AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

Howard Gillman • Mark A. Graber • Keith E. Whittington

Supplementary Material

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

**State of Connecticut v. Parnoff, 186 A. 3d 640** (CT 2018)

*Laurence Parnoff encountered two water company employees, Kyle Lavin and David Lathlean, performing water hydrant maintenance on Parnoff’s property. Lavin and Lathlean arrived at the property in a clearly marked truck and wearing uniforms. The water company had a preexisting easement on the property that included the area around the hydrant and hydrant pipe, and Parnoff was legally prohibited from tampering with the hydrant. The hydrant was located well within a wooded area on Parnoff’s property and some 100 feet from his house. Lavin and Lathlean discovered that a cap of the hydrant had been removed, and they found it attached to a garden hose near a shed near the hydrant. At that point, Parnoff and his family members approached Lavin and Lathlean and demanded that they leave the property. At one point, Parnoff threatened to “get my gun and [fucking] kill you.” Lavin and Lathlean called the police, but did not leave the property. Parnoff did not retrieve a gun. When the police arrived, Parnoff refused to comply with their request to back away and was arrested.*

*At trial, Parnoff was found guilty of disorderly conduct. An appellate court reversed, holding that Parnoff’s words had not been demonstrated to be likely to provoke an immediate violent reaction, and thus were not fighting words that were outside the bounds of constitutional protections. On further appeal, with one dissenter, the state supreme court agreed with the intermediate court. The majority held that in the circumstances, Parnoff’s statement would not have led a reasonable water company employee to react with violence, and thus Parnoff’s speech did not fall within the fighting words exception to the First Amendment.*

JUSTICE D’AURIA.

. . . .

The first amendment bars the states from criminalizing pure speech, unless that speech falls into one of a few constitutionally *unprotected* categories. Therefore, the disorderly conduct statute can proscribe "[o]nly certain types of narrowly defined speech [that] are not afforded the full protections of the first amendment, including fighting words.” *State v. Baccala* (CT 2017).

"Fighting words" are defined as speech that has "a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed." To qualify as unprotected fighting words, the speech must be "likely to provoke an *imminent* violent response from the [addressee]." The imminence of a response is based on "the likelihood of actual violence, [and] not [merely] an undifferentiated fear or apprehension of disturbance.” Fighting words must immediately cause the addressee to resort to violence such that the speech is "akin to dropping a match into a pool of gasoline."

The first amendment also does not protect speech that qualifies as "[t]rue threats." *State v. Pelella* (CT 2017). "True threats encompass those statements [in which] the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group.” . . . [L]ike the jury, we have no occasion to determine whether the defendant's utterance qualified as a "true threat," and, therefore, we analyze this case solely under the fighting words doctrine.

. . . .

[W]e are not persuaded that the defendant's threatening words, unaccompanied by any effectuating action, were likely to provoke an imminent and violent reaction from the water company employees at whom those words were directed.

We examine first the nature and "quality of the words" that the defendant used and how that bears on the likelihood of imminent violence. . . .

In this case, it is reasonable to presume that an addressee in the position of the water company employees would understand the defendant's statement to be threatening, even though it was conditioned on further action or inaction by the water company employees. The defendant indicated he was going to retrieve a gun and either "shoot" or "[fucking] kill" the employees if they remained on his property or went into his shed. A reasonable person hearing either version would likely recognize its threatening nature. Therefore, we do not doubt that, under certain circumstances, such a statement could provoke a reasonable person to retaliate with physical violence to prevent the threat from being carried out.

Nevertheless, even though threatening, we do not believe that the defendant's statement, considered in context, was likely to provoke an immediate and violent reaction because the objectively apparent circumstances did not indicate any immediate intent or ability on the part of the defendant to carry out that threat. The evidence established that the defendant was walking around, wearing only shorts, carrying what appeared to be a can of worms, and otherwise appeared to be unarmed. These facts indicate that the defendant would need to retrieve a gun to carry out his threat, suggesting his gun was at a different location and decreasing the likelihood that an addressee would consider any danger so imminent that he would feel compelled to react with violence to dispel it. The defendant was not heading in the direction of his residence, which was located approximately 100 feet away, where, by one account of the defendant's statement, he had said his gun was located. Instead, the defendant began walking toward his animal pen while searching for worms. Given that the defendant was in the presence of his family and did not appear to have the immediate ability to carry out his threat, his utterance was unlikely to constitute a serious expression of intent to harm. Therefore, we doubt that the defendant's statements, considered in context, would be viewed as so threatening that they would incite the average person in the water company employees' positions to imminent violence.

The improbability of a violent response is further supported by examining the "personal attributes of the ... addressee[s] that are reasonably apparent.” In this case, Lavin and Lathlean were professionals performing duties on behalf of the water company and acting within the scope of their employment. . . . But because they were acting as professionals representing the water company, they "would reasonably be expected to ... exercise a higher degree of restraint than the ordinary citizen" and, thus, would be unlikely to react violently when faced with angry property owners.

Lathlean's and Lavin's heightened level of professional restraint undercuts the state's contention that the average employee in either of their positions would strike the defendant first to either forestall violence or, under the state's more strained argument, to respond to the "humiliating" and "insulting" nature of the threat. . . .

. . . . Seclusion alone, however, does not in our view elevate the circumstances in the present case so as to satisfy the imminent violence threshold. An average water company employee working in the field in Connecticut would routinely be present on private property in many settings, including in wooded areas, while interacting with irritable property owners. The mere secluded nature of the defendant's property does not convince us that the employees were likely to react with imminent violence, particularly given that there were two of them present and a third on her way.

. . . .

A subjective analysis of the addressees' actual reactions confirms our conclusion that it was unlikely that imminent violence would follow from the defendant's words. Though the fighting words standard is an objective inquiry, our decision in *Baccala* underscored that examining the subjective reaction of an addressee, although "not dispositive," may be "probative of the likelihood of a violent reaction." . . . Here, Lathlean gave no reaction whatsoever — let alone a violent one. He testified that, not only was he not frightened by the defendant's words, but, rather, they "bounced right off" him, stating that, "I just stood there and was like, okay then, you know, let's see what happens." Lathlean then proceeded to follow the defendant around the property, even though he was trained to retreat in the event that he encountered an angry property owner. In fact, when Lathlean called the police, he characterized the defendant as merely "`a little crabby'" and made no mention at all of the defendant's gun threat. Although Lavin acknowledged that the defendant's words caused him "alarm" and "trepidation," he too did not outwardly react or leave the premises. Given that the addressees' subjective reactions amounted to no reaction at all, their dispassion supports our independent conclusion that average water company employees in Lathlean's and Lavin's circumstances who were confronted by the defendant's threatening words, unaccompanied by any effectuating action, and who are trained to retreat from hostile situations, would not likely be incited to react imminently and violently. Therefore, the defendant's comments do not qualify as unprotected fighting words, and there is insufficient evidence to sustain his conviction.

. . . .

. . . . Whatever vitality remains to the fighting words doctrine, we conclude that the threat in this particular case — by a shirtless man collecting worms with his wife and daughter nearby — simply did not rise to *Baccala*'s necessarily high standard of being "*likely*" to provoke "*immediate*" violence.

Consistent with the first amendment, therefore, we cannot conclude those statements constituted fighting words.

*Affirmed*.

JUSTICE KAHN, concurring.

. . . .

. . . . [T]he concern behind the true threats exception is that a threatening statement will cause a listener to fear violence.

In contrast, fighting words are "those words that have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed." Unlike true threats, the fighting words exception is driven by the concern that an offensive statement will cause "violent retaliation" by the listener.

. . . .

The continuing vitality of the fighting words exception is dubious and the successful invocation of that exception is so rare that it is practically extinct. Indeed, the United States Supreme Court has not upheld a fighting words conviction since *Chaplinsky v. New Hampshire* (1942*)*. . . .

. . . .

. . . . [T]he state contends that the fighting words exception applies to statements that provoke violence not due to anger, but, instead, out of a perceived need for preemptive self-defense.

After an exhaustive review of fighting words cases, I am aware of no controlling precedent that supports such an argument. Although fighting words jurisprudence is "concerned with the likelihood of violent retaliation;” the underlying theory is that fighting words will provoke that violent retaliation by *angering* or *insulting* the addressee. . . .

. . . .

This is not a matter of mere semantics; identifying the purpose behind the fighting words exception clarifies its doctrinal parameters and the types of speech that may fit within the exception. It is the *true* *threats* exception that encompasses threatening statements that cause a listener to fear violence; not the fighting words exception. Thus, allowing the fighting words exception to encompass statements that might cause violent, preemptive self-defense would be inconsistent with the underlying theory of how fighting words work. Statements that are not threatening enough to be true threats or offensive enough to be fighting words would be exempt from first amendment protection under a nebulous hybrid exception. This is a dangerous proposition given that the exceptions to first amendment protection are limited. . . .

. . . .

As the majority correctly noted, such threats invite a range of responses in the reasonable person. A reasonable person might have retreated, as Lathlean was trained to do. Alternatively, a reasonable person might have called the police, as Lathlean did in the present case. Given these alternatives, a reasonable person would not have responded violently to the defendant's conditional threat by attacking a shirtless man armed with only a can of worms in order to escape speculative violence. It is unsurprising and telling that neither Lavin nor Lathlean considered responding with violence. Admittedly, it is tempting to ponder whether the fighting words exception would have applied had the threat been more immediate — for example, if the defendant had brandished a gun — but such hypotheticals tend to take the defendant's actions from the category of pure speech that must fit within a first amendment exception, to the realm of conduct in which the first amendment is not implicated. *State v. Indrisano* (CT 1994).

. . . .

The circumstances surrounding the defendant's statement do not bring its content to the level of fighting words, as evidenced by the reactions of Lavin and Lathlean, who were not angered, let alone brought to the point of violent retaliation. . . .

. . . .

Although the defendant's statement does not rise to the level of fighting words, it was a true threat. In the present case, the defendant told Lavin and Lathlean that he would shoot them if they did not comply with his demands. With regard to the constitutional parameters of the true threats exception, a reasonable person would foresee that threatening to shoot someone if he refused to follow demands would be interpreted as a serious expression of an intent to harm. . . .

. . . .

I do not condone the defendant's statement in the present case — the threat of gun violence is tasteless, shameful, and all too real. Indeed, the statement would have fit within the true threats exception to first amendment protection had the state made that argument. It did not. Furthermore, its attempt to alchemize the defendant's threatening statement into fighting words through a theory of preemptive self-defense is doctrinally and factually unpersuasive. Although I recognize that there may be instances where a true threat is insulting in a manner that also makes it fighting words, that is not the present case. The state simply failed to raise the claim that the defendant's statement constituted a true threat, rather than fighting words, and, as such, was not protected speech.

JUSTICE ROBINSON, dissenting.

. . . . I respectfully disagree with the majority's opinion, which allows the defendant to use the first amendment to the United States constitution to shield himself from what should be the obvious consequences of this unwarranted threat to two water company employees just doing their jobs. . . .

. . . .

In my view, the majority's application of *Baccala* gives short shrift to the words actually used in concluding that they were not fighting words, notwithstanding its acknowledgment that a "reasonable person hearing [the defendant's statement] would likely recognize its threatening nature." The jury reasonably could have found that the defendant had threatened both water company employees with a gun if they did not leave his property. . . .

. . . . In my view, as soon as the defendant introduced the prospect of firearms into his exchange with the water company employees, he escalated the conflict over the apparent theft of hydrant water far beyond any possible epithets that he could have directed at Lavin and Lathlean. . . .

. . . . Although I agree with the majority that the employees' jobs servicing fire hydrants on land owned by others without prior notice to landowners "could precipitate encounters with confrontational property owners as part of their work," and that they would "`reasonably be expected to... exercise a higher degree of restraint,'" my agreement on that point ends with the water company employees being on the receiving end of vituperative language and epithets such as those in *Baccala.* Once the defendant explicitly introduced the specter of a shooting into the already tense situation — and there was no indication that he was joking or facetious — he escalated the confrontation beyond that subject to first amendment protection. Indeed, both Lathlean and Lavin testified that they notified the police because, in Lavin's words, the "situation was starting to get out of control," given the defendant's anger and his threat to get a gun.

. . . .

. . . . I am not prepared to say that our discourse has devolved to the point that a person's threat to use a gun during a heated confrontation with public utility workers is anything less than a specific threat of violence likely to precipitate an immediate preemptive strike or, in its place, a significant law enforcement response. . . .