americans-believe-the-us-is-in-moral-decline-n2330938>.

²³ Sreya Pinnamaneni & Stevie Shukman, *The Evolution of First Amendment Jurisprudence in a Post-Fact World*, COLUM. UNDERGRADUATE L. REV. (Oct. 31, 2017),

Carolina rode the criminal public profanity train until 2011,²⁴ and Virginia is *still* on board with penalizing profanity.²⁵ This Note will analyze the current laws restricting profane speech in each state and examine the national pattern of repealing laws that mirror the Virginia statute, which continues to criminalize public profanity.

This Note consists of four Parts. Part I will explore and identify an anti-profanity statute deemed unconstitutional, how it originated, and why it has since been ruled unconstitutional. Part II will consist of a fifty-state survey evaluating the status of anti-profanity statutes, both past and present. Part III will consider how and why these statutes endure: is the statute the product of a conservative constituency? Has the statute been dormant in the depths of the penal code, effectively retired from use? Or is this a situation in which the perfect plaintiff has yet to come forward and challenge this law? Part IV will conclude that all anti-profanity statutes are unconstitutional.

I. AN UNCONSTITUTIONAL ANTI-PROFANITY STATUTE

Identifying an unconstitutional anti-profanity statute consists of two primary components. First, a statute that expressly restricts the use of “fighting words,” or has been construed to do so, is likely to be constitutional. Second, a statute that criminalizes profane language in a specific context or with a specific intent is less vulnerable to attack as unconstitutional. In order to identify unconstitutional statutory targets, it is first important to understand the constitutional statutes that are exempt from criticism.

In North Carolina, it was a Class 3 misdemeanor “on any public road or highway and in the hearing of two or more persons, in a loud and boisterous manner, [to] use indecent or profane language.”²⁶ This was the language of North Carolina General Statute 14-197 (hereinafter “N.C. 14-197”),²⁷ and, spoiler alert, the law was held unconstitutional in 2011.²⁸ This anti-profanity statute is an appropriate vehicle for learning how to identify other anti-profanity statutes, understand their breadth, and ultimately dismantle them.

<http://blogs.cuit.columbia.edu/culr/2017/10/31/feature-the-evolution-of-first-amendment-jurisprudence-in-a-post-fact-world/>.

²⁴ See ACLU, *supra* note 1.

²⁵ See Vozzella, *supra* note 2.

²⁶ N.C. GEN. STAT. § 14-197 (2013), *repealed by* 2015 N.C. Sess. Laws. 286, § 1.1(1); *see also* Vozzella, *supra* note 2.

²⁷ *Id.*

²⁸ *State v. Elabanjo*, No. 09 CRS 54172 (Orange Cnty. Super. Ct. Jan. 5, 2011); *see also* ACLU, *supra* note 1.

In pre-2011 North Carolina, N.C. 14-197 criminalized an extraordinary amount of behavior that the typical person would not normally recognize as punishable under the law. A group of students walking along Franklin Street, swearing loud enough for passersby to overhear, would be committing a Class 3 misdemeanor. Elderly friends strolling down the sidewalk, using colorful language at a volume the hearing-impaired among them can appreciate, would be committing a Class 3 misdemeanor. To a layperson, something seems strange about a statute that would yield these results. How then did it take 98 years for North Carolina to rectify this error?²⁹

A. Defining Profanity: Distinguishing Profanity, Obscenity, and Indecency

Profanity, the subject of this Note, is a narrow path through the world of censored content. Included in that world is obscenity (in its many forms) and indecent content—two similar yet distinct content categories. It is helpful in distinguishing these two descriptors to refer to their definitions as provided by the Federal Communications Commission (the “FCC”) as guidance.³⁰ Per the FCC, “[p]ropane content includes ‘grossly offensive’ language.”³¹ In *Miller v. California* the U.S. Supreme Court determined that obscene content “does not have protection by the First Amendment” and, to be categorized as obscene, must satisfy the Supreme Court’s three-part test: “[i]t must appeal to an average person’s prurient interest; depict or describe sexual conduct in a ‘patently offensive’ way; and, taken as a whole, lack serious literary, artistic, political or scientific value.”³² Indecent content includes sexual content that fails to satisfy the obscenity test.³³ Although the FCC guidance is helpful, states are of course free to tailor their definitions as they see fit. As a taste of where state courts have taken this idea, words that “imply divine condemnation” or “divine vengeance” have been considered profane words.³⁴ Blackstone, the original anti-profanity puppet master, would be damn proud.

²⁹ See N.C. GEN. STAT. § 14-197 (2013), *repealed by* 2015 N.C. Sess. Laws. 286 § 1.1(1).

³⁰ See *Obscene, Indecent and Profane Broadcasts*, FCC CONSUMER GUIDES <https://www.fcc.gov/consumers/guides/obscene-indecnt-and-profane-broadcasts> (last visited Sept. 2, 2018) [hereinafter *Profane Broadcasts*]. Note that these definitions are being used strictly for guidance in this context, and are not the legal standards or definitions applied to statutes generally.

³¹ *Id.*

³² *Id.*; see also *Miller v. California*, 413 U.S. 15, 18 (1973).

³³ *Profane Broadcasts*, *supra* note 30.

³⁴ Thomas Trenker, *Annotation, Validity and Construction of Statutes or Ordinances Prohibiting Profanity or Profane Swearing or Cursing*, 5 A.L.R. 4th 956 (1981).

For the limited purpose of analyzing statutes that criminalize words spoken in public, references made to “anti-profanity statutes” will include those statutes that condemn: offensive, profane, vulgar, and/or indecent language.³⁵ N.C. 14-197, for example, forbade “indecent or profane language” when used in a boisterous manner.³⁶

B. Identifying the Statute: Fighting Words vs. Fun Words

Distinct from pure profanity, fighting words are “those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction.”³⁷ In terms of constitutional protection, “guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”³⁸ The line separating fun words and fighting words has thus been drawn; a statute criminalizing fighting words is a constitutional anti-profanity statute. Conversely, unconstitutional anti-profanity statutes target profanity for its own sake, unjustifiably punishing fun words.

The fighting words doctrine has been refined and narrowed over time.³⁹ Whereas the doctrine originally focused on the words themselves, the present application considers the circumstances under which the words were said.⁴⁰ Indeed “words may or may not be ‘fighting words,’ depending upon the circumstances of their utterance.”⁴¹ Explaining the rationale and importance of this consideration, “[i]t is unlikely, for example, that [alleged fighting words] . . . would have precipitated a physical confrontation between [a] middle-aged woman who spoke them and the police officer in whose presence they were uttered.”⁴²

The distinction between profanity and fighting words is therefore crucial as fighting words exist outside the bubble of

³⁵ See *infra* Part II.

³⁶ See N.C. GEN. STAT. § 14-197 (2013), *repealed by* 2015 N.C. Sess. Laws. 286 § 1.1(1).

³⁷ *Cohen v. California*, 403 U.S. 15, 20 (1971) (clarifying that the phrase “fuck the draft” on a jacket is protected under the First Amendment); see also *Virginia v. Black*, 538 U.S. 343, 359 (2003) (applying the definition of fighting words to Virginia’s cross burning statute).

³⁸ *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

³⁹ *Cohen*, 403 U.S. at 20; see also *Blasphemy and Profanity*, 12 AM. JUR. 2D § 13 (2018).

⁴⁰ *Lewis v. City of New Orleans*, 415 U.S. 130, 135 (1974) (Powell, J., concurring).

⁴¹ *Id.*

⁴² *Id.*

constitutional protection granted to speech generally.⁴³ Profanity for its own sake, on the other hand, occupies a place comfortably within the constitutional bubble,⁴⁴ much to the forever moral and decent William Blackstone's chagrin. In the absence of a narrow exception, speech "is constitutionally protected regardless of how vulgar or lacking in taste or social, political or artistic content."⁴⁵ Explicitly, "[a] state may not punish the mere public utterance of the word 'fuck' in order to maintain what it regards as a suitable level of discourse within the body politic."⁴⁶

Although there is overlap in the literal content of profanity and fighting words, their paths diverge when it comes to intent. To be considered "fighting words," the speaker must be using personally abusive language and addressing another person.⁴⁷ An example of the significant weight a speaker's intent carries in this analysis is illustrated in *Cohen v. California*.⁴⁸ Cohen "was observed in the Los Angeles County Courthouse . . . wearing a jacket bearing the words 'Fuck the Draft' which were plainly visible."⁴⁹ Cohen's jacket ultimately did not violate the First Amendment, and the use of "fuck" was not considered to be in the context of fighting words.⁵⁰ "No individual actually or likely to be present could reasonably have regarded the words on appellant's jacket as a direct personal insult."⁵¹ In the absence of a narrow exception, like the fighting words doctrine or hate speech, criminalizing speech for its own sake violates the First Amendment.⁵² Per *Cohen*, "the State may not, consistently with the First and Fourteenth Amendments, make the simple public display here involved of this single four-letter expletive a criminal offense."⁵³

Returning to the language of N.C. 14-197, the statute did not satisfy the fighting words doctrine or any other narrow

⁴³ *Brandenburg*, 395 U.S. at 447.

⁴⁴ *See id.* at 456 (Douglas, J., concurring) ("The line between what is permissible and not subject to control and what may be made impermissible and subject to regulation is the line between ideas and overt acts.").

⁴⁵ *Commonwealth v. Zullinger*, 450 Pa. Super. 533, 537 (1996) (noting such narrow exceptions to constitutional protections as "obscenity, defamation, and 'fighting words'").

⁴⁶ 12 AM. JUR. 2D *Blasphemy and Profanity* § 13 (2009) (citing *Cohen v. California*, 403 U.S. 15 (1971)).

⁴⁷ *Cohen v. California*, 403 U.S. 15, 20 (1971); *see also* *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

⁴⁸ *Cohen*, 403 U.S. at 20.

⁴⁹ *Id.* at 16.

⁵⁰ *Id.* at 20.

⁵¹ *Id.* at 20–21 ("The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is . . . dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner.").

⁵² *Id.* at 21.

⁵³ *Id.* at 26.

exception to constitutional protection. Operating outside of the fighting words doctrine makes a statute like N.C. 14-197 ripe for constitutional attack. North Carolina's Disorderly Conduct statute, on the other hand, includes language that falls under the fighting words doctrine, criminalizing "a public disturbance intentionally caused by any person who . . . [m]akes or uses any utterance, gesture, display or abusive language which is intended and plainly likely to provoke violent retaliation and thereby cause a breach of the peace."⁵⁴

C. Understanding The Unconstitutional Anti-Profanity Statute's Breadth: An Intent Requirement

Criminalizing language simply because it is profane, rather than because of the intent behind it triggers First Amendment protection. "[T]he [speech-restricting] statute must be carefully drawn or be authoritatively construed to punish only unprotected speech and not be susceptible of application to protected expression."⁵⁵ In other words, as the Supreme Court clarified, "[b]ecause First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity."⁵⁶

A reliable means of narrowing a statute such that it remains constitutional is to include an intent requirement or comparable limiting provision. A statute that prohibits "intentionally or knowingly . . . us[ing] abusive, indecent, profane, or vulgar language in a public place, and the language by its very utterance tends to incite an immediate breach of the peace"⁵⁷ is of course narrower than its counterpart in another state that prohibits "[a]ny person, who shall, without provocation, use to or of another, and in his presence . . . opprobrious words or abusive language."⁵⁸

From afar, this proposed theory mirrors the *Brandenburg* test prohibiting language "directed to inciting or producing imminent lawless action."⁵⁹ In the context of profane language, however, this idea becomes more complex. Acknowledging that narrowing the scope of a statute with a defined intent requirement means that the statute is less likely to be found void

⁵⁴ N.C. GEN. STAT. § 14-288.4(a)(2) (2013).

⁵⁵ *Gooding v. Wilson*, 405 U.S. 518, 522 (1972); *see also Cantwell v. Connecticut*, 310 U.S. 296, 304 (1940) ("In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom.").

⁵⁶ *Gooding*, 405 U.S. at 522 (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)).

⁵⁷ 2013 TEX. GEN. LAWS 42.01.

⁵⁸ *Gooding*, 405 U.S. at 518-19.

⁵⁹ *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

for vagueness or overbreadth, states have adopted a range of intent requirements with varying degrees of success.⁶⁰

Using the North Carolina statute as an example, N.C. 14-197 was silent on intent, but included two other limiting provisions: the offense must take place “on any public road or highway” and “in the hearing of two or more persons.”⁶¹ Although these requirements are limiting, they did little more than say it was acceptable to swear alone in an open field, or in a private place. The present Disorderly Conduct statute, N.C. Gen. Stat. § 14-288.4, explicitly requires that the individual use language “intended and plainly likely to provoke violent retaliation and thereby cause a breach of the peace.”⁶² Essentially, the present statute expressly criminalizes “fighting words” rather than any and all profane language. The literal or constructional difference between these statutes is that the former was sweeping and the latter far narrower. The functional difference is that the struck statute criminalized the speaker’s profane content (regardless of to whom it was addressed or in what context), while the modern statute considers intent first and content second.

Distilling a possible rule from this comparison, a statute that criminalizes behavior (profane language in a specific context with a specific intent) is constitutional; a statute that criminalizes speech (profane language in any context ignoring intent) is unconstitutional.⁶³ Unconstitutional anti-profanity statutes are an affront to the First Amendment and belong in history books, not “on the books.”

D. Dismantling the Statute: Unconstitutionally Void for Vagueness

In a perfect world, a citizen could reach out to his or her representative in the legislature, explain that an archaic law violates his or her freedom of speech, and that law would consequently be repealed. In reality, however, a combination of red tape, busy schedules, and lack of awareness combine to perpetuate ancient rules and ideas.

Navigating the dense thicket of tradition, standing, and creative arguments, attorneys and judges seeking to rid the world of unconstitutional anti-profanity statutes often forego the free speech approach in favor of a “void for vagueness” argument.⁶⁴

⁶⁰ See *infra* Part II.

⁶¹ N.C. GEN. STAT. § 14-197 (2015), *repealed by* 2015 N.C. Sess. Laws. 286 § 1.1(1).

⁶² N.C. GEN. STAT. § 14-288.4(a)(2) (2013).

⁶³ Under N.C. GEN. STAT. § 14-197, the exasperated observation: “it’s so fucking humid today” would constitute a misdemeanor; under N.C. GEN. STAT. § 14-288.4, it would not, due to lack of intent to provoke violent retaliation or breach the peace. N.C. GEN. STAT. § 14-197 (2015); N.C. GEN. STAT. § 14-288.4(a)(2) (2013).

⁶⁴ See Pinnamaneni & Shukman, *supra* note 23.

Illustrating this point, N.C. 14-197 was not struck down as violating the First Amendment—it was struck down as “unconstitutionally vague.”⁶⁵ The lack of clarity as to what constituted “indecent or profane language” meant that the law risked inconsistent application and provided little guidance to North Carolinians as to what they could and could not say without risk of committing a misdemeanor.⁶⁶ “There is no longer any consensus, if there ever was, on what words in the modern American lexicon are ‘indecent’ or ‘profane.’”⁶⁷ Superior Court Judge Allen Baddour concluded: “[a] reasonable person cannot be certain before she acts that her language is not violative of this law, and it is therefore unconstitutionally vague.”⁶⁸

Funneling through the conclusions above, identifying a potentially unconstitutional anti-profanity statute becomes a manageable task. First, a statute that expressly restricts the use of “fighting words,” or has been construed to do so, is less vulnerable to attack as unconstitutional. Second, a statute that criminalizes profane language in a specific context or with a specific intent is less vulnerable to attack as unconstitutional. The remaining statutes, those criminalizing profanity for its own sake, are without a constitutional defense. Unconstitutional anti-profanity statutes belong in history books, where they cannot infringe on citizens’ First Amendment rights.

II. ANTI-PROFANITY STATUTES ACROSS AMERICA: A FIFTY-STATE SURVEY

It would be wonderful to say that N.C. 14-197 was the last of its kind, and its death in 2011 marked the end of a repressive era. Unfortunately, that is not the case. The stubborn siblings of N.C. 14-197 live on, for reasons that will be explored in Part III.⁶⁹

Utilizing the methods of identifying anti-profanity statutes explained in Part I (profanity, fighting words, and intent) this survey will examine the present state of anti-profanity statutes across America, paying particular attention to those statutes that are vulnerable to constitutional challenge. First, this

⁶⁵ State v. Elabanjo, No 09 CRS 54172 (Orange Cnty. Super. Ct. Jan 5, 2011); *see also Judge Strikes Down NC Ban On Public Profanity*, FOX NEWS U.S., (Jan. 7, 2011), <http://www.foxnews.com/us/2011/01/07/judge-strikes-nc-ban-public-profanity.html>; *see supra* note 1.

⁶⁶ *See generally* N.C. GEN. STAT. § 14-197 (2015), *repealed by* 2015 N.C. Sess. Laws. 286, § 1.1(1).

⁶⁷ *Judge Strikes Down NC Ban on Public Profanity*, FOX NEWS U.S. (Jan. 7, 2011), <http://www.foxnews.com/us/2011/01/07/judge-strikes-nc-ban-public-profanity.html>.

⁶⁸ *Id.*

⁶⁹ *See infra* Part III.

Note will consider these statutes collectively, noting the commonalities that bind them despite state boundaries. Next, this Note will separate this body of statutory law into two categories: those with intent requirements, and those without, and evaluate the relative strengths and weaknesses of their language. Finally, this Note will delve deeper into a select few statutes that I consider the most dangerous, the most violative of Free Speech, and the most in need of timely repeal.⁷⁰

A. Statutory Schemes and Similarities: Disorderly Conduct and Breach of the Peace

Upon examining all fifty states and the District of Columbia, every state has a law on the books regulating speech.⁷¹ The majority of states stash their anti-profanity statutes under the umbrella of “Disorderly Conduct;” thirty-nine states regulate public speech as Disorderly Conduct or a variation thereon.⁷² Nine additional states regulate speech as Breach of the Peace or similar terminology.⁷³ Four states, including California and Oklahoma, have statutes that independently criminalize profane language.⁷⁴

It is important to note that this is not a zero-sum game: There are not simply 50 states with 50 statutes—states are free to enact a multitude of similar statutes, more specific statutes, or seemingly overlapping statutes.⁷⁵ Maryland regulates speech via a sub-section of a much broader statute and uses both of the

⁷⁰ This survey examined state statutes criminalizing profanity or synonyms thereof. Notably, I did not consider state constitutional provisions. I did not consider statutes criminalizing speech: over the telephone or email; on public transportation such as buses or trains; or as harassment. I did examine statutes pertaining to the distribution of obscene materials (including pornography) in general, or to juveniles. As accurately as possible, I limited the surveyed statutes to those that apply generally, and prohibit profane, offensive, or vulgar language.

⁷¹ Of course, this seemingly dramatic statement includes those statutes prohibiting fighting words, which are not included within the constitutional bubble of free speech protection.

⁷² States that fall under this category: Alabama, Alaska, Arizona, Colorado, Delaware, Washington D.C., Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Michigan, Minnesota, Montana, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, and Wisconsin.

⁷³ States that fall under this category: Connecticut, Idaho, Louisiana, Maryland, Mississippi, Missouri, Nebraska, Nevada, and Wyoming.

⁷⁴ States that have independent statutes: California, Massachusetts, Mississippi, Oklahoma (which has two), and Virginia (which also has two).

⁷⁵ *Missouri v. Hunter*, 459 U.S. 359, 368–69 (1983) (“Where . . . a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the ‘same’ conduct under *Blockburger*, a court’s task of statutory construction is at an end and . . . the trial court or jury may impose cumulative punishment under such statutes in a single trial.”).

aforementioned phrases.⁷⁶ Mississippi, on the other hand, regulates profanity in a specific and self-explanatory statute: Miss. Code 97-29-47 “Public Profanity of Drunkenness”⁷⁷ distinct from its general “Disturbance of the Peace” statute.⁷⁸ Oklahoma is the big winner, with two independent and specific statutes on the books: Okla. Stat. tit. 21 § 906⁷⁹ and Okla. Stat. tit. 21 § 1362,⁸⁰ prohibiting “Obscene Language” and “Disturbance by loud or unusual noise or abusive, violent, obscene, profane or threatening language.”

As one might expect, those states that have enacted independent anti-profanity statutes (contrasted against those that criminalize speech as a sub-part of a more general or broad statute) are those most blatantly violating the Constitution. Those states, via their independent anti-profanity statutes, are targeting profanity for its own sake. In addition to a lesser body of case law explaining the breadth of the provision, these independent statutes often omit an intent requirement, whereas speech regulation under the umbrella of Disorderly Conduct, for example, is subject to the intent requirement imposed on all behavior or activity that is punishable as disorderly.⁸¹

The relative advantages and disadvantages of these two disparate penal strategies are evident when one compares two statutes side-by-side.⁸² On the one hand, criminalizing profane language under the broader category of “Disorderly Conduct” in Montana makes it a crime to “knowingly disturb[] the peace by . . . using threatening, profane, or abusive language.”⁸³ This statute is found among the other “Offenses Against Public Order,” and specifically “Conduct Disruptive of Public Order.”⁸⁴ Because the statute is a sub-part of disorderly conduct, the law is explained by considerable legislative and judicial history, including bill drafts, editor notes,⁸⁵ and more than fifty notes of decisions.⁸⁶

⁷⁶ MD. CODE ANN., Criminal Law § 10-201 (2018).

⁷⁷ MISS. CODE ANN. § 97-29-47 (2017).

⁷⁸ *Id.* § 97-35-15 (2018).

⁷⁹ OKLA. STAT. tit. 21, § 906 (2017).

⁸⁰ *Id.* § 1362 (2018).

⁸¹ Comparing two Virginia statutes: Under VA. CODE ANN. § 18.2-415 (2006), “Disorderly Conduct” requires actors to have “the intent to cause public inconvenience, annoyance or alarm, or recklessly creat[e] a risk thereof.” Under VA. CODE ANN. § 18.2-388 (1990) relating to “Profane Swearing,” “[i]f any person profanely curses or swears or is intoxicated in public” the mere use of profanity is a crime, absent any intent requirement.

⁸² For comparative purposes, this Note examines VA. CODE ANN. § 18.2-388 (1990) and MONT. CODE ANN. § 45-8-101 (West 2017).

⁸³ MONT. CODE ANN. § 45-8-101(1)(c) (West 2017).

⁸⁴ *Id.*

⁸⁵ MONT. CODE ANN. § 45-8-101 (West 2017).

⁸⁶ *Id.*

On the other hand, criminalizing “[p]ropane swearing” in Virginia looks very different.⁸⁷ Under Virginia law, “[i]f any person profanely curses or swears . . . he shall be deemed guilty of a Class 4 misdemeanor.”⁸⁸ This statute is found among “Crimes Involving Morals and Decency,” and specifically among “Obscenity and Related Offenses.”⁸⁹ As a (relatively) independent statute,⁹⁰ there are fewer sub-sections and therefore fewer comments available.⁹¹ There is minimal legislative history available, and far fewer notes of decision, meaning that there is little guidance available for attorneys and judges.⁹²

There are, of course, bound to be commonalities among statutes across this country, including those explained above. Turning to the differences—and the most important line to draw among them—the presence or omission of an intent requirement is key.

B. Intent Requirements: Knowingly and Intentionally Using Profanity

Criminalizing an act that was intentionally or knowingly done is inherently more specific than criminalizing just the act itself. Missouri, for example, prefaces its enumeration of what constitutes “Peace Disturbance” with the requirement that the act “[u]nreasonably and knowingly disturbs or alarms another person.”⁹³ Nevada similarly requires a “Breach of Peace” be “maliciously and willfully” committed.⁹⁴ In total, thirty-six of the states surveyed⁹⁵ criminalize profanity in a statute that requires intent.⁹⁶

Criminalizing an act without providing intent via context is broad and vague (potentially to the point of being void). Mississippi, for example, requires only that “[i]f any person shall profanely swear or curse, or use vulgar and indecent language, . . . in the presence of two (2) or more persons, he shall, on

⁸⁷ VA. CODE ANN. § 18.2-388 (1990).

⁸⁸ *Id.*

⁸⁹ *Id.* This statute appears in Article 5. Obscenity and Related Offenses of Chapter 8. Crimes Involving Morals and Decency.

⁹⁰ This law in its entirety criminalizes “[p]ropane swearing and intoxication in public”—although it is not strictly profane language, it is narrower than the larger “Disorderly Conduct” statute in Montana that included sub-sections (a) through (i).

⁹¹ VA. CODE ANN. § 18.2-388 (West 2018).

⁹² *Id.*

⁹³ MO. REV. STAT. § 574.010(1)(1) (2017).

⁹⁴ NEV. REV. STAT. § 203.010 (2017).

⁹⁵ Alabama, Arizona, Colorado, Connecticut, Delaware, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Minnesota, Missouri, Montana, Nevada, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, and Wyoming.

⁹⁶ Given that some of the states surveyed have multiple relevant laws, there are more than 50 statutes being considered in this survey. For example, Oklahoma, Pennsylvania, and Virginia appear on both lists discussing intent.

conviction thereof, be fined . . . or be imprisoned.”⁹⁷ Similarly, in Michigan, “[a]ny person . . . who shall profanely curse or damn or swear by the name of God, Jesus Christ or the Holy Ghost, shall be guilty of a misdemeanor.”⁹⁸

Omitting an intent requirement in the context of anti-profanity statutes makes for a much more aggressive law. Although residents are nonetheless able to familiarize themselves with the laws, upon committing the offense (even by accident) there is little recourse. Under this strict liability-esque regime, to convict a citizen, the state need only prove that the event happened. Under such a statutory regime, saying “shit” on the street becomes akin to speeding—it does not matter *why* you did it, but you are damned if you do. In total, seventeen of the states surveyed criminalize profanity to this day without requiring any form of intent.⁹⁹

Sometimes, however, even a strong intent requirement (and neutral language) fails to save an anti-profanity statute from unconstitutionality.¹⁰⁰ A Rhode Island case, *State v. Tavarozzi*, illustrates the failure of such a statute that was found unconstitutional based on its general prohibition on “loud and unreasonable noise.”¹⁰¹

Ms. Dolores Tavarozzi was arrested after a “less-than-enviable set of circumstances” following a St. Patrick’s Day party at a local bar, which required police involvement.¹⁰² A visibly intoxicated Tavarozzi, upon being asked to leave the bar “stated her address as ‘Alaska’ and began speaking in a loud and vulgar manner.”¹⁰³ As she reluctantly followed the officer outside, Tavarozzi used “very very vulgar language” and “attempted to kick [the officer].”¹⁰⁴ She “continued kicking so vigorously in all directions that she kicked off both her high-heeled shoes.”¹⁰⁵ Convicted of both disorderly conduct and assault, Tavarozzi ultimately defeated the anti-profanity statute when the court

⁹⁷ MISS. CODE ANN. § 97-29-47 (2017).

⁹⁸ MICH. COMP. LAWS § 750.103 (2018).

⁹⁹ Alaska, Arkansas, California, Washington D.C., Florida, Georgia, Hawaii, Iowa, Michigan, Mississippi, Nebraska, New Mexico, Oklahoma, Pennsylvania, South Carolina, Virginia, and Wisconsin.

¹⁰⁰ See *State v. Tavarozzi*, 446 A.2d 1048, 1053 (R.I. 1982) (holding that the relevant statute was “inapplicable to speech and . . . neither vague nor overbroad when applied to conduct other than speech”). Tavarozzi’s conviction for “loud, profane, and opprobrious speech” was consequently “constitutionally impermissible.” *Id.*

¹⁰¹ *Id.* See also 11 R.I. GEN. LAWS § 11-45-1 (2008) (“A person commits disorderly conduct if he or she intentionally, knowingly, or recklessly: . . . disturbs another person by making loud and unreasonable noise which under the circumstances would disturb a person of average sensibilities.”).

¹⁰² *Tavarozzi*, 446 A.2d at 1049.

¹⁰³ *Id.* at 1050.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

decided that “[the disorderly conduct statute] constitutionally cannot be applied to speech.”¹⁰⁶ Although the statute did not even *mention* profanity or vulgar language, the Rhode Island Supreme Court concluded that “[t]he loud and unreasonable noise defendant was accused of making, however, consisted of loud and vulgar speech. In effect, the prosecution in this case is thereby seeking to punish potentially protected speech under the guise of noise.”¹⁰⁷ In a victory for free speech, the court concluded “that the state may not impose criminal sanctions upon speech under the rubric of prevention of loud and unreasonable noise. Although speech may be noisy and profane, it may nevertheless be protected save for the rather narrow *Chaplinsky* exception.”¹⁰⁸

It is worth noting that at least five states have already repealed unconstitutional anti-profanity statutes and replaced them with laws that conform to constitutional precedents protecting freedom of speech.¹⁰⁹

C. *The Worst of the Worst: An Unconstitutional Most Wanted List*

Several news articles proclaiming that Virginia maintains an archaic law that criminalizes profanity inspired this Note.¹¹⁰ “In the state of Virginia, the code of law suggests that citizens use no profanity in public . . . [l]etting out an f-bomb in Virginia is a misdemeanor!”¹¹¹ Unfortunately, these articles failed to mention the host of other states that maintain similarly restrictive (and unconstitutional) laws.¹¹² The five statutes that follow are the most egregious unconstitutional anti-profanity statutes; the five statutes flailing and screaming to be repealed or revised.

1. New Mexico

In New Mexico, “[d]isorderly conduct consists of . . . engaging in violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly conduct which tends to disturb the peace.”¹¹³ Despite case law interpreting this statute

¹⁰⁶ *Id.* at 1052; *see generally* 11 R.I. GEN. LAWS § 11-45-1 (2008).

¹⁰⁷ *Tavarozzi*, 446 A.2d at 1049.

¹⁰⁸ *Id.* at 1053.

¹⁰⁹ Arkansas, Indiana, Kentucky, North Carolina, and South Dakota.

¹¹⁰ Emily Merrell, *Virginia’s Censorship Laws May Be More Dangerous Than We Think*, 71REPUBLIC (Dec. 16, 2017), <https://71republic.com/2017/12/16/virginias-censorship-laws-may-be-more-dangerous-than-we-think/>; *Change Virginia’s Profanity Law? About & Time*, BRISTOL HERALD COURIER (Dec. 25, 2017), http://www.heraldcourier.com/opinion/change-virginia-s-profanity-law-about-time/article_bdd1dfee-f6c6-56cb-a746-dffe383e7295.html.

¹¹¹ Merrell, *supra* note 110.

¹¹² Virginia, Georgia, Michigan, Nebraska, New Mexico, Oklahoma, South Carolina, and Wisconsin.

¹¹³ N.M. STAT. ANN. § 30-20-1 (2018).

as targeting only fighting words, it appears vulnerable to a constitutional challenge.¹¹⁴

Comparing this statute to N.C. 14-197, they are functionally identical. N.C. 14-197 forbade “indecent or profane language,” used “on any public road or highway,” that was “in the hearing of two or more persons, in a loud and boisterous manner.”¹¹⁵ N.M. Stat. Ann. § 30-20-1 forbids “indecent, [or] profane language” used in public, that is “boisterous, unreasonably loud, or otherwise disorderly conduct which tends to disturb the peace.”¹¹⁶ Remove the final clause, and these laws mirror one another exactly; maintain that final clause, and there is but one low wall protecting this law from being struck down. Side by side, this statute is vulnerable to constitutional challenge, as it violates the same rights that were disputed under N.C. 14-197.

Of course, states are not compelled to follow others, and North Carolina’s decision is not binding on New Mexico. However, if nothing else, North Carolina’s decision can inspire additional state challenges, and provide a rubric for future First Amendment successes.

2. Oklahoma

Under Oklahoma law, “[i]f any person shall utter or speak any obscene or lascivious language or word in any public place . . . he shall be liable to a fine . . . or imprisonment”¹¹⁷ Unlike New Mexico, case law attempting to defend the constitutionality of this statute is lacking. Instead, federal courts in Oklahoma abstained from addressing the question to “afford the State Court the first opportunity” to interpret the law.¹¹⁸

Unlike the statutes in New Mexico and North Carolina, Oklahoma does not require that the speaker be in the presence of others, nor does it require the speaker to be boisterous. This distinction is the nail in Oklahoma’s statutory coffin: without requiring the speaker to be addressing others or using a specific tone, there is little to no support for an interpretation of this

¹¹⁴ *State v. James M.*, 111 N.M. 473, 478 (1990) (concluding that the New Mexico disorderly conduct statute was neither unconstitutionally vague nor overbroad).

¹¹⁵ See N.C. GEN. STAT. § 14-197 (2013), *repealed* by 2015 N.C. Sess. Laws. 286 § 1.1(1).

¹¹⁶ See articles discussed, *supra* note 110.

¹¹⁷ See OKLA. STAT. tit. 21, § 906 (2017) (noting that there are other clauses that forbid “obscene or lascivious language . . . in the presence of females, or in the presence of children,” but, given that the clauses are separated by “or,” they can be permissibly separated for purposes of this analysis).

¹¹⁸ *Brown v. Fallis*, 311 F. Supp. 548, 551–52 (1970) (explaining that contrary to party objection, “where the State statute is fairly subject to an interpretation which will avoid or modify the federal constitutional question, the court may properly abstain from the granting of declaratory relief”).

statute as permissibly forbidding fighting words. As it is written, this statute criminalizes “obscene or lascivious language” for its own sake, and cannot seek constitutional refuge.¹¹⁹ Although the federal court addressing this statute in *Brown v. Fallis*¹²⁰ concluded “we should not attempt to foreclose an interpretation that may be made to avoid any constitutional infirmity which might exist, as the Oklahoma courts do,”¹²¹ they were really leaving the door open to a state court challenge, which is likely to succeed.

3. South Carolina

“Any person who shall . . . use obscene or profane language on any highway or at any public place or gathering or in hearing distance of any schoolhouse or church . . . shall be deemed guilty of a misdemeanor” in South Carolina.¹²²

Very much like Oklahoma, South Carolina does not require that the profane language be addressed at another person, or with a particular intent or inflection. The additional clause that forbids profane language “in hearing distance of any schoolhouse or church” provides no constitutional support because the Constitution does not condone censorship in proximity to schools or churches. South Carolina consequently criminalizes the language for its own sake, this is not prohibiting fighting words, and it is therefore unconstitutional.

4. Wisconsin

Under this final violative statute, “[w]hoever, in a public or private place, engages in violent, abusive, . . . profane, boisterous, unreasonably loud or otherwise disorderly conduct . . . in which the conduct tends to cause or provoke a disturbance is guilty of a Class B misdemeanor.”¹²³

This statute is both more specific and more vague than the others in two distinct ways, neither of which render it constitutional. First, unlike other anti-profanity, or even disorderly conduct statutes, Wisconsin is stepping into the

¹¹⁹ Interestingly, under OKLA. STAT. tit. 21, § 1362, “[i]f any person shall willfully or maliciously disturb, either by day or night, the peace and quiet . . . by loud or unusual noise, or by abusive, violent, obscene or profane language, whether addressed to the party so disturbed or some other person, or by threatening to kill, do bodily harm or injury, . . . or by running any horse at unusual speed along any street, alley, highway or public road, he shall be deemed guilty of a misdemeanor.” The horse clause is not particularly relevant, but it is interesting. Relevant here is the language expressly prohibiting fighting words. Comparing this statute to OKLA. STAT. tit. 21, § 906 makes clear that the former is constitutional, whereas the latter is not.

¹²⁰ 311 F. Supp. 548, 549–50.

¹²¹ *Id.* at 552.

¹²² S.C. CODE ANN. § 16-17-530 (1969).

¹²³ WIS. STAT. § 947.01(1) (2017).

private sphere by regulating both public and “private place[s].”¹²⁴ Second, the threshold for legality under this statute is vaguely stated as behavior that “tends to cause or provoke a disturbance.”¹²⁵ What is “a disturbance?”¹²⁶ On the one hand, a tavern brawl sounds like a disturbance. On the other hand, exclaiming “shit” too loudly while passing a family on the street could also be a disturbance.

The Supreme Court of Wisconsin has yet to consider the constitutionality of this statute. Unfortunately, the case that brought this statute before the court in 2002 did not include a constitutional challenge, compelling the court to “decline to address the overall constitutionality of the statute in this case.”¹²⁷

5. Virginia

Finally, the statute that launched a thousand words: Virginia’s blatantly unconstitutional prohibition on profanity. “If any person profanely curses or swears or is intoxicated in public, whether such intoxication results from alcohol, narcotic drug or other intoxicant or drug of whatever nature, he shall be deemed guilty of a Class 4 misdemeanor.”¹²⁸ I intentionally did not abridge the language of this statute: it is fully intact, leaving no room for misinterpretation or persuasion.

Examining the statutory language, there is no intent requirement, nor any limiting clause narrowing the scope to fighting words. Instead, the statute criminalizes profane swearing or cursing no matter the context. Drawing the obvious parallel, this statute is as bad, if not worse, than N.C. 14-197. Under the now-dead North Carolina law, the profane speaker had to be “in the hearing of two or more persons” while being “loud and boisterous.”¹²⁹ Although these limitations do not bring this law even an inch closer to constitutionality, they succeed in illustrating the sheer breadth of the unconstitutional and enduring Virginia statute by comparison. As it is written, the Virginia statute criminalizes profanity regardless of how many people can hear, meaning it could be zero people. As it is written, the Virginia statute criminalizes profanity regardless of the speaker’s tone, therefore including even conversational profanity. Applying the statute as written, I would commit a “Class 4 misdemeanor” by walking along a quiet street, tripping

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ State v. Schwebke, 644 N.W.2d 666, 680 (Wis. 2002).

¹²⁸ See VA. CODE ANN. § 18.2-388 (1990).

¹²⁹ See N.C. GEN. STAT. § 14-197 (2013), *repealed by* 2015 N.C. Sess. Laws. 286 § 1.1(1).

on an uneven sidewalk, and saying “fuck” as I stubbed my toe before regaining my balance.

Although Virginia courts and federal courts have addressed the statute as recently as 2017, it has only been in regard to the intoxication clause, leaving the profanity clause to endure, like the fossil that it is.¹³⁰

The foregoing statutes are the culmination of rigorous research—the five statutes shouting and waving their arms for a constitutional challenge. After surveying the fifty states, exploring how courts have construed these statutes, and comparing the language and meaning to the now vanquished N.C. 14-197, these five statutes represent the clearest constitutional violations. The section that follows will consider how and why they remain good law, as well as how and why they should be put down in a timely manner.

III. THE WHY AND HOW OF DISMANTLING AN UNCONSTITUTIONAL ANTI-PROFANITY STATUTE

As a member of the First Amendment Law Review, a law student, and a general advocate for Free Speech, I wholeheartedly believe that anti-profanity statutes like those specifically mentioned in Part II are an affront to the Constitution.¹³¹ As a human, I wholeheartedly believe that censorship is a stepping-stone to tyranny.¹³² As a product of these many considerations, I say “fuck you” to anyone who tells me profanity is un-ladylike, inappropriate, or against the law.¹³³ That is my subjective view.¹³⁴ Objectively, a state cannot make

¹³⁰ See *United States v. Wilson*, 246 F. Supp. 3d 1160 (E.D. Va. 2017) (denying defendant’s motion to dismiss charges, including charges under 18.2-388, after defendant cursed out a shop employee).

¹³¹ See David L. Hudson, Jr., *Can Anti-Profanity Laws and the Fighting Words Doctrine Be Squared with the First Amendment?*, ABA J. (Apr. 2018), http://www.abajournal.com/magazine/article/fighting_words_profanity_1st_amendment (“In my opinion, laws banning profanity are unconstitutional on their face[.]”).

¹³² See Sarah Lynch, *Censorship: Tyranny In Disguise*, ODYSSEY ONLINE (Nov. 7, 2016) <https://www.theodysseyonline.com/censorship-tyranny-in-disguise> (discussing censorship in literature and the detrimental impact on sheltered children, which is analogous to censoring profanity and the detrimental impact on society generally).

¹³³ See Gillian Tett, *Bad Language: The Curse Of Gender Equality*, FIN. TIMES (Dec. 8, 2016), <https://www.ft.com/content/72de2930-bc10-11e6-8b45-b8b81dd5d080> (explaining the trend toward gender equality in utilizing profanity, but not actively embracing profanity itself); see also Elizabeth Enochs, *11 Things People Get Wrong About Women Who Love To Swear*, BUSTLE (Feb. 23, 2016), <https://www.bustle.com/articles/143149-11-things-people-get-wrong-about-women-who-love-to-swear>.

¹³⁴ My passion for profanity was ignited at an early age by the incomparable George Carlin, free speech fanatic and cunning linguist, whose “7 Dirty Words” (shit, piss, fuck, cunt, cocksucker, motherfucker, and tits) changed my life; it is a privilege to (hopefully) pay tribute to him with this piece. See Timothy Bella, *The ‘7 Dirty Words’*

constitutional something that fundamentally is not. Why then do these statutes continue to exist? On a basic level, the very idea that we have laws on the books that cannot be squared with the Constitution is confounding, and yet, that is the country in which we live. Anti-profanity statutes should be relics, not our reality.

First and foremost, unconstitutional anti-profanity statutes, like the five identified in Part II, need to be reshaped or repealed because they are unconstitutional in their present form. An additional consideration (and cause that I champion) is that rather than punishing profanity, we should be embracing it: embracing the health benefits, the expressive benefits, and the academic benefits, which are explained later in this Note. To establish a new pro-profanity regime, however, we must first dismantle the old laws. The sections that follow will examine how and why these offensive statutes continue to exist, as well as the numerous pro-profanity arguments and analyses.

A. How and Why Statutes Endure: Perfect Plaintiffs, Stubborn Conservatives, and Useless Legislators

“Flowers may die, and old soldiers may fade away, but statutes do neither.”¹³⁵

1. Wanted: The Perfect Plaintiff

Successfully challenging these unconstitutional anti-profanity statutes requires the perfect plaintiff.¹³⁶ The perfect plaintiff is in the right place, at the right time, with the right cause of action.¹³⁷

“A well-selected plaintiff can provide a concrete context for abstract legal concepts and personalize the stakes.”¹³⁸ Beyond the crucial standing requirement that a plaintiff must satisfy, the ideal plaintiff “must be amenable to the spotlight and both

Turn 40, but They're Still Dirty, ATLANTIC (May 24, 2012), <https://www.theatlantic.com/entertainment/archive/2012/05/the-7-dirty-words-turn-40-but-theyre-still-dirty/257374/>.

¹³⁵ Paul Larkin & John-Michael Seibler, *Time to Prune the Tree: The Need to Repeal Unnecessary Criminal Laws*, HERITAGE FOUND. (Feb. 25, 2016), <https://www.heritage.org/crime-and-justice/report/time-prune-the-tree-the-need-repeal-unnecessary-criminal-laws>.

¹³⁶ In a podcast exploring what it means to find the perfect plaintiff in the context of Supreme Court litigation, Edward Blum has personally found the perfect plaintiff for six Supreme Court cases, including *Fisher v. University of Texas*. Additionally, the podcast discusses the groundbreaking case of *Lawrence v. Texas*, and the necessity of identifying a suitable plaintiff even in cases where the law is so clearly unconstitutional. Edward Blum, *More Perfect: The Imperfect Plaintiffs*, NEW YORK PUBLIC RADIO (June 28, 2016), <https://www.wnycstudios.org/story/imperfect-plaintiff>.

¹³⁷ See generally Cynthia Godsoe, *Perfect Plaintiffs*, 125 YALE L.J. F. 136 (2015).

¹³⁸ *Id.* at 137.

sympathetic and relatable to the average person.”¹³⁹ Of course, these ideas scale up and down depending on the judicial stage on which they are set: at the Supreme Court, with the eyes of the world on that forum, a plaintiff is “selected and groomed . . . with great care.”¹⁴⁰ At the state level, on the other hand, the stakes are lower: the eyes of the world pay little mind to a meager state law challenge.¹⁴¹

In terms of identifying the perfect plaintiff to combat an anti-profanity statute, the biggest hurdle is less likely to be finding one with the perfect personality, and more likely to be finding one with a cause of action. It is obvious but nonetheless important to emphasize that to challenge a law, one must suffer an injury under that law. Therefore, until someone is arrested pursuant to an anti-profanity statute, that statute can linger in legal limbo seemingly forever.

“It’s an unfortunate truth that, once a law is passed, it is rarely removed from the books.”¹⁴² Moreover, as long as they are not being used, and thus not being challenged, dusty, archaic (and unconstitutional) laws endure. “Statutes may become obsolete or fall into desuetude . . . but they retain their force and effect until repealed by the legislature or held unconstitutional by the courts.”¹⁴³ It is for this reason that strange and obscure state laws remain intact. In Nebraska, for example, “[n]o person who is afflicted with a venereal disease shall marry.”¹⁴⁴ In Illinois, “[a] person commits fornication when he or she knowingly has sexual intercourse with another not his or her spouse if the behavior is open and notorious.”¹⁴⁵ Both of these laws seem vulnerable to challenge, but, like anti-profanity statutes, they are unlikely to reach the court absent the perfect plaintiff.¹⁴⁶

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 138 (citing Amanda Terkel et al., *Meet the Couples Fighting to Make Marriage Equality the Law of the Land*, HUFFINGTON POST (June 17, 2015, 2:58 PM), http://www.huffingtonpost.com/2015/06/17/supreme-court-marriage-n_7604396.html).

¹⁴¹ See, e.g., Tom Joyce, *Anti-Cursing Law Is #@!#ing Ridiculous*, MOUNT AIRY NEWS (Dec. 30, 2017), <https://www.mtairynews.com/opinion/57395/anti-cursing-law-is-ing-ridiculous>.

¹⁴² Adrian Moore, *How to Get Dumb, Obsolete Laws off the Books*, REASON FOUND. (Apr. 27, 2015), <https://reason.org/commentary/how-to-get-dumb-obsolete-laws-off-t/>.

¹⁴³ Larkin & Seibler, *supra* note 135 (defining desuetude as “a legal term used to describe anachronistic and rarely (if ever) enforced laws”).

¹⁴⁴ NEB. REV. STAT. § 42-102 (1978).

¹⁴⁵ 720 ILL. COMP. STAT. 5/11-40(a) (2011).

¹⁴⁶ See Kristin Hunt, *The Weirdest Law We Could Track Down in All 50 States*, THRILLIST (Aug. 17, 2015, 4:39 PM) (identifying other examples of strange but enduring laws), <https://www.thrillist.com/entertainment/nation/weird-state-laws>; see also *Dumb Laws*, LEGAL-FORMS-KIT.COM, <http://www.legal-forms-kit.com/legal-jokes/dumb-laws.html>.

North Carolina was fortunate: Samantha Elabanjo was the perfect state law plaintiff. She was in the right place on Franklin Street, at the right time, saying “you need to clean your damn dirty car” to the right “asshole” police officers who arrested her for “use of profanity on a public roadway.”¹⁴⁷ In order for courts in other states to have the authority to strike these statutes, the attorneys need to find their Samantha.

2. Conservatives Fear Change, or Profanity, or Both

Aside from, or in addition to, statutes enduring because they are unchallenged, there is a second possible explanation: conservative representatives and their constituencies like them. Conservatives can be “less tolerant of compromise; see the world in ‘us’ versus ‘them’ terms; . . . are ‘motivated to punish violators of social norms (*e.g.*, deviations from traditional norms of sexuality or responsible behavior) and to deter free riders.’”¹⁴⁸ Potentially damning for the pro-profanity cause is the idea that “[t]he old-fashioned ways’ and ‘old-fashioned values’ still show the best way to live,” a sentiment that conservatives, rather than liberals supported in a recent survey.¹⁴⁹

Not only are conservative values a potential motivator for maintaining anti-profanity statutes, those conservative constituencies elect conservative representatives whom they believe will champion their conservative causes. To make matters worse for the pro-profanity supporters, a recent study indicated that “[p]oliticians tend to vastly overestimate just how conservative their constituents really are.”¹⁵⁰ Conservative representatives, to a greater degree than their liberal counterparts, “appear to believe that they represent a district that is more conservative . . . than the most conservative legislative district in the entire country.”¹⁵¹

¹⁴⁷ See ACLU, *supra* note 1.

¹⁴⁸ Thomas B. Edsall, *Conservatives vs. Liberals: More Than Politics*, HUFFINGTON POST (Dec. 6, 2017, 9:11 AM), https://www.huffingtonpost.com/thomas-b-edsall/conservatives-vs-liberals_b_1262309.html; see generally Linda J. Skitka & Philip E. Tetlock, *Providing Public Assistance: Cognitive and Motivational Processes Underlying Liberal and Conservative Policy Preferences*, 65 J. PERSONALITY & SOC. PSYCHOL. 1205 (1993) (available at <http://faculty.haas.berkeley.edu/tetlock/Vita/Philip%20Tetlock/Phil%20Tetlock/1992-1993/1993%20Providing%20Public%20Assistance...pdf>).

¹⁴⁹ *Id.*

¹⁵⁰ Sal Gentile, *Study: Politicians Think Voters Are Way More Conservative Than They Actually Are*, NBC NEWS (March 10, 2013, 7:47 AM), <http://www.nbcnews.com/id/51115737/t/study-politicians-think-voters-are-way-more-conservative-they-actually-are/> (reporting that conservative politicians can underestimate constituency support by “as much as 20 percentage points[.]” and that liberal politicians are also fallible, though “not by nearly as much”).

¹⁵¹ *Id.*

In terms of how this overestimation impacts the struggle to repeal unconstitutional anti-profanity statutes, it seems less and less likely that a conservative legislator would even attempt to appear pro-profanity if she (erroneously) believes that her (über-conservative) constituents would be against it.

3. Legislators Spend Time Making Law, Not Unmaking Law

“More often than not, though, elected officials are too busy making new laws to spend time getting rid of the obsolete ones already on the books.”¹⁵² Successfully getting a law repealed is therefore an uphill battle, and one that requires national publicity and divisive issues that rally support.¹⁵³ Legislators working to appease their constituents and colleagues have a full schedule without the added consideration of working to repeal a statutory relic. But what if there was a bureaucratic solution to combat a legislator’s finite amount of time and energy?

Professor Glenn Reynolds has theorized such a solution: “a third house of Congress whose sole function is to repeal laws.”¹⁵⁴ This “House of Repeal” would create a congressional body that is incentivized to subtract rather than add to our current body of law.¹⁵⁵ This solution, which would necessitate a constitutional amendment, would remedy the issues of inadequate legislator time and demanding constituents.¹⁵⁶ Although Reynolds’ theory is geared toward the federal system, it could just as easily be applied to the states. Of course, this radical idea would require fundamentally altering our system of government at the state or federal level. That being said, drastic measures are sometimes necessary “usually when the populace thinks that the existing system is letting them down.”¹⁵⁷ As Reynolds sees it, “the prospects for constitutional change don’t look so bad.”¹⁵⁸

B. Why Support Profanity? It is a Path to a Smarter, Healthier Populous

¹⁵² Moore, *supra* note 142.

¹⁵³ See, e.g., Jason Hanna, *North Carolina Repeals ‘Bathroom Bill’*, CNN (Mar. 30, 2017, 9:36 PM), <https://www.cnn.com/2017/03/30/politics/north-carolina-hb2-agreement/index.html>.

¹⁵⁴ Glenn H. Reynolds, *Foreword: Divine Operating System?*, 78 TENN. L. REV. 651, 656 (2011).

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ Glenn H. Reynolds, *We Don’t Need More Laws*, USA TODAY (Dec. 22, 2014, 4:19 PM), <https://www.usatoday.com/story/opinion/2014/12/22/congress-productivity-repeal-pork-regulation-column/20729173/>.

¹⁵⁸ *Id.*

“People who curse are smart as f—k!”¹⁵⁹

Beyond what I hope is the now obvious reason that anti-profanity statutes should be dismantled (just see the U.S. Constitution), there are persuasive and scientific justifications for promoting profanity both personally and professionally.¹⁶⁰ On the professional side, profanity “promot[es] trust and teamwork in the office”¹⁶¹ Profanity can also “increase the effectiveness and persuasiveness of an argument” and help to “communicate how [one] feel[s] about a certain subject.”¹⁶² On the personal side, profanity both: (1) increases health and happiness¹⁶³; and (2) indicates worthwhile personal traits.¹⁶⁴ Profanity’s health benefits include “increased circulation, elevated endorphins, and an overall sense of calm, control and well-being.”¹⁶⁵

Behavioral psychologist Richard Stephens concluded that “swearing really does allow you to withstand pain for longer” based on a study he conducted that involved submerging subjects’ hands in ice water.¹⁶⁶ Compared to those subjects who could not use profanity, those who did use profanity could “keep their hands in the iced water for *half as long again*” than their neutral counterparts.¹⁶⁷ Profanity can help alleviate pain by having “a similar soothing effect to drugs like morphine” that results from the body’s “release of natural, pain-relieving chemicals.”¹⁶⁸ Profanity also serves as an indicator of personality traits and intellectual ability. “A recent study found that people who swear often lie less and have higher levels of integrity,” noting a correlation between “those who cursed and their honesty levels.”¹⁶⁹ These byproducts of profanity are worthy causes, and bolster the idea that we ought to celebrate profanity rather than regard it as taboo, or (more importantly) illegal.

¹⁵⁹ Natalie O’Neill, *Smarter People Are More Likely to Use Curse Words*, N.Y. POST (Aug. 28, 2017, 4:51 PM), <https://nypost.com/2017/08/28/smarter-people-are-more-likely-to-use-curse-words/>.

¹⁶⁰ See Simon Worrall, *Swearing Is Good For You—And Chimps Do It, Too*, NAT. GEOG. (Jan. 27, 2018), <https://news.nationalgeographic.com/2018/01/science-swearing-profanity-curse-emma-byrne/>.

¹⁶¹ *Id.*

¹⁶² Lindsay Holmes, *People Who Swear May Be Happier, Healthier and More Honest*, HUFFINGTON POST, (Feb. 14, 2018, 2:17 PM), https://www.huffingtonpost.com/entry/health-benefits-of-swearing_us_5a5e44a8e4b0106b7f65b3a6.

¹⁶³ *Id.*

¹⁶⁴ Neel Burton, *Hell Yes: The 7 Best Reasons for Swearing*, PSYCHOL. TODAY (May 19, 2012), <https://www.psychologytoday.com/us/blog/hidden-and-seeking/201205/hell-yes-the-7-best-reasons-swearing>.

¹⁶⁵ See *id.*

¹⁶⁶ Worrall, *supra* note 160.

¹⁶⁷ *Id.* (emphasis added).

¹⁶⁸ Holmes, *supra* note 162.

¹⁶⁹ *Id.*

Although “use of obscene or taboo language—or swearing, as it’s more commonly known—is often seen as a sign that the speaker lacks vocabulary, cannot express themselves . . . or even lacks intelligence[,]” studies have proven the opposite.¹⁷⁰ In addition to being more honest, pro-profanity people are thought to have larger vocabularies and “the habit [of swearing] may be linked with a higher IQ.”¹⁷¹ According to psychologists at Marist College, the relationship between “verbal fluency” (which measures a person’s general vocabulary abilities), and “swearing fluency” (which measures a person’s vocabulary of swear words or profanity) indicates that “people who scored highest on the verbal fluency test also tended to do best on the swearing fluency task.”¹⁷²

Dispelling the myth that profanity is indicative of lesser intelligence, “swearing appears to be a feature of language that an articulate speaker can use in order to communicate with maximum effectiveness.”¹⁷³ Not only are unconstitutional anti-profanity statutes trampling First Amendment rights, they are furthering false ideas to the detriment of smart, honest, well-spoken people to whom swearing is second nature.

IV. CONCLUSION

For three key reasons, anti-profanity statutes are fucking ridiculous. First and foremost, they are blatantly unconstitutional.¹⁷⁴ In a perfect world, unconstitutional laws wouldn’t exist, but in our world, shit happens. Second, anti-profanity statutes remain on the books because they are not a legislative priority and rarely get their day in court.¹⁷⁵ Unfortunately, we have to hope for citizens to have their constitutional rights violated and be arrested under an unconstitutional statute in order for these laws to be struck down. Alternatively, we lobby our legislators to repeal these statutes. This option would save innocent citizens from being arrested in the name of profanity, but would require heavy reliance on busy, potentially conflicted representatives. Ultimately, there is not a shortcut to constitutionality, however backwards that conclusion

¹⁷⁰ Richard Stephens, *Swearing Is Actually a Sign of More Intelligence—Not Less—Say Scientists*, SCI. ALERT (Feb. 2, 2017), <https://www.sciencealert.com/swearing-is-a-sign-of-more-intelligence-not-less-say-scientists>.

¹⁷¹ See Holmes, *supra* note 162.

¹⁷² Stephens, *supra* note 170 (citing Kristin L. Jay & Timothy B. Jay, *Taboo Word Fluency and Knowledge of Slurs and General Pejoratives: Deconstructing the Poverty-of-Vocabulary Myth*, 52 LANGUAGE SCI. 251, 257 (2015)).

¹⁷³ *Id.*

¹⁷⁴ See *supra* Part I.

¹⁷⁵ See *supra* Part III.

might be. Finally, state residents would benefit from uninhibited use of profanity.¹⁷⁶ And yet, despite the pros vastly outweighing the cons, anti-profanity statutes endure. Criminalizing profanity stifles intellectuals, who swear more than others.¹⁷⁷ Criminalizing profanity demands that a car wreck victim suppress her swearing, abide the law, and endure greater pain, rather than use profanity and violate the law.

Be it during one's formative years or final years, the freedom to say fuck is protected under the First Amendment. Unconstitutional anti-profanity statutes that criminalize profanity for its own sake, rather than in the context of fighting words, trample this First Amendment right.

¹⁷⁶ *Id.*

¹⁷⁷ See *supra* Part III.