AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 11: The Contemporary Era—Democratic Rights/Free Speech

**Montana v. Robinson, 82 P. 3d 27** (MT 2003)

*Around midnight on October 8, 2000, Malachi Robinson crossed a crowded intersection in Missoula, Montana, and yelled, “fucking pig” at the sheriff’s deputy who was stopped at the red light. Deputy David McGinnis pulled over his car and approached Robinson on foot. Robinson told McGinnis to “fuck off, asshole,” at which point Robinson was arrested for disorderly conduct, which is understood under Montana law to apply to words “that have a direct tendency to violence and which are willfully and maliciously uttered.”*

*Robinson moved to have the charges dismissed on the grounds that his speech was constitutionally protected, but the trial court denied that motion. Robinson was given a fine and a ten day jail sentence (the jail time and half of the $100 fine were suspended, so long as Robinson did not commit any new offenses). Robinson appealed, but again lost. He appealed further to the state supreme court. The state supreme court in a 5-2 decision held that Robinson’s speech was an example of “fighting words” and thus outside the protection of the First Amendment of the U.S. Constitution. In examining what constituted fighting words, the Montana court refused to apply a contextual analysis that would take into account the audience for the speech. Although the court accepted that some speech might be constitutionally protected in the context of a speech at a political rally and not elsewhere, it rejected the notion that police officers had a heightened duty to refrain from reacting violently to insults in a way that affected the application of a disorderly conduct statute. The state could reasonably expect an officer to arrest rather than punch someone who maliciously used profane or abusive language that had a direct tendency to instigate violence, but such language was properly regarded as a criminal offense even when aimed at a police officer.*

JUSTICE LEAPHART.

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As we explained in *City of Whitefish v. O’Shaughnessy* (MT 1985), the right to free speech is protected by the First Amendment to the United States Constitution. This right is not absolute, however. There are some types of speech that are not protected and can subject the speaker to criminal action; one such type is speech that is considered to constitute "fighting words."

"Fighting words" are those words that "inflict injury or tend to incite an immediate breach of peace" or “have a direct tendency to violence.” The United States Supreme Court noted in *Houston v. Hill* (1987), that "[s]peech is often provocative and challenging. . . . [But it] is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest."

Robinson argues that the Ninth Circuit Court of Appeals' decision in *United States v. Poocha* (9th Cir. 2001) controls this case. In *Poocha,* several people had gathered as National Park Service rangers were trying to arrest someone. Poocha was among the spectators, many of whom were loudly protesting the arrest. A ranger specifically told Poocha to disperse. Poocha responded with "f\*\*\* you." Poocha was charged with violating the federal disorderly conduct regulation prohibiting the use of "fighting words." He was found guilty. The Ninth Circuit, however, reversed, holding that Poocha's language was not such that there was a "likelihood that the person addressed would make an immediate violent response." . . .

The District Court concluded that the Ninth Circuit's decision in *Poocha* was not controlling precedent. We agree. The Supremacy Clause does not require state courts to follow precedent from the circuit courts of appeal interpreting the United States Constitution. . . .

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In *O'Shaughnessy,* the defendant and his friends were engaged in a loud conversation at about 2:00 a.m. while walking through the City of Whitefish. An officer approached them and asked them "to hold it down." The parties dispute what occurred and what was said next but according to the police officer he asked O'Shaughnessy between three and five times to "keep it down." . . . O'Shaughnessy approached the officer as if to shake hands. According to the officer's testimony, when he refused to shake O'Shaughnessy's hand, O'Shaughnessy called him a "m\*\*\*-f\*\*\*" and said he would continue to "holler and yell when and wherever" he wanted. At this point, the officer arrested O'Shaughnessy, who continued to be threatening and vulgar. Upon arriving at the police station, O'Shaughnessy's profane and threatening behavior continued in front of a female desk clerk. A jury convicted O'Shaughnessy of disturbing the peace. . . .

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Based on *Chaplinsky v. New Hampshire* (1942), this Court held that the jury properly found that O'Shaughnessy's speech constituted "fighting words," and that, by definition, a threat of violence or threat of violent response was present.

. . . . Were we to adopt this "who is likely to respond belligerently" rationale, any troglodyte could wander the streets calling young children and old men "f\*\*\* pigs" because, due to their age or infirmity, they, like the well-trained policeman, will not be able to respond in a violent fashion.

If the statements in question had been uttered in the context of a political rally or protest, free speech concerns might well prevail. However, we fail to see how randomly goading a police officer by calling him a "f\*\*\* pig" adds to our constitutionally-protected social discourse. It is one thing to expect peace officers to exercise more restraint than the average citizen. However, it is quite another to allow the likes of Malachi Robinson to gratuitously test that restraint without fear of being charged with disorderly conduct.

. . . .

If we are to maintain a "fighting words" interpretation of [the Montana statute], per our decision in *O'Shaughnessy,* then we must conclude that, outside the confines of a sty, "f\*\*\* pig" qualifies as sufficiently and inherently inflammatory, irrespective of the intended audience.

*Affirmed*.

JUSTICE COTTER, with whom CHIEF JUSTICE GRAY joins, dissenting.

. . . .

O'Shaughnessy was given multiple warnings to quiet his loud, disruptive behavior. He refused to comply. He twice entered the patrol car without being asked to do so, and he threatened continued disobedience of police orders in a direct and personally abusive manner. These circumstances provided ample evidence upon which a jury could convict O'Shaughnessy of disorderly conduct. By contrast, Robinson uttered a crude statement from the sidewalk in the direction of an officer who was sitting behind the wheel of a squad car.

More to the point, it was McGinnis—not Robinson—who escalated the encounter. After Robinson made his remark, McGinnis pulled over, parked his squad car, approached Robinson on foot, and challenged him to further conversation. Had McGinnis let it go and driven on once the light turned green, the two men would never have faced off on the street.

The Court concludes that the fact that the intended recipient of Robinson's vulgar remarks was a police officer should have no bearing on our decision. I disagree. The "young children and old men" referenced in the Opinion are neither trained nor obligated to keep the peace. Those distinctions belong to police officers. This being so, I agree with the conclusion of the Ninth Circuit that a trained officer should "... be expected to exercise a higher degree of restraint than the average citizen." Instead of exercising restraint, Deputy McGinnis went out of his way to confront Robinson. It was only at this point, and not before, that the prospect of an actual "breach of the peace" arose.

I do not condone Robinson's vulgar remarks, nor do I blame McGinnis for being angered by them. Nonetheless, I would conclude, on these facts and on the presumption that an officer should exercise restraint in the face of such facts, that Robinson's conduct and language did not rise to the level of "fighting words." I would therefore reverse the judgment of the District Court.