AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

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

**State of Connecticut v. Liebenguth, SC 20145** (CT 2020)

*Michael McCargo was a parking enforcement officer for the town of New Canaan. One morning in August 2014, he wrote a $15 parking ticket for a car at an unpaid meter. As he was leaving, the owner of the car, David Liebenguth, approached McCargo and soon accused McCargo of giving him a ticket because he was white. As McCargo walked away, Liebenguth said, “remember Ferguson.” After McCargo got in his own car to leave, he thought he heard Liebenguth say “fucking niggers.” McCargo then came to believe that “remember Ferguson” was a veiled threat. Nonetheless, McCargo drove away, but as he did so Liebenguth cut him off and repeated the slur.*

*McCargo reported the incident to the police, who arrested Liebenguth for breach of the peace. At trial, a witness described Liebenguth as acting in an aggressive manner during the exchange. Liebenguth was found guilty. A divided intermediate appellate court overturned the conviction on the grounds that Liebenguth’s speech was constitutionally protected. The state supreme court unanimously reversed the intermediate court, concluding that Liebenguth’s slur was, in context, a fighting word likely to incite a violent reaction from a reasonable person and not protected by the First Amendment.*

JUSTICE PALMER.

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. . . . In recognizing the fighting words exception to the protection ordinarily afforded speech under the first amendment, the court in *Chaplinsky v. New Hampshire* (1942) reasoned that such words comprise ‘‘no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest’’ in maintaining the peace by preventing the immediate incitement of violence.

It is by now well settled that there are no per se fighting words because words that are likely to provoke an immediate, violent response when uttered under one set of circumstances may not be likely to trigger such a response when spoken in the context of a different factual scenario. *State v. Baccala* (2017). Consequently, whether words are fighting words necessarily will depend on the particular circumstances of their utterance. . . .

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With respect to the language at issue in the present case, the defendant, who is white, uttered the words ‘‘fucking niggers’’ to McCargo, an African-American per-son, thereby asserting his own perceived racial dominance and superiority over McCargo with the obvious intent of denigrating and stigmatizing him. When used in that way, ‘‘[i]t is beyond question that the use of the word ‘nigger’ is highly offensive and demeaning, evoking a history of racial violence, brutality, and subordination.’’ *McGinest v. GTE Service Corp.* (9th Cir. 2004). Not only is the word ‘‘nigger’ ’undoubtedly the most hateful and inflammatory racial slur in the contemporary American lexicon; see id.; but it is probably the single most offensive word in the English language. *Ayissi-Etoh v. Fannie Mae* (D.C. Cir. 2013). . . .

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In addition to the defendant’s use of the word ‘‘niggers,’’ other language and conduct by the defendant further inflamed the situation, rendering it that much more likely to provoke a violent reaction. First, the defendant used the profane adjective ‘‘fucking’’ — a word of emphasis meaning wretched, rotten or accursed — to intensify the already highly offensive and demeaning character of the word ‘‘niggers.’’ Like the term ‘‘nigger,’’ however, the term ‘‘ ‘fucking nigger’ [is] . . . so powerfully offensive that . . . [it] inflicts cruel injury by its very utterance. It is degrading, it is humiliating, and it is freighted with a long and shameful history of humiliation, the ugly effects of which continue to haunt us all.’’ *Augis Corp. v. Massachusetts Commission Against Discrimination* (MA 2009). The defendant’s resort to such language underscored for McCargo how especially incensed and insulted the defendant was by virtue of his having been issued by the ticket by an African-American parking official. . . .

Second . . . the fact that the defendant repeated this epithet only served to exacerbate the provocative and hostile nature of the confrontation. . . .

Third, the defendant employed additional, racially offensive, crude and foreboding language during his interaction with McCargo. . . .

Finally, in addition to his offensive and intimidating utterances, certain conduct by the defendant further manifested his extreme anger and hostility toward McCargo. As the two men were speaking outside of their respective vehicles, the defendant stepped toward McCargo while moving his hands and body in an aggressive and irate manner. . . .

As we previously discussed, speech will be deemed to be unprotected fighting words only if it so ‘‘touch[es]the raw nerves of [the addressee’s] sense of dignity, decency, and personality . . . [that it is likely] to trig-ger an immediate violent reaction;’’ a standard that, we have said, is satisfied only if the speech is so inflammatory that it ‘‘is akin to dropping a match into a pool of gasoline.’’ *State v. Parnoff* (2018). We believe this to be the rare case in which that demanding standard has been met. Born of violence, the word ‘‘nigger,’’ when uttered with the intent to personally offend and demean, also engenders violence. Indeed, such use of the word ‘‘nigger’’ aptly has been called ‘‘a classic case’’ of speech likely to incite a violent response. *In re Spivey* (NC 1997). It therefore is unsurprising that many courts have rejected first amendment challenges to convictions predicated on the use of the word. *In re John M.* (AZ 2001); *State v. Hoshijo ex rel. White* (HI 2003); *In re H.K.* (ND 2010). . . . To whatever extent public discourse in general may have coarsened over time; it has not eroded to the point that the racial epithets used in the present case are any less likely to provoke a violent reaction today than they were in previous decades.

. . . . Although we agree that police officers generally are expected to exercise greater restraint than the average citizen when confronted with offensive language or unruly conduct, McCargo was not a police officer, and his duties cannot fairly be characterized as similar to those of a police officer. Additionally, McCargo’s testimony concerning his five years of experience as a parking enforcement officer — testimony in which he explained that he never before had been on the receiving end of such hostile or offensive language or had ever reported a prior incident to the police — suggests that the abuse McCargo endured during his encounter with the defendant well exceeded that which someone in his position reasonably might be expected to face. . . .

It is true, of course, that McCargo did not react violently despite the highly inflammatory and inciting nature of the defendant’s language and conduct. ‘‘[Even] [t]hough the fighting words standard is an objective inquiry . . . examining the subjective reaction of an addressee, although not dispositive, may be probative of the likelihood of a violent reaction.’’ *Parnoff*. . . .

We also reject the defendant’s contention that his use of the epithets ‘‘fucking niggers’’ cannot provide the basis of his conviction in view of the fact that the defendant and McCargo were in their vehicles on both occasions when the defendant directed those slurs at McCargo. Because the rationale underlying the fighting words doctrine is the state’s interest in preventing the immediate violent reaction likely to result when highly offensive language is used to insult and humiliate the addressee, ‘‘[t]he potential to elicit [such] an immediate violent response exists only [when] the communication occurs [face to face] or in close physical proximity.’’ *Billings v. Nelson* (MT 2014). This requirement is satisfied in the present case even though both men were in their vehicles when the defendant uttered the slurs. . . . In such circumstances, it would have been easy enough for McCargo to exit his vehicle and to charge after the defendant, or to ram the defendant’s vehicle with his own, or to pursue the defendant out of the parking lot in his own vehicle. Unless the use of a vehicle by the speaker makes it impossible for the addressee to retaliate immediately, courts routinely have held that the likelihood of an immediate violent reaction is not diminished merely because the speaker or addressee was in a vehicle when the offending utterances were made. . . .

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. . . . In light of the uniquely injurious and provocative nature of the term, we also agree that its use is all the more likely to engender the kind of violent reaction that distinguishes fighting words from the vast majority of words that, though also offensive and provocative, are nevertheless constitutionally protected.

For all the foregoing reasons, we conclude that the language the defendant used to demean, intimidate and anger McCargo were fighting words likely to provoke a violent response from a reasonable person under the circumstances. Because the first amendment does not shield such speech from prosecution, the state was free to use it to obtain the defendant’s conviction of breach of the peace in the second degree, which, as we have explained, is supported by the evidence. . . .

*Reversed*.