AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 12: The Contemporary Era—Democratic Rights/Free Speech

**State of Connecticut v. Baccala, 163 A. 3d 1** (CT 2017)

*In 2013, Nina Baccala called her local Stop & Shop supermarket and asked that they not close the customer service desk before she arrived to pick up a Western Union money transfer. She was informed that the customer service desk was already closed and that no one would be able to access the necessary computer until the next business day. Baccala then unleashed “pretty much every swear word you can think of” on the assistant store manager who had answered the phone. Shortly thereafter, Baccala appeared in person at the Stop & Shop and demanded that the customer service desk be reopened. When the assistant store manager, Tara Freeman, refused, Baccala again screamed obscenities at her, but Baccala eventually left the store. She was subsequently arrested for breach of the peace and threatening (the threatening charge arose from a second phone call in which Baccala allegedly told the store manager to “come outside” where there “was a gun waiting for her”). At trial, the jury was unable to agree on a guilty verdict on the threatening charge, but did convict Baccala on the charge of breaching the peace. The offense of breach of the peace included actions undertaken with the “intent to cause inconvenience, annoyance or alarm, or recklessly creating the risk thereof,” including the use of “abusive” language in a public place. She was sentenced to twenty-five days in jail.*

*Baccala appealed her conviction, arguing that the breaching of the peace statute as applied to her case violated her constitutional rights under the First Amendment and under the Connecticut Constitution. A divided state supreme court found that Baccala’s actions did not fall within the “fighting words” exception to constitutionally protected speech, and as a consequence her conviction under the statute was barred by the First Amendment. Notably, the majority used a contextual analysis for examining what constituted fighting words that included a consideration of the position of the person at whom the alleged fighting words were directed. The majority thought that there was a heightened expectation that a reasonable store manager would not resort to violence when targeted by abusive language, though an ordinary citizen on the street might.*

JUSTICE McDONALD.

. . . . Fundamentally, we are called upon to determine whether the defendant's speech is protected under the first amendment to the United States constitution or, rather, constitutes criminal conduct that a civilized and orderly society may punish through incarceration. The distinction has profound consequences in our constitutional republic. "If there is a bedrock principle underlying the [f]irst [a]mendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson* (1989).

Only certain types of narrowly defined speech are not afforded the full protections of the first amendment, including "fighting words," i.e., those words that "have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed." *Chaplinsky v. New Hampshire* (1942). The broad language of Connecticut’s breach of the peace statute has been limited accordingly. *State v. Indrisano* (1994). . . .

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Unlike George Carlin's classic 1972 comedic monologue, "Seven Words You Can Never Say on Television," it is well settled that there are no per se fighting words. *Downs v. State* (1976). Although certain language in *Chaplinsky* seemed to suggest that some words in and of themselves might be inherently likely to provoke the average person to violent retaliation, such as "God damned racketeer" and "damned Fascist"; subsequent case law eschewed the broad implications of such a per se approach. *Texas v. Johnson* (1989); *Gooding v. Wilson* (1972). . . .

This context based view is a logical reflection of the way the meaning and impact of words change over time. . . . While calling someone a racketeer or a fascist might naturally have invoked a violent response in the 1940s when *Chaplinsky* was decided, those same words would be unlikely to even raise an eyebrow today. Since that time, public discourse has become more coarse. "[I]n this day and age, the notion that *any* set of words are so provocative that they can reasonably be expected to lead an average listener to immediately respond with physical violence is highly problematic." *State v. Tracy* (VT 2015). We need not, however, consider the continued vitality of the fighting words exception in the present case because a contextual examination of the circumstances surrounding the defendant's remarks inexorably leads to the conclusion that they were not likely to provoke a violent response and, therefore, were not criminal in nature or form.

A proper contextual analysis requires consideration of the actual circumstances as perceived by a reasonable speaker and addressee to determine whether there was a likelihood of violent retaliation.

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We are mindful that, despite the substantial body of case law underscoring the significance of the actual circumstances in determining whether the words spoken fall within the narrow fighting words exception, a few courts remain reluctant to take into account the circumstances of the addressee, e.g., occupation, in considering whether he or she is more or less likely to respond with immediate violence. *State v. Robinson* (MT 2003). The rationale behind ignoring these characteristics of the addressee is that such a standard would be inconsistent with applying an objective standard contemplating an average addressee. This position is flawed in several respects.

First, these courts misapprehend the objective aspect of the fighting words standard. The "`average addressee'" element "was designed to safeguard against the suppression of speech which might only provoke a particularly violent or sensitive listener" because "[a] test which turned upon the response of the actual addressee would run the risk of impinging upon the free speech rights of the speaker who could then be silenced based upon the particular sensitivities of each individual addressee." Accordingly, it is not inconsistent with the application of an objective standard to consider the entire factual context in which the words were uttered because "[i]t is the tendency or likelihood of the words to provoke violent reaction that is the touchstone of the *Chaplinsky* test." . . .

Second, it is precisely this consideration of the specific context in which the words were uttered and the likelihood of *actual* violence, not an "undifferentiated fear or apprehension of disturbance," that is required by the United States Supreme Court's decisions following *Chaplinsky*. . . .

. . . . [B]ecause the fighting words exception is intended only to prevent the likelihood of an actual violent response, it is an unfortunate but necessary consequence that we are required to differentiate between addressees who are more or less likely to respond violently and speakers who are more or less likely to elicit such a response. . . .

Accordingly, a proper contextual analysis requires consideration of the actual circumstances, as perceived by both a reasonable speaker and addressee, to determine whether there was a likelihood of violent retaliation. This necessarily includes the manner in which the words were uttered, by whom and to whom the words were uttered, and any other attendant circumstances that were objectively apparent and bear on the question of whether a violent response was likely. . . .

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At the outset of that examination, we must acknowledge that the words and phrases used by the defendant — "fat ugly bitch," "cunt," and "fuck you, you're not a manager" — were extremely offensive and meant to personally demean Freeman. The defendant invoked one or more of the most vulgar terms known in our lexicon to refer to Freeman's gender. Nevertheless, "[t]he question in this case is not whether the defendant's words were reprehensible, which they clearly were; or cruel, which they just as assuredly were; or whether they were calculated to cause psychic harm, which they unquestionably were; but whether they were *criminal.*" *State v. Krijger* (CT 2011). . . .

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[A]s the store manager on duty, Freeman was charged with handling customer service matters. The defendant's angry words were an obvious expression of frustration at not being able to obtain services to which she thought she was entitled. Store managers are routinely confronted by disappointed, frustrated customers who express themselves in angry terms, although not always as crude as those used by the defendant. People in authoritative positions of management and control are expected to diffuse hostile situations, if not for the sake of the store's relationship with that particular customer, then for the sake of other customers milling about the store. Indeed, as the manager in charge of a large supermarket, Freeman would be expected to model appropriate, responsive behavior, aimed at deescalating the situation, for her subordinates, at least one of whom was observing the exchange.

Significantly, as a store manager, Freeman would have had a degree of control over the premises where the confrontation took place. An average store manager would know as she approached the defendant that, if the defendant became abusive, the manager could demand that the defendant leave the premises, threaten to have her arrested for trespassing if she failed to comply, and make good on that threat if the defendant still refused to leave. With such lawful self-help tools at her disposal and the expectations attendant to her position, it does not appear reasonably likely that Freeman was at risk of losing control over the confrontation.

We recognize that a different conclusion might be warranted if the defendant directed the same words at Freeman after Freeman ended her work day and left the supermarket, depending on the circumstances presented. Given the totality of the circumstances in the present case, however, it would be unlikely for an on duty store manager in Freeman's position to respond in kind to the defendant's angry diatribe with similar expletives. It would be considerably more unlikely for a person in Freeman's position, in the circumstances presented, to respond with a physical act of violence. Indeed, in keeping with the expectations attendant to her position and the circumstances with which she was confronted, Freeman did not respond with profanity, much less with violence, toward the defendant. Instead, she terminated the conversation before it could escalate further with the simple words, "Have a good night." . . .

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*Reversed*.

JUSTICE EVELEIGH, with whom CHIEF JUSTICE ROGERS and JUSTICE ESPINOSA join, concurring in part and dissenting in part.

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The facts *of State v.* *Szymkiewicz* (CT 1996) are strikingly similar to the facts of the present case. In that case, the defendant was shopping at a grocery store in Waterford when she was approached by a store detective. . . . In the office, the detective accused the defendant of shoplifting certain items from the store. Upon hearing the accusation, the defendant "became loud and abusive," and, consequently, the police were called. . . . As the defendant was escorted down the stairs from the manager's office by the police officer and the store detective, she said "[f]uck you" several times. In addition, she said the following to the store detective: "You fucking bitch. I hope you burn in hell for all eternity." She also made an unspecified threat to the store detective. It was also observed that a crowd had begun to form at the bottom of the stairs. On the basis of those facts, the defendant was convicted of violating [the state breach of the peace statute].

In affirming the breach of the peace conviction, this court concluded that the defendant's speech constituted fighting words. This court adumbrated the speech of the defendant and the circumstances in which they occurred and concluded that "the defendant's language could have aroused a violent reaction" by the addressees — namely, the store detective and the crowd. . . .

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. . . . [O]n the basis of *Szymkiewicz,* I would conclude that the evidence is sufficient to sustain a conviction. . . .

. . . . Context is, of course, critical to understanding what the speaker is expressing. First and foremost, the fighting words must be personally provocative. . . . When the abusive language is directed to a particular person, the level of outrage certain words are likely to engender is correlated to how insulting certain words are to that person. Language that targets certain personal attributes that have served as bases for subjugation and dehumanization when directed to individuals with those attributes is among the most harmful. For this reason, racial epithets are more likely fighting words when addressed to a member of the race which the epithet is designed to demean. . . .

The circumstances of the addressee are not wholly irrelevant to the determination of whether a defendant's speech is protected. For there to be an immediate violent reaction by the addressee, there must be some physical proximity between the speaker and the addressee. . . .

Evaluating whether the circumstances of the addressee are such that he or she would be likely to respond with immediate violence is a more delicate matter. Although furnished with more than one opportunity, the United States Supreme Court has declined to adopt a rule that the fighting words doctrine applies more narrowly to speech addressed to a police officer. In a concurring opinion, Justice Powell once suggested that "a properly trained officer *may* reasonably be expected to exercise a higher degree of restraint than the average citizen, and thus be less likely to respond belligerently to fighting words." *Lewis v. New Orleans* (1974). . . .

The reluctance of the United States Supreme Court to embrace an approach that more closely evaluates the circumstances of the addressee is understandable given the fact that that such an approach is maladapted to the nature of fighting words. Fighting words are unprotected speech because they tend to provoke an immediate, visceral response in a face to face situation "because of their raw effect." *State v. Caracoglia* (CT 2003). . . . Ideally, no one would ever respond to abusive speech with violence especially given the likelihood of criminal, professional, or other collateral consequences that could result from violent conduct. Nevertheless, fighting words are so pernicious that they tend to provoke an ordinary person to respond viscerally to scathing insults in a manner that is invariably irrational — that is, with violence. . . .

. . . . Because the defendant has failed to adequately brief the issue of whether the evidence in this case is sufficient under the federal fighting words standard, I would decline to address it.

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Ultimately, I conclude that the fighting words doctrine strikes the appropriate balance. It permits the state to regulate speech that is so abusive and hurtful that it will provoke an immediate violent response, while protecting harsh, but less hurtful speech that has cognizable expressive value. The consequence of limiting the fighting words doctrine to the extent advanced by the defendant would be to protect degrading speech that has the recognized effect of causing palpable impact — enough impact to provoke the listener to immediate violence — in order to preserve, at most, such speech's practical utility as emotive expression. In other words, fighting words are not constitutionally protected merely because they could be used as a tool to express how strongly a speaker feels about an idea or belief. Accordingly, I find that the public policy factor favors the state's position.

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. . . . I would conclude that the trial court's failure to properly instruct the jury on the elements of the fighting words doctrine necessitates a new trial.