Free Speech or Hate Speech? A Conversation Regarding *State v. Liebenguth*

November 16, 2020

4:00 p.m. – 6:00 p.m.

CT Bar Association

Webinar

CT Bar Institute, Inc.

CT: 2.0 CLE Credits (1.0 General / 1.0 Ethics)
NY:2.0 CLE Credits (1.0 AOP / 1.0 Ethics)

Table of Contents

LAWYERS' PRINCIPLES OF PROFESSIONALISM

As a lawyer, I have dedicated myself to making our system of justice work fairly and efficiently for all. I am an officer of this Court and recognize the obligation I have to advance the rule of law and preserve and foster the integrity of the legal system. To this end, I commit myself not only to observe the Connecticut Rules of Professional Conduct, but also conduct myself in accordance with the following Principles of Professionalism when dealing with my clients, opposing parties, fellow counsel, self-represented parties, the Courts, and the general public.

Civility:

Civility and courtesy are the hallmarks of professionalism. As such,

- I will be courteous, polite, respectful, and civil, both in oral and in written communications;
- I will refrain from using litigation or any other legal procedure to harass an opposing party;
- I will not impute improper motives to my adversary unless clearly justified by the facts and essential to resolution of the issue;
- I will treat the representation of a client as the client's transaction or dispute and not as a dispute with my adversary;
- I will respond to all communications timely and respectfully and allow my adversary a reasonable time to respond;
- I will avoid making groundless objections in the discovery process and work cooperatively to resolve those that are asserted with merit;
- I will agree to reasonable requests for extensions of time and for waiver of procedural formalities when the legitimate interests of my client will not be adversely affected;
- I will try to consult with my adversary before scheduling depositions, meetings, or hearings, and I will cooperate with her when schedule changes are requested;
- When scheduled meetings, hearings, or depositions have to be canceled, I will notify my adversary and, if appropriate, the Court (or other tribunal) as early as possible and enlist their involvement in rescheduling; and
- I will not serve motions and pleadings at such time or in such manner as will unfairly limit the other party's opportunity to respond.

Honesty:

Honesty and truthfulness are critical to the integrity of the legal profession – they are core values that must be observed at all times and they go hand in hand with my fiduciary duty. As such,

- I will not knowingly make untrue statements of fact or of law to my client, adversary or the Court;
- I will honor my word;
- I will not maintain or assist in maintaining any cause of action or advancing any position that is false or unlawful;

- I will withdraw voluntarily claims, defenses, or arguments when it becomes apparent that they do not have merit or are superfluous;
- I will not file frivolous motions or advance frivolous positions;
- When engaged in a transaction, I will make sure all involved are aware of changes I make to documents and not conceal changes.

Competency:

Having the necessary ability, knowledge, and skill to effectively advise and advocate for a client's interests is critical to the lawyer's function in their community. As such,

- I will keep myself current in the areas in which I practice, and, will associate with, or refer my client to, counsel knowledgeable in another field of practice when necessary;
- I will maintain proficiency in those technological advances that are necessary for me to competently represent my clients.
- I will seek mentoring and guidance throughout my career in order to ensure that I act with diligence and competency.

Responsibility:

I recognize that my client's interests and the administration of justice in general are best served when I work responsibly, effectively, and cooperatively with those with whom I interact. As such,

- Before dates for hearings or trials are set, or if that is not feasible, immediately after such dates have been set, I will attempt to verify the availability of key participants and witnesses so that I can promptly notify the Court (or other tribunal) and my adversary of any likely problem;
- I will make every effort to agree with my adversary, as early as possible, on a voluntary exchange of information and on a plan for discovery;
- I will attempt to resolve, by agreement, my objections to matters contained in my opponent's pleadings and discovery requests;
- I will be punctual in attending Court hearings, conferences, meetings, and depositions;
- I will refrain from excessive and abusive discovery, and I will comply with all reasonable discovery requests;
- In civil matters, I will stipulate to facts as to which there is no genuine dispute;
- I will refrain from causing unreasonable delays;
- Where consistent with my client's interests, I will communicate with my adversary in an effort to avoid needless controversial litigation and to resolve litigation that has actually commenced;
- While I must consider my client's decision concerning the objectives of the representation, I nevertheless will counsel my client that a willingness to initiate or engage in settlement discussions is consistent with zealous and effective representation.

Mentoring:

I owe a duty to the legal profession to counsel less experienced lawyers on the practice of the law and these Principles, and to seek mentoring myself. As such:

- I will exemplify through my behavior and teach through my words the importance of collegiality and ethical and civil behavior;
- I will emphasize the importance of providing clients with a high standard of representation through competency and the exercise of sound judgment;
- I will stress the role of our profession as a public service, to building and fostering the rule of law;
- I will welcome requests for guidance and advice.

Honor:

I recognize the honor of the legal profession and will always act in a manner consistent with the respect, courtesy, and weight that it deserves. As such,

- I will be guided by what is best for my client and the interests of justice, not what advances my own financial interests;
- I will be a vigorous and zealous advocate on behalf of my client, but I recognize that, as an officer of the Court, excessive zeal may be detrimental to the interests of a properly functioning system of justice;
- I will remember that, in addition to commitment to my client's cause, my responsibilities as a lawyer include a devotion to the public good;
- I will, as a member of a self-regulating profession, report violations of the Rules of Professional Conduct as required by those rules;
- I will protect the image of the legal profession in my daily activities and in the ways I communicate with the public;
- I will be mindful that the law is a learned profession and that among its desirable goals are devotion to public service, improvement of administration of justice, and the contribution of uncompensated time and civic influence on behalf of those persons who cannot afford adequate legal assistance; and
- I will support and advocate for fair and equal treatment under the law for all persons, regardless of race, color, ancestry, sex, pregnancy, religion, national origin, ethnicity, disability, status as a veteran, age, gender identity, gender expression or marital status, sexual orientation, or creed and will always conduct myself in such a way as to promote equality and justice for all.

Nothing in these Principles shall supersede, supplement, or in any way amend the Rules of Professional Conduct, alter existing standards of conduct against which a lawyer’s conduct might be judged, or become a basis for the imposition of any civil, criminal, or professional liability.

Free Speech or Hate Speech? A Conversation Regarding State v. Liebenguth (EYL201116)

Agenda

4:00 - Introduction of Event and Speakers (**Aigné Goldsby**)

4:10 - Free Speech and the First Amendment (**Dan Barret**)

4:25 - Hate Crimes and Hate Speech (**Nicole Christie**)

4:40 - The History of the N-word (**Frank Harris III**)

4:55 - Facilitated Discussion

5:40 - Q&A

Free Speech or Hate Speech? A Conversation Regarding *State v. Leibenguth*

PANELISTS

Dan Barrett

Dan Barrett is the American Civil Liberties Union of Connecticut's legal director. His interests in the law include anonymous speech, freedom of movement, mass surveillance, and maximizing democratic control of government through open courts and open records. Prior to coming to the ACLU of Connecticut, Dan directed the litigation at the ACLU of Vermont for seven years and clerked for the Hon. Janet Bond Arterton of the United States District Court for the District of Connecticut.

Nicole Christie

Attorney Christie is licensed to practice in Connecticut and is a member of the American Bar Association, and Connecticut Bar Association. She has Bachelor's Degree from Wesleyan University and a Juris Doctor Degree from Quinnipiac University School of Law. Attorney Christie graduated from law school with honors. She also has a Certificate in Theology. Attorney Christie has been an active member of a church for over 20 years. In her youth, she served as Sunday School teacher and Pastoral Committee Secretary. Recently, Attorney Christie served as the Chairperson of the Evangelism Board of Phillips Metropolitan CME Church and continues to work on that Board. She also has served as a trustee at Phillips as well. Attorney Christie was employed as a social worker and social work supervisor at the Department of Children and Families for eleven years. As an employee at DCF, she was a staunch supporter of the rights of both parents and children, especially those children with special needs. Attorney Christie was recently a prosecutor in the Tolland Judicial District for the past twelve years. During her tenure as a prosecutor, she managed the Youthful Offender Docket, conducted over twenty trials, and successfully negotiated over 1000 cases towards a disposition without a trial. As a prosecutor, she also managed many of the grave or complicated domestic violence cases, which often involved divorce and child custody issues. Attorney Christie opened The Christie Law Firm because she wanted to take all of her knowledge and experience a step further in helping to build stronger faith-based organizations, and families, which aids in building stronger communities.

Frank Harris III

Frank Harris III is a journalism professor at Southern Connecticut State University, a former columnist for the Hartford Courant, and a documentary filmmaker. As a university professor, he

has taught journalism at SCSU for more than 25 years in classes covering reporting and writing, American journalism history, the First Amendment, race and the news, and digital journalism. As a newspaper columnist, he wrote for the Courant for more than 15 years on a range of topics covering race, politics, and life. In addition to the Courant, his writing has appeared in newspapers and magazines across the country, including the New York Times, USA Today, the New Haven Register, the City Sun, the Chicago Tribune, Essence, and Crisis Magazine.

He is also the author of the books The Craft of Quoting and co-author of The Power of Free Expression in America. As a filmmaker, his documentary films have addressed such topics as the N-word (Journey to the Bottom of the n-Word) and the challenges of a wounded Vietnam veteran (The First Casualty of Lake County.) and the 400th anniversary of the first enslaved Africans brought to America (They Came Across the Water). His work has led to appearances on radio and television, as well as a variety of speaking engagements where he has served as keynote, moderator and panelist. Originally from Waukegan, Ill., Harris earned his graduate degree at the University of Texas and his undergraduate degree at Southern Illinois University. He lives in Hamden, Connecticut.

MODERATOR

Aigné Goldsby

Aigné Goldsby is currently a Trial Attorney for MAPFRE Insurance. Thus far in her legal practice, Attorney Goldsby has gained extensive experience in pretrial and trial proceedings. She has taken and defended over one-hundred depositions and completed four jury trials to verdict. Attorney Goldsby's clients have included insurance companies, healthcare providers, municipalities, product manufacturers, and school districts.

Attorney Goldsby is also the Founder and Principal of Black Esquire® LLC, an organization that provides opportunities and resources for Black and minority legal professionals. Through Black Esquire®, Attorney Goldsby provides one-on-one coaching to pre-law and law students and publishes Black Esquire® Magazine. She received her J.D. from the University of Connecticut School of Law and her B.A. from Bryn Mawr College.

Attorney Goldsby is the immediate past President of the George W. Crawford Black Bar Association in Connecticut. She is also active in the Connecticut Bar Association as a member of the Diversity & Inclusion Committee and Co-Diversity Director of the Young Lawyers Section. She currently serves as a Board of Director for the ACLU of Connecticut, on the Steering Committee for the Governor's Council on Women and Girls and a member of the Connecticut Judicial Branch Jury Selection Task Force.

HATE CRIME LAWS

A WORD TO THE WISE

HATE CRIME LAWS

- "Connecticut has a number of statutes on hate crimes that protect a range of people, **enhance penalties for bias crimes**, and **allow an injured person to sue for money damages**."

By: Christopher Reinhart, Senior Attorney - OLR Research Report dated April 15, 2008

HATE CRIME LAWS

- **Sec. 53a-181i. Intimidation based on bigotry or bias: Definitions.** For the purposes of sections 53a-181j to 53a-181*l*, inclusive:
- (1) **"Disability"** means physical disability, mental disability or intellectual disability;
- (2) **"Gender identity or expression"** means a person's gender-related identity, appearance or behavior, whether or not that gender-related identity, appearance or behavior is different from that traditionally associated with the person's assigned sex at birth;

HATE CRIME LAWS

- (3) **"Mental disability"** means one or more mental disorders, as defined in the most recent edition of the American Psychiatric Association's "Diagnostic and Statistical Manual of Mental Disorders";

- (4) **"Intellectual disability"** has the same meaning as provided in section 1-1g; and

HATE CRIME LAWS

- (5) **"Physical disability"** means any chronic physical handicap, infirmity or impairment, whether congenital or resulting from bodily injury, organic processes or changes or from illness, including, but not limited to, blindness, epilepsy, deafness or being hard of hearing or reliance on a wheelchair or other remedial appliance or device.

HATE CRIME LAWS

- **Sec. 53a-181j. Intimidation based on bigotry or bias in the first degree: Class C felony.** (a) A person is guilty of intimidation based on bigotry or bias in the first degree when such **person maliciously**, and with **specific intent to intimidate** or harass another person because of the actual or perceived **race, religion, ethnicity, disability, sex, sexual orientation or gender identity or expression of such other person**, causes physical injury to such other person or to a third person.

- (b) Intimidation based on bigotry or bias in the first degree is a **class C felony**, for which three thousand dollars of the fine imposed may not be remitted or reduced by the court unless the court states on the record its reasons for remitting or reducing such fine.

HATE CRIME LAWS

- **Sec. 53a-181*l*. Intimidation based on bigotry or bias in the third degree: Class E felony.** (a) A person is guilty of intimidation based on bigotry or bias in the third degree when such person, with **specific intent to intimidate or harass** another person or group of persons because of the actual or perceived **race, religion, ethnicity, disability, sex, sexual orientation or gender identity or expression of such other person or persons**: (1) Damages, destroys or defaces any real or personal property, or (2) threatens, **by word** or act, to do an act described in subdivision (1) of this subsection or advocates or urges another person to do an act described in subdivision (1) of this subsection, if there is reasonable cause to believe that an act described in said subdivision will occur.
- (b) Intimidation based on bigotry or bias in the third degree is a **class E felony**, for which one thousand dollars of the fine imposed may not be remitted or reduced by the court unless the court states on the record its reasons for remitting or reducing such fine.
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HATE CRIME LAWS

- **Sec. 53a-181*l*. Intimidation based on bigotry or bias in the third degree: Class E felony.** (a) A person is guilty of intimidation based on bigotry or bias in the third degree when such person, with **specific intent to intimidate or harass** another person or group of persons because of the actual or perceived race, religion, ethnicity, disability, sex, sexual orientation or gender identity or expression of such other person or persons: (1) Damages, destroys or defaces any real or personal property, or (2) threatens, **by word** or act, to do an act described in subdivision (1) of this subsection or advocates or urges another person to do an act described in subdivision (1) of this subsection, if there is reasonable cause to believe that an act described in said subdivision will occur.
- (b) Intimidation based on bigotry or bias in the third degree is a **class E felony**, for which one thousand dollars of the fine imposed may not be remitted or reduced by the court unless the court states on the record its reasons for remitting or reducing such fine.
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HATE CRIME LAWS

- **Sec. 53-37. Ridicule on account of creed, religion, color, denomination, nationality or race.** Any person who, **by his advertisement**, ridicules or holds up to contempt any person or class of persons, on account of the creed, religion, color, denomination, nationality or race of such person or class of persons, shall be guilty of a **class D misdemeanor**.

HATE CRIME LAWS

- **Sec. 46a-58. (Formerly Sec. 53-34). Deprivation of rights. Desecration of property. Placing of burning cross or noose on property. Penalty. Restitution.** (a) It shall be a discriminatory practice in violation of this section for any person to subject, or cause to be subjected, any other person to the deprivation of any rights, privileges or immunities, secured or protected by the Constitution or laws of this state or of the United States, on account of religion, national origin, alienage, color, race, sex, gender identity or expression, sexual orientation, blindness, mental disability, physical disability or status as a veteran.
- (b) **Any person who intentionally desecrate**s any public property, monument or structure, or any religious object, symbol or house of religious worship, or any cemetery, or any private structure not owned by such person, shall be in violation of subsection (a) of this section. For the purposes of this subsection, "desecrate" means to mar, deface or damage as a demonstration of irreverence or contempt.
- (c) Any person **who places a burning cross or a simulation thereof** on any public property, or on any private property without the written consent of the owner, and with intent to intimidate or harass any other person or group of persons, shall be in violation of subsection (a) of this section.
- (d) **Any person who places a noose or a simulation thereof on any public property**, or on any private property without the written consent of the owner, and with intent to intimidate or harass any other person on account of religion, national origin, alienage, color, race, sex, gender identity or expression, sexual orientation, blindness, mental disability, physical disability or status as a veteran, shall be in violation of subsection (a) of this section.

HATE CRIME LAWS

- **Sec. 46a-58. (Formerly Sec. 53-34). Deprivation of rights. Desecration of property. Placing of burning cross or noose on property. Penalty. Restitution.**
- (e) (1) Except as provided in subdivision (2) of this subsection, any person who violates any provision of this section shall be guilty of a **class A misdemeanor** and shall be fined not less than one thousand dollars, except that if property is damaged as a consequence of such violation in an amount in excess of one thousand dollars, such person shall be guilty of a class D felony and shall be fined not less than one thousand dollars.
- (2) Any person who violates the provisions of this section **by intentionally desecrating a house of religious worship** (A) shall be guilty of a class D felony and shall be fined not less than one thousand dollars if property is damaged as a consequence of such violation in an amount up to and including ten thousand dollars, and (B) shall be guilty of a class C felony and shall be fined not less than three thousand dollars if the property damaged as a consequence of such violation is in an amount in excess of ten thousand dollars.
- (3) The minimum amount of any fine imposed by the provisions of this section may not be remitted or reduced by the court unless the court states on the record its reasons for remitting or reducing such fine.
- (4) The **court may order restitution for any victim** of a violation of this section pursuant to subsection (c) of section 53a-28.

HATE CRIME LAWS

- **Sec. 53a-40a. Persistent offenders of crimes involving bigotry or bias. Authorized sentences.** (a) A persistent offender of crimes involving bigotry or bias is a person who (1) stands convicted of a violation of section 46a-58, 53-37a, 53a-181j, 53a-181k or 53a-181*l*, and (2) has been, prior to the commission of the present crime, convicted of a violation of section 46a-58, 53-37a, 53a-181j, 53a-181k or 53a-181*l* or section 53a-181b in effect prior to October 1, 2000.
- (b) When any person has been found to be a persistent offender of crimes involving bigotry or bias, the court shall: (1) In lieu of imposing the sentence authorized for the crime under section 53a-35a if the crime is a felony, **impose the sentence of imprisonment authorized by said section for the next more serious degree of felony**, or (2) in lieu of imposing the sentence authorized for the crime under section 53a-36 if the crime is a misdemeanor, **impose the sentence of imprisonment authorized by said section for the next more serious degree of misdemeanor**, except that if the crime is a class A misdemeanor the court shall impose the sentence of imprisonment for a class D felony as authorized by section 53a-35a.

HATE CRIME LAWS

Sec. 54-56e. (Formerly Sec. 54-76p). Accelerated pretrial rehabilitation.

- (e) If the court orders the defendant to participate in a hate crimes diversion program as a condition of probation, the defendant shall pay to the court a participation fee of **four hundred twenty-five dollars**. No person may be excluded from such program for inability to pay such fee, provided (1) such person files with the court an affidavit of indigency or inability to pay, (2) such indigency or inability to pay is confirmed by the Court Support Services Division, and (3) the court enters a finding thereof.

HATE CRIME LAWS

Sec. 54-56e. (Formerly Sec. 54-76p). Accelerated pretrial rehabilitation. Hate Crimes Diversion Program

- The Judicial Department shall contract with service providers, develop standards and oversee appropriate hate crimes diversion programs to meet the requirements of this section. Any defendant whose employment or residence makes it unreasonable to attend a hate crimes diversion program in this state may attend a program in another state which has standards substantially similar to, or higher than, those of this state, subject to the approval of the court and payment of the application and program fees as provided in this section. The hate crimes diversion program shall consist of an educational program and supervised community service.

HATE CRIME LAWS – MORAL OF THE STORY

Sticks and stone may break my bones

But words will never hurt me –

But words can get you jail time!

STATE OF CONNECTICUT *v.* DAVID G. LIEBENGUTH
(SC 20145)

Robinson, C. J., and Palmer, McDonald, D'Auria, Mullins, Kahn and Ecker, Js.*

Argued March 29, 2019—officially released August 27, 2020**

Procedural History

Amended information charging the defendant with breach of the peace in the second degree and tampering with a witness, brought to the Superior Court in the judicial district of Stamford-Norwalk, geographical area number twenty, and tried to the court, *Hernandez*, *J.*; verdict and judgment of guilty, from which the defendant appealed to the Appellate Court, *DiPentima*, *C. J.*, and *Sheldon* and *Devlin*, *Js.*, which reversed in part the trial court's judgment and remanded the case to that court with direction to render a judgment of acquittal on the charge of breach of the peace in the second degree, and the state, on the granting of certification, appealed to this court. *Reversed in part*; *judgment directed.*

Timothy F. Costello, assistant state's attorney, with whom, on the brief, were *Richard J. Colangelo, Jr.*, state's attorney, and *Nadia C. Prinz*, former deputy assistant state's attorney, for the appellant (state).

John R. Williams, for the appellee (defendant).

Opinion

PALMER, J. Under General Statutes § 53a-181 (a) (5), a person is guilty of breach of the peace in the second degree when, with the intent to cause inconvenience, annoyance or alarm, he uses abusive language in a public place.[1] That broad statutory proscription, however, is limited by the free speech provisions of the first amendment to the United States constitution,[2] which prohibit the government from "restrict[ing] expression because of its message, its ideas, its subject matter, or its content"; (internal quotation marks omitted) *Ashcroft* v. *American Civil Liberties Union*, 535 U.S. 564, 573, 122 S. Ct. 1700, 152 L. Ed. 2d 771 (2002); thereby protecting speech "without regard . . . to the truth, popularity, or social utility of the ideas and beliefs [that] are offered." *National Assn. for the Advancement of Colored People* v. *Button*, 371 U.S. 415, 445, 83 S. Ct. 328, 9 L. Ed. 2d 405 (1963). These safeguards, however, although expansive, are not absolute, and the United States Supreme Court has long recognized a few discrete categories of speech that may be prosecuted and punished, including so-called "fighting words"—"those personally abusive epithets [that], when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction." *Cohen* v. *California*, 403 U.S. 15, 20, 91 S. Ct. 1780, 29 L. Ed. 2d 284 (1971). In this certified appeal, we must determine whether certain vulgar and racially charged remarks of the defendant, David G. Liebenguth, which included multiple utterances of the words "fucking niggers" directed at an African-American parking enforcement official during a hostile confrontation with that official following the defendant's receipt of a parking ticket, were "fighting words" subject to criminal sanctions. As a result of his conduct, the defendant was arrested and charged with breach of the peace in the second degree in violation of § 53a-181 (a) (5) and, following a trial to the court, was found guilty.[3] On appeal to the Appellate Court, the defendant claimed, inter alia, that the evidence was insufficient to support the trial court's finding of guilty because the words he uttered to the parking official constituted protected speech that could not, consistent with the first amendment, provide the basis of a criminal conviction. See *State* v. *Liebenguth*, 181 Conn. App. 37, 47, 186 A.3d 39 (2018). Although acknowledging that the defendant's language was "extremely vulgar and offensive" and "meant to personally demean" the official; id., 53; the Appellate Court, with one judge dissenting, agreed with the defendant that his speech was constitutionally protected and that, consequently, his conviction, because it was predicated on that speech, could not stand. See id., 54; see also id., 58 (*Devlin*, *J.*, concurring in part and dissenting in part). We granted the state's petition for certification to appeal, limited to the question of whether the Appellate Court correctly concluded that

the defendant's conviction must be reversed because the first amendment barred his prosecution for the verbal statements at issue. See *State* v. *Liebenguth*, 330 Conn. 901, 189 A.3d 1231 (2018). We now conclude that the defendant's remarks were unprotected fighting words and, therefore, that his conviction does not run afoul of the first amendment. Accordingly, we reverse the judgment of the Appellate Court in part and remand the case to that court with direction to affirm the trial court's judgment with respect to his conviction of breach of the peace in the second degree.

The opinion of the Appellate Court sets forth the following relevant facts and procedural history. "Michael McCargo, a parking enforcement officer for the town of New Canaan, testified that he was patrolling the [Morse] Court parking lot on the morning of August 28, 2014, when he noticed that the defendant's vehicle was parked in a metered space for which no payment had been made. He first issued a [fifteen dollar parking] ticket for the defendant's vehicle, then walked to another vehicle to issue a ticket, while his vehicle remained idling behind the defendant's vehicle. As McCargo was returning to his vehicle, he was approached by the defendant, whom he had never before seen or interacted with. The defendant said to McCargo, 'not only did you give me a ticket, but you blocked me in.' Initially believing that the defendant was calm, McCargo jokingly responded that he didn't want the defendant getting away. When the defendant then attempted to explain why he had parked in the lot, McCargo responded that his vehicle was in a metered space for which payment was required, not in one of the lot's free parking spaces. McCargo testified that the defendant's demeanor then 'escalated,' with the defendant [having said] that the parking authority was '[fucking] [un]believable' and [having told] McCargo that he had given him a parking ticket 'because my car is white. . . . [N]o, [you gave] me a ticket because I'm white.' As the defendant, who is white, spoke with McCargo, who is African-American, he 'flared' his hands and added special emphasis to the profanity he uttered. Even so, according to McCargo, the defendant always remained a 'respectable' distance from him. Finally, as the defendant was walking away from McCargo toward his own vehicle, he spoke the words, 'remember Ferguson.' " *State* v. *Liebenguth*, supra, 181 Conn. App. 39–40.

McCargo also testified that, "[a]fter both men had returned to and reentered their vehicles, McCargo, whose window was rolled down . . . thought he heard the defendant say the words, 'fucking niggers.' This caused him to believe that the defendant's prior comment about Ferguson had been made in reference to the then recent [and highly publicized] shooting of an African-American man by a white police officer in Ferguson, Missouri [on August 9, 2014, approximately three

weeks earlier]. [McCargo] thus believed that the [defendant's reference to Ferguson was a 'threat'] meant to imply that what had happened in Ferguson 'was going to happen' to him. McCargo also believed that, by uttering the racial slur and making reference to Ferguson, the defendant was trying to rile him up and [to] escalate the situation [by 'taking it to a whole other level']. That, however, did not happen, for, although McCargo found the remark offensive, and he had never before been the target of such language while performing his duties, he remained calm at all times and simply drove away to resume his patrol." Id., 40. McCargo further testified, however, that, "[s]hortly thereafter . . . as [McCargo] was driving away, the defendant [cut through the parking lot in his vehicle, approached McCargo, and then] drove past him." Id., 40–41. As the defendant was driving past McCargo, "the defendant turned toward him, looked directly at him with an angry expression on his face, and repeated the slur, 'fucking niggers.' McCargo [also] noted in his testimony that the defendant said the slur louder the second time than he had the first time.

"After the defendant drove out of the parking lot, McCargo [who was shocked and personally offended by the encounter] called his supervisor, who instructed him to report the incident to the New Canaan police. In his report, McCargo noted that there might have been a witness to the interaction, whom he described as a young, white female. The defendant later was arrested in connection with the incident on the charge of breach of the peace in the second degree." Id., 41.

"Next to testify was Mallory Frangione, the young, white female witness to the incident whom McCargo had mentioned in his report. She testified that she parked in the [Morse] Court parking lot around 9:45 a.m. on . . . August 28, 2014, and, as soon as she opened her car door, she heard yelling. She then saw two men, McCargo and the defendant, who were standing outside of their vehicles about seventy feet away from her. She observed that the defendant was moving his hands all around, that his body movements were aggressive and irate, and that his voice was loud. She heard him say something about Ferguson, then say that something was '[fucking] unbelievable.' [Frangione] further testified that she saw the defendant take steps toward McCargo while acting in an aggressive manner. She described McCargo, by contrast, as calm, noting that he never raised his voice, moved his arms or gesticulated in any way. McCargo ultimately backed away from the defendant and got into his vehicle. The defendant, [Frangione] recalled, drove in two circles around the parking lot before leaving. Frangione testified that witnessing the interaction made her feel nervous and upset."[4] Id.

"After the state rested [its case], the defendant moved

for a judgment of acquittal . . . which the court denied. The defendant elected not to testify. The court, ruling from the bench, found the defendant guilty . . . . It reasoned as follows: 'In finding that the defendant's language and behavior [are] not protected speech, the court considers the words themselves, in other words, the content of the speech, the context in which [they were] uttered, and all of the circumstances surrounding the defendant's speech and behavior.

" 'The court finds that the defendant's language, fucking niggers directed at . . . McCargo twice . . . is not protected speech. . . . [I]n the American lexicon, there is no other racial epithet more loaded with racial animus, no other epithet more degrading, demeaning or dehumanizing. It is a word [that] is probably the most [vile] racial epithet a non-African-American can direct [toward] an African-American. [The defendant] is white. . . . McCargo is African-American.

" 'In light of this country's long and shameful history of state sanctioned slavery, Jim Crow segregation, state sanctioned racial terrorism, financial and housing discrimination, the word simply has . . . no understanding under these circumstances other than as a word directed to incite violence. The word itself is a word likely to provoke a violent response.

" 'The defendant is not however being prosecuted solely for use of this word. All language must be considered in light of its context.

" 'The court finds that considering . . . the content of the defendant's speech taken in context and in light of his belligerent tone, his aggressive stance, the fact that he was walking [toward] . . . McCargo and moving his hands in an aggressive manner, there's no other interpretation other than these are fighting words.[5] And he uttered the phrase not once but twice. It was directed—the court finds that it was directed directly at . . . McCargo. There were no other African-Americans present . . . in the parking lot when it happened, and indeed . . . McCargo's unease and apprehension at hearing those words [were] corroborated by . . . Frangione who . . . said that she felt disconcerted by the defendant's tone of voice and his aggressive stance and actions.' " (Footnote added.) Id., 43–44.

The defendant thereafter appealed to the Appellate Court, claiming, inter alia, that the evidence was insufficient to support his conviction of breach of the peace in the second degree. Id., 39. Specifically, he maintained that the racial taunts he directed at McCargo were protected by the first amendment and, therefore, could not form the basis of a conviction under § 53a-181 (a) (5). Id., 47. Relying in large measure on this court's decision in *State* v. *Baccala*, 326 Conn. 232, 163 A.3d 1, cert. denied, U.S. , 138 S. Ct. 510, 199 L. Ed. 2d 408 (2017),[6] the Appellate Court, in a two-to-one decision,

agreed with the defendant that the evidence was insufficient to support his conviction because his utterances were unlikely to provoke an immediate, violent response by a reasonable person in McCargo's shoes—that is, his utterances were not prohibited fighting words, and, therefore, the defendant's conviction could not pass muster under the first amendment. See *State* v. *Liebenguth*, supra, 181 Conn. App. 53–54.

In support of its conclusion, the Appellate Court reasoned: "[T]he defendant used extremely vulgar and offensive language, meant to personally demean McCargo. Under the circumstances in which he uttered this language, however, it was not likely to tend to provoke a reasonable person in McCargo's position immediately to retaliate with violence. Although the evidence unequivocally supports a finding that the defendant at one point walked toward McCargo while yelling and moving his hands . . . [t]he evidence [also] unequivocally shows . . . that the defendant was in his car both times that he directed the racial slurs toward McCargo. McCargo did testify that the defendant's use of the slurs shocked and appalled him, and that he found the remarks offensive. He also testified, however, that he remained calm throughout the encounter and felt no need to raise his voice to the defendant. A reasonable person acting in the capacity of a parking official would be aware that some level of frustration might be expressed by some members of the public who are unhappy with receiving tickets and would therefore not be likely to retaliate with immediate violence during such an interaction. In reviewing the entire context of the interaction, we therefore find that, because McCargo was unlikely to retaliate with immediate violence to the conduct for which the defendant was charged, the defendant's words were not 'fighting words,' [on] which he might appropriately be convicted of breach of the peace. The defendant's conviction of breach of the peace in the second degree must therefore be reversed." (Footnotes omitted.) Id.

Judge Devlin dissented with respect to this holding because, in his view, the defendant's remarks, when considered in the context in which they were uttered, constituted fighting words that were likely to provoke a reasonable person in McCargo's position to retaliate with violence. See id., 66 (*Devlin*, *J.*, concurring in part and dissenting in part). Judge Devlin concluded that the majority did not adequately account for the truly heinous and inflammatory nature of the word "nigger," in particular, when, as in the present case, that "viciously hostile epithet," which has deep roots in this nation's long and deplorable history of racial bigotry and discrimination, is used by a white person with the intent of demeaning and humiliating an African-American person. (Internal quotation marks omitted.) Id., 64–65 (*Devlin*, *J.*, concurring in part and dissenting in part). In rejecting the defendant's assertion that his

speech was shielded from prosecution by the first amendment, Judge Devlin explained that the defendant's words "were scathing insults that in many situations would provoke a reflexive, visceral response." Id., 67 (*Devlin, J.*, concurring in part and dissenting in part). Indeed, according to Judge Devlin, "if angrily calling an African-American man a 'fucking [nigger]' after taunting him with references to a recent police shooting of a young African-American man by a white police officer is not breach of the peace," then the fighting words doctrine no longer has any "continued vitality" under the first amendment. (Internal quotation marks omitted.) Id., 68 (*Devlin, J.*, concurring in part and dissenting in part).

We subsequently granted the state's petition for certification to appeal to decide whether the Appellate Court was correct in holding that the defendant's conviction had to be reversed because the language that formed the basis of that conviction was protected by the first amendment.[7] For the reasons that follow, we agree with Judge Devlin and the trial court that, under the circumstances presented, the first amendment does not bar the defendant's conviction because his racist and demeaning utterances were likely to incite a violent reaction from a reasonable person in McCargo's position.[8]

For purposes of this appeal, there is no dispute that the evidence adduced by the state at trial supports the trial court's factual findings. The sole issue we must decide, then, is whether, contrary to the determination of the Appellate Court, those factual findings and any inferences that reasonably may be drawn therefrom are sufficient to establish the defendant's guilt beyond a reasonable doubt. See, e.g., *State* v. *Parnoff*, 329 Conn. 386, 395, 186 A.3d 640 (2018).

Because the defendant's conviction is predicated on his verbal statements, our determination of the sufficiency of the state's case necessarily depends on whether those statements deserve the protection of the first amendment, despite their patently offensive and objectionable nature. If they do, they cannot serve as the basis for his conviction, which would have to be reversed for evidentiary insufficiency. The defendant having been charged with violating § 53a-181 (a) (5) by use of allegedly "abusive . . . language"; General Statutes § 53a-181 (a) (5); see footnote 1 of this opinion; we therefore must decide whether his language, which was no doubt "abusive" under the commonly understood meaning of that term, nonetheless is entitled to constitutional protection. To make that determination, we apply the judicial gloss necessary to limit the reach of the breach of the peace statute to ensure that it comports with constitutional requirements. See *State* v. *Baccala*, supra, 326 Conn. 234, 251 (placing gloss on § 53a-181 (a) (5) to avoid possibility of conviction

founded on constitutionally protected speech). For present purposes, "the constitutional guarantee of freedom of speech requires that [§ 53a-181 (a) (5)] be confined to language [that], under the circumstances of its utterance, constitutes [unprotected] fighting words—those [that] by their very utterance inflict injury or tend to incite an immediate breach of the peace." (Internal quotation marks omitted.) *State* v. *Beckenbach*, 1 Conn. App. 669, 678, 476 A.2d 591 (1984), rev'd on other grounds, 198 Conn. 43, 501 A.2d 752 (1985). "Accordingly, to establish the defendant's violation of § 53a-181 (a) (5) . . . in light of its constitutional gloss, the state was required to prove beyond a reasonable doubt that the defendant's words were likely to provoke an imminent violent response" under the circumstances in which they were uttered. (Citation omitted.) *State* v. *Baccala*, supra, 250–51.

In view of the fact that the state's case against the defendant implicates his free speech rights, several additional principles govern our review of the issue presented. In certain cases, such as the present one, in which "[the line between speech unconditionally guaranteed and speech that may be legitimately regulated] must be drawn, the rule is that we examine for ourselves the statements [at] issue and the circumstances under which they were made to see if they are consistent with the first amendment." (Internal quotation marks omitted.) Id., 251. In other words, "the inquiry into the protected status of . . . speech is one of law, not fact." (Internal quotation marks omitted.) *State* v. *Parnoff*, supra, 329 Conn. 395. We therefore "apply a de novo standard of review . . . ." (Internal quotation marks omitted.) Id. Accordingly, we have "an obligation to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion [in] the field of free expression." (Internal quotation marks omitted.) Id., 395–96. "This independent scrutiny, however, does not authorize us to make credibility determinations regarding disputed issues of fact. Although we review de novo the trier of fact's ultimate determination that the statements at issue constituted [fighting words], we accept all subsidiary credibility determinations and findings that are not clearly erroneous." (Internal quotation marks omitted.) Id., 396.

Recently, in *State* v. *Baccala*, supra, 326 Conn. 237–50, we undertook a thoroughgoing examination of the roots and scope of the fighting words doctrine, which was first articulated by the United States Supreme Court more than seventy-five years ago in *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 62 S. Ct. 766, 86 L. Ed. 1031 (1942). See id., 569, 573 (holding that "God damned racketeer" and "damned Fascist" were epithets likely to provoke addressee to retaliate violently, thereby causing breach of the peace (internal quotation marks omitted)). As we explained in *Baccala*; see *State* v.

Baccala, supra, 237–38; although the first amendment protects nearly all speech, no matter how detestable or odious it may be, that protection does not extend to the extremely narrow category of words that "have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed." (Internal quotation marks omitted.) *Chaplinsky* v. *New Hampshire*, supra, 573. In recognizing the fighting words exception to the protection ordinarily afforded speech under the first amendment, the court in *Chaplinsky* 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. Id., 572.

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. See *State* v. *Baccala*, supra, 326 Conn. 238. Consequently, whether words are fighting words necessarily will depend on the particular circumstances of their utterance. See id., 239; see also *State* v. *Hoskins*, 35 Conn. Supp. 587, 591, 401 A.2d 619 (App. Sess. 1978) ("The fighting words concept has two aspects. One involves the quality of the words themselves. The other concerns the circumstances under which the words are used." (Internal quotation marks omitted.)). This contextual approach is also "a logical reflection of the way the meaning and impact of words change over time." *State* v. *Baccala*, supra, 239; see also id. ("[w]hile 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"). Indeed, due to changing social norms, public discourse has become coarser in the years following *Chaplinsky*; id., 298 (*Eveleigh*, *J.*, concurring in part and dissenting in part); such that, today, "there are fewer combinations of words and circumstances that are likely to fit within the fighting words exception."[9] *State* v. *Parnoff*, supra, 329 Conn. 413 (*Kahn*, *J.*, concurring in the judgment); see also id. ("[a]s certain language is acceptable in more situations, the borders of the fighting words exception contract").

Against this broad jurisprudential backdrop in *Baccala*, we sought to identify the kinds of considerations likely to be relevant in determining, in any given case, whether the words at issue constituted unprotected fighting words. We explained: "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. . . . This necessarily includes a

consideration of a host of factors.

"For example, the manner and circumstances in which the words were spoken . . . [and] [t]he situation under which the words are uttered . . . . Thus, whether the words were preceded by a hostile exchange or accompanied by aggressive behavior will bear on the likelihood of such a reaction. . . .

"A proper examination of context also considers those personal attributes of the speaker and the addressee that are reasonably apparent because they are necessarily a part of the objective situation in which the speech was made. . . . Courts have, for example, considered the age, gender, race, and status of the speaker. . . . Indeed, common sense would seem to suggest that social conventions, as well as special legal protections, could temper the likelihood of a violent response when the words are uttered by someone less capable of protecting [himself or herself], such as a child, a frail elderly person, or a seriously disabled person.

"Although . . . the speech must be of such a nature that it is likely to provoke the *average* person to retaliation . . . when there are objectively apparent characteristics that would bear on the likelihood of such a response, many courts have considered the average person with those characteristics. Thus, courts also have taken into account the addressee's age, gender, and race. . . .

"Similarly, because the fighting words exception is concerned with the likelihood of violent retaliation, it properly distinguishes between the average citizen and those addressees who are in a position that carries with it an expectation of exercising a greater degree of restraint. . . . [Consequently, because] a properly trained [police] officer may reasonably be expected to exercise a higher degree of restraint than the average citizen . . . [we] hold police officers to a higher standard than ordinary citizens when determining the likelihood of a violent response by the addressee." (Citations omitted; emphasis in original; footnotes omitted; internal quotation marks omitted.) *State* v. *Baccala*, supra, 326 Conn. 240–44.

In addition, "several courts have considered as part of the contextual inquiry whether the addressee's position would reasonably be expected to cause him or her to exercise a higher degree of restraint than the ordinary citizen under the circumstances." Id., 245. "Finally . . . the fighting words exception is not concerned with creating symmetrical free speech rights by way of establishing a uniform set of words that are constitutionally proscribed. . . . Rather, because 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 differen-

tiate between addressees who are more or less likely to respond violently and speakers who are more or less likely to elicit such a response." (Citation omitted.) Id., 249.

We then summarized: "Accordingly, a proper contextual analysis requires consideration of the actual circumstances, as perceived by both a reasonable speaker and addressee, to determine whether there is 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." Id., 250. The starting point, however, for any analysis of a claim involving the fighting words doctrine must include an examination of the words themselves and the extent to which they are understood to be inflammatory or inciting.

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 person, 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.*, 360 F.3d 1103, 1116 (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. See, e.g., *Ayissi-Etoh* v. *Fannie Mae*, 712 F.3d 572, 580 (D.C. Cir. 2013) (Kavanaugh, J., concurring) ("[The] epithet ['nigger'] has been labeled, variously, a term that 'sums up . . . all the bitter years of insult and struggle in America,' [L. Hughes, The Big Sea: An Autobiography (Hill and Wang 2d Ed. 1993) p. 269], 'pure anathema to African-Americans,' *Spriggs* v. *Diamond Auto Glass*, 242 F.3d 179, 185 (4th Cir. 2001), and 'probably the most offensive word in English.' [Random House Webster's College Dictionary (2d Rev. Ed. 2000) p. 894]. See generally [A. Haley, Roots: The Saga of an American Family (Doubleday 1976); [H. Lee, To Kill a Mockingbird (J. B. Lippincott Co. 1960)]. . . . No other word in the English language so powerfully or instantly calls to mind our country's long and brutal struggle to overcome racism and discrimination against African-Americans." (Citation omitted.)); R. Kennedy, "The David C. Baum Lecture: 'Nigger!' as a Problem in the Law," 2001 U. Ill. L. Rev. 935, 935 (although "[t]he American language is (and has long been) rife with terms of ethnic, racial, and national insult: kike, mick, wop, nip, gook, honkie, wetback, chink, [etc.] . . . 'nigger is now probably the most offensive word in English' " (footnote omitted)); Dictionary.com, available at https://

www.dictionary.com/browse/nigger?s=t ("The term nigger is now probably the most offensive word in English. Its degree of offensiveness has increased markedly in recent years, although it has been used in a derogatory manner since at least the Revolutionary War.").

In fact, because of the racial prejudice and oppression with which it is forever inextricably linked, the word "nigger," when used by a white person as an assertion of the racial inferiority of an African-American person, "is more than [a] mere offensive utterance . . . . No word . . . is as odious or loaded with as terrible a history." (Internal quotation marks omitted.) *Daso* v. *Grafton School, Inc.*, 181 F. Supp. 2d 485, 493 (D. Md. 2002); see also *In re John M.*, 201 Ariz. 424, 428, 36 P.3d 772 (App. 2001) ("the term is generally regarded as virtually taboo because of the legacy of racial hatred that underlies the history of its use among whites" (internal quotation marks omitted)); *In re Spivey*, 345 N.C. 404, 414, 480 S.E.2d 693 (1997) ("[N]o fact is more generally known than that a white man who calls a black man a 'nigger' within his hearing will hurt and anger the black man and often provoke him to confront the white man and retaliate. The trial court was free to judicially note this fact."). The word being "one of insult, abuse and belittlement harking back to slavery days"; (internal quotation marks omitted) *Taylor* v. *Metzger*, 152 N.J. 490, 510, 706 A.2d 685 (1998); it is uniquely "expressive of racial hatred and bigotry"; (internal quotation marks omitted) *Swinton* v. *Potomac Corp.*, 270 F.3d 794, 817 (9th Cir. 2001), cert. denied, 535 U.S. 1018, 122 S. Ct. 1609, 152 L. Ed. 2d 623 (2002); and "degrading and humiliating in the extreme . . . ." (Citation omitted; internal quotation marks omitted.) *Pryor* v. *United Air Lines, Inc.*, 791 F.3d 488, 496 (4th Cir. 2015). For all these reasons, the word rightly has been characterized as "the most provocative, emotionally-charged and explosive term in the [English] language." (Internal quotation marks omitted.) *Lee* v. *Superior Court*, 9 Cal. App. 4th 510, 513, 11 Cal. Rptr. 2d 763 (1992).

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[10]—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*, 75 Mass. App. 398, 409, 914 N.E.2d 916, appeal denied, 455 Mass. 1105, 918 N.E.2d 90 (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 the ticket by an African-American parking official. By adding this additional measure of contempt and disgust to the epithet, the defendant only amplified the assaultive nature of the utterance, making it even more hateful and debasing.

Second, the defendant, having directed the term "fucking niggers" at McCargo upon entering his vehicle and learning that McCargo had ticketed him, was not content just to leave and end the confrontation. Instead, after McCargo had entered his vehicle and was starting to drive out of the parking lot, the defendant circled the lot twice, pulled up next to McCargo and, while looking angrily at him, again uttered the term "fucking niggers," this time more loudly than before. The fact that the defendant repeated this epithet only served to exacerbate the provocative and hostile nature of the confrontation. See *Landrum* v. *Sarratt*, 352 S.C. 139, 145, 572 S.E.2d 476 (App. 2002) (whether epithets were uttered repeatedly is factor to be considered in fighting words determination); see also *State* v. *Szymkiewicz*, 237 Conn. 613, 615–16, 623, 678 A.2d 473 (1996) (holding that certain epithets were fighting words due, in part, to repeated nature of utterances).

Third, the defendant employed additional, racially offensive, crude and foreboding language during his interaction with McCargo. Early on in the defendant's confrontation with McCargo, after learning that he had been issued a ticket, the defendant became angry and loudly asserted that the parking authority, McCargo's employer, was "fucking unbelievable." Almost immediately thereafter, the defendant injected race into the encounter, first stating that McCargo had ticketed him because his car is white and then accusing McCargo of issuing him the ticket because the defendant himself is white. Next, as the defendant walked to his vehicle, he uttered the words, "remember Ferguson." In light of the defendant's other racially charged remarks, his menacing invocation of the extremely controversial shooting of a young, unarmed African-American man by a white police officer had its intended effect: McCargo understood that the defendant was raising the specter of the same race based violence that reportedly had occurred in Ferguson, Missouri. Considering the defendant's offensive remarks together, as we must; see, e.g., *State* v. *Parnoff*, supra, 329 Conn. 401 n.5 (fighting words determination requires consideration of "the totality of the attendant circumstances"); the defendant's reference to Ferguson significantly escalated the already fraught and incendiary confrontation.

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. Frangione witnessed the defendant's conduct and testified that, even from about seventy feet away, the hostility of the encounter made her nervous and upset. Moreover, after entering his car, the defendant drove through the parking lot twice before leaving, cutting through empty parking spaces so he could pass by McCargo and again angrily confront him. As we observed in *Baccala*, the fact that the defendant's words were accompanied by such aggressive and menacing behavior increased the likelihood of a violent response. See *State* v. *Baccala*, supra, 326 Conn. 241.

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 trigger an immediate violent reaction"; (internal quotation marks omitted) *State* v. *Beckenbach*, supra, 1 Conn. App. 678; 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." (Internal quotation marks omitted.) *State* v. *Parnoff*, supra, 329 Conn. 394. 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*, supra, 345 N.C. 415; see also *State* v. *Hoshijo ex rel. White*, 102 Haw. 307, 322, 76 P.3d 550 (2003) ("The experience of being called 'nigger' . . . is like receiving a slap in the face. The injury is instantaneous." (Internal quotation marks omitted.)). It therefore is unsurprising that many courts have rejected first amendment challenges to convictions predicated on the use of the word. See, e.g., *In re John M.*, supra, 201 Ariz. 428 ("lean[ing] out of a car window and scream[ing] at an African-American woman, 'fuck you, you god damn nigger,' before the car pulled into a nearby . . . parking lot" was behavior likely to provoke an immediate violent response); *State* v. *Hoshijo ex rel. White*, supra, 321 (speech of student manager of university basketball team who yelled "shut up you [fucking] nigger," "I'm tired of hearing your shit," and [s]hut your mouth or I'll kick your ass" to African-American spectator constituted unprotected fighting words); *In re J.K.P.*, Docket No. 108,617, 2013 WL 1010694, *1, *3–5 (Kan. App. March 8, 2013) (calling boys in group of African-American children "niggers" during altercation with them constituted fighting words that violated disorderly conduct statute) (decision without published opinion, 296 P.3d 1140 (2013)); *In re Shane EE.*, 48 App. Div. 3d 946, 946–47, 851 N.Y.S.2d 711 (2008) (threats and racial slurs, including " 'we shoot niggers like you in the woods,' " were likely to provoke

immediate violent reaction and therefore constituted fighting words); *In re Spivey*, supra, 408, 414 ("loudly and repeatedly address[ing] a black patron [at a bar] . . . using the derogatory and abusive racial epithet 'nigger' " was conduct that "squarely falls within the category of unprotected [fighting words]"); *In re H.K.*, 778 N.W.2d 764, 766–67, 770 (N.D. 2010) (following African-American girl into bathroom during dance, calling her "nigger" and threatening her constituted fighting words likely to incite breach of peace); see also *Bailey* v. *State*, 334 Ark. 43, 53–54, 972 S.W.2d 239 (1998) (stating that word "nigger" was fighting word in context used); *Lee* v. *Superior Court*, supra, 9 Cal. App. 4th 518 (upholding trial court's denial of request by African-American to change his name from Russell Lawrence Lee to "Misteri Nigger" and stating that "men and women . . . of common intelligence would understand [that] . . . [the word nigger] likely [would] cause an average addressee to fight" (internal quotation marks omitted)). To whatever extent public discourse in general may have coarsened over time; see, e.g., *State* v. *Baccala*, supra, 326 Conn. 239; 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.

In support of his contention that the Appellate Court correctly concluded that his language did not constitute fighting words, the defendant argues that "a public official [such as McCargo] is expected to exercise a greater degree of self-restraint in the face of provocation than is a civilian." To support this assertion, however, the defendant cites to cases involving offensive language directed at police officers,[11] in particular, *Resek* v. *Huntington Beach*, 41 Fed. Appx. 57 (9th Cir. 2002), in which the court, in concluding that the words " '[t]hat's fucked up, those pigs can't do that' " were not fighting words; id., 59; went on to explain that, "[a]long with good judgment, intelligence, alertness, and courage, the job of police officers requires a thick skin. Theirs is not a job for people whose feelings are easily hurt." Id. 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. Consequently, although we do agree with the Appellate Court that McCargo, like any parking enforcement offi-

cial, undoubtedly was aware that some members of the public might well express frustration and even anger upon receiving a ticket;[12] see, e.g., *State* v. *Liebenguth*, supra, 181 Conn. App. 54; we disagree that the average African-American parking official would have been prepared for and responded peaceably to the kind of racial slurs, threatening innuendo, and aggressive behavior with which McCargo was confronted.

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." (Internal quotation marks omitted.) *State* v. *Parnoff*, supra, 329 Conn. 403. Although McCargo acknowledged that the defendant's racial epithets had shocked and appalled him and that he felt "very bad" and personally insulted by them, he quite rightly opined that he had "handled [him]self very well" under the circumstances. We fully agree, of course, that McCargo handled the incident exceptionally well, but we simply are not persuaded that the average person would have exercised a similar measure of self-control and professionalism under the same circumstances. Thus, the fact that McCargo did not react violently in the face of the defendant's malicious and demeaning insults does not alter our conclusion with respect to the likelihood of a violent reaction to that language. See, e.g., *State* v. *Hoshijo ex rel. White*, supra, 102 Haw. 322 ("[It] is of no consequence . . . [that violence was not precipitated], as the proper standard is whether the words were *likely to provoke a violent response*, not whether violence occurred. Plainly, there is no requirement that violence must occur, merely that there be a likelihood of violence. It is abundantly clear on the facts of this case that there was a likelihood of violence." (Emphasis in original.)); *Little Falls* v. *Witucki*, 295 N.W.2d 243, 246 (Minn. 1980) ("The fact that the addressee and object of the fighting words exercised responsible and mature forbearance in not retaliating cannot be relied [on] by [the] defendant to escape responsibility for his own actions. . . . The focus is properly on the nature of the words and the circumstances in which they were spoken rather than on the actual response. The actual response of the addressee and object of the words is relevant, but not determinative, of the issue of whether the utterances meet the fighting words test.").

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*, 374 Mont. 444, 449, 322 P.2d 1039 (2014). This requirement is satisfied in the present case even though both men were in their vehicles when the defendant uttered the slurs. When the defendant did so for the first time, McCargo had pulled his vehicle so close to the defendant's vehicle that the defendant accused McCargo of intentionally blocking him in. On the second such occasion, the defendant turned directly toward McCargo as he drove by McCargo's vehicle and then repeated the slur loud enough so that McCargo would be sure to hear it. At this point, the men were sufficiently close that McCargo could see the angry expression on the defendant's face and discern that he had uttered the slur louder the second time than he had the first time. At all relevant times, therefore, the two men were in close proximity to and maintained eye contact with one another, so that each could see and hear the other clearly and without difficulty. 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. See, e.g., *In re John M.*, supra, 201 Ariz. 428–29 (passenger in car who yelled " 'fuck you, you god damn nigger' " before car pulled into parking lot was found to have used fighting words likely to provoke violent reaction); *Billings* v. *Nelson*, supra, 450 ("The fact that [the defendant and the driver] were in a car does not mean their speech could not have incited an immediate violent response from a listener on the street. . . . [The victim] was close enough to recognize the [speakers'] faces and to hear their words clearly, even though they did not holler them." (Citation omitted; internal quotation marks omitted.)); *In re S.J.N-K.*, 647 N.W.2d 707, 709, 711–12 (S.D. 2002) (when passenger in vehicle who repeatedly uttered " 'fuck you' " with accompanying middle finger gesture while driver of vehicle cut diagonally across adjacent parking lot and in front of addressee's vehicle, evidence established that passenger's words and gestures constituted unprotected fighting words). But cf. *Sandul* v. *Larion*, 119 F.3d 1250, 1252, 1255 (6th Cir.) (when passenger in vehicle traveling at high rate of speed shouted " '[fuck] you' " and extended his middle finger at abortion protesters who were located considerable distance away, there was no face-to-face contact between passenger and protesters, no

protester was offended or even acknowledged passenger's behavior, and entire incident was over in matter of seconds, "it was inconceivable that [the passenger's] fleeting actions and words would provoke the type of lawless action" necessary to satisfy fighting words standard), cert. dismissed, 522 U.S. 979, 118 S. Ct. 439, 139 L. Ed. 2d 377 (1997).

Finally, the defendant claims that the Appellate Court correctly concluded that the present case is governed by our analysis and conclusion in *State* v. *Baccala*, supra, 326 Conn. 232, in which we determined that the vulgar language at issue in that case did not constitute fighting words.We reject this argument because *Baccala* is distinguishable from the present case in a number of material respects.[13]

Before doing so, however, it is necessary to recite the relevant facts of *Baccala* and the reasons we reached the conclusion we did. Those facts, as explained in our decision in that case, are as follows. "On the evening of September 30, 2013, the defendant [Nina C. Baccala] telephoned the Stop & Shop supermarket in Vernon to announce that she was coming to pick up a Western Union money transfer so they would not close the customer service desk before she arrived. [Baccala] spoke with Tara Freeman, an experienced assistant store manager who was in charge of the daily operations at the supermarket . . . . Freeman informed [Baccala] that the customer service desk already had closed and that she was unable to access the computer that processed Western Union transactions. [Baccala] became belligerent, responded that she 'really didn't give a shit,' and called Freeman '[p]retty much every swear word you can think of' before the call was terminated.

"Despite Freeman's statements to the contrary, [Baccala] believed that as long as she arrived at the supermarket before 10 p.m., she should be able to obtain the money transfer before the customer service desk closed. Accordingly, a few minutes after she telephoned, [Baccala] arrived at the supermarket, which was occupied by customers and employees. [She] proceeded toward the customer service desk located in proximity to the registers for grocery checkout and began filling out a money transfer form, even though the lights at the desk were off. Freeman approached [Baccala], a forty year old woman who used a cane due to a medical condition that caused severe swelling in her lower extremities, and asked her if she was the person who had called a few minutes earlier. Although [Baccala] denied that she had called, Freeman recognized her voice. After Freeman informed [Baccala], as she had during the telephone call, that the customer service desk was closed, [Baccala] became angry and asked to speak with a manager. Freeman replied that she was the manager and pointed to her name tag and

a photograph on the wall to confirm her status. [Other] employees . . . were standing nearby as this exchange took place.

"[Baccala] proceeded to loudly call Freeman a 'fat ugly bitch' and a 'cunt,' and said 'fuck you, you're not a manager,' all while gesticulating with her cane. Despite [Baccala's] crude and angry expressions . . . Freeman remained professional. She simply responded, '[h]ave a good night,' which prompted [Baccala] to leave the supermarket." Id., 235–36. Following a jury trial, Baccala was convicted of breach of the peace in the second degree in violation of § 53a-181 (a) (5). Id., 233–34, 236. On appeal to this court, we agreed with Baccala that her conviction was incompatible with the first amendment. See id., 234–35.

We began our analysis of Baccala's claim with the observation that the language she used was both extremely offensive and intentionally demeaning. Id., 251. We nevertheless concluded that her utterances did not rise to the level of fighting words because, under the circumstances, they were not likely to trigger an immediate violent response by the average person in Freeman's position. Id., 254. In reaching this conclusion, we relied primarily on four considerations relative to the circumstances of the encounter. First, the verbal assault that Baccala launched against Freeman on the telephone placed Freeman on notice of the possibility that Baccala would resort to similar language when she arrived at the supermarket a few minutes later. Id., 252. Second, as a person in an "authoritative [position] of management and control," Freeman would be expected to diffuse such a hostile situation by "model[ing] appropriate, responsive behavior, aimed at de-escalating the situation," both for the sake of other customers and store personnel alike. Id., 253. Third, as a store manager, Freeman had a measure of control over the premises insofar as she could demand that Baccala leave if she became abusive, threaten to have Baccala arrested for trespassing if she didn't leave, and follow through on that threat if necessary. Id., 253. Fourth, there was no reason to think that Freeman's professional and restrained response to Baccala's offensive harangue was atypical of the manner in which an average person in Freeman's position would have responded to the same provocation under the same circumstances. See id., 253–54.

In the present case, the first three of the foregoing factors support the conclusion that the defendant's utterances *were*, in fact, fighting words. In contrast to the notice Freeman had received with respect to the likelihood of an angry and offensive, face-to-face outburst by Baccala, McCargo had no forewarning of the verbal abuse that the defendant inflicted on him. Unlike Freeman, McCargo was not acting in a supervisory capacity with respect to the safety and well-being of

others. Nor did he have any degree of control over the area in which his encounter with the defendant took place.

Only the fourth factor we considered in *Baccala*—the fact that Freeman did not resort to violence in responding to the verbal provocation she confronted—militates against a finding that the average person in the same situation as McCargo, who also refrained from any physical retaliation, likely would have had an immediate violent response to the defendant's verbal attack. In *Baccala*, however, our conclusion that the response of the average supermarket manager in Freeman's situation probably would be no different from Freeman's necessarily was predicated on the existence of the first three factors discussed—*none of which* is present here. Moreover, in *Baccala*, we expressly acknowledged that we might have reached a different conclusion if Baccala had directed the same language at Freeman after Freeman had completed work and left the supermarket. Id., 253. Notably, that situation—in which Freeman would not have been acting in a managerial or supervisory capacity, had no real control over the relevant premises, and was more or less alone with Baccala—is much more like the circumstances McCargo found himself in when he was accosted by the defendant.

Finally, we agree with the observation that "[r]acial insults, relying as they do on the unalterable fact of the victim's race and on the history of slavery and race discrimination in this country, have an even greater potential for harm than other insults." R. Delgado, "Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling," 17 Harv. C.R.-C.L. L. Rev. 133, 143 (1982); see id., 135–36 (explaining that such insult "injures the dignity and self-regard of the person to whom it is addressed, communicating the message that distinctions of race are distinctions of merit, dignity, status, and personhood"); see also *Matusick* v. *Erie County Water Authority*, 757 F.3d 31, 38 n.3 (2d Cir. 2014) (observing that word "nigger" has "unique . . . power to offend, insult, and belittle"); *Toussaint* v. *Brigham & Women's Hospital, Inc.*, 166 F. Supp. 3d 110, 116 n.4 (D. Mass. 2015) ("[t]he word 'nigger' has unique meaning that makes its use particularly egregious"). 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. Because the Appellate Court reached a contrary conclusion, that portion of its judgment reversing the defendant's conviction on that charge cannot stand.

The judgment of the Appellate Court is reversed with respect to the defendant's conviction of breach of the peace in the second degree only and the case is remanded to that court with direction to affirm the judgment of conviction on that charge; the judgment of the Appellate Court is affirmed in all other respects.

In this opinion the other justices concurred.

* This case originally was scheduled to be argued before a panel of this court consisting of Chief Justice Robinson and Justices Palmer, McDonald, D'Auria, Mullins, Kahn and Ecker. Although Justice McDonald was not present when the case was argued before the court, he has read the briefs and appendices, and listened to a recording of oral argument prior to participating in this decision.

The listing of justices reflects their seniority status on this court as of the date of oral argument.

** August 27, 2020, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

[1] General Statutes § 53a-181 (a) provides in relevant part: "A person is guilty of breach of the peace in the second degree when, with intent to cause inconvenience, annoyance or alarm, or recklessly creating a risk thereof, such person . . . (5) in a public place, uses abusive or obscene language or makes an obscene gesture . . . ."

[2] The first amendment to the United States constitution provides in relevant part: "Congress shall make no law . . . abridging the freedom of speech . . . ."

The first amendment prohibition against laws abridging the freedom of speech is made applicable to the states through the due process clause of the fourteenth amendment to the United States constitution. E.g., *44 Liquormart, Inc.* v. *Rhode Island*, 517 U.S. 484, 489 n.1, 116 S. Ct. 1495, 134 L. Ed. 2d 711 (1996)

[3] The trial court also found the defendant guilty of tampering with a witness in violation of General Statutes § 53a-151. See footnote 4 of this opinion. On the charge of breach of the peace in the second degree, the court sentenced the defendant to a term of imprisonment of six months, execution suspended, followed by two years of probation with several conditions, plus a $1000 fine; on the charge of tampering with a witness, the court sentenced the defendant to a consecutive term of imprisonment of four years, execution suspended, followed by four years of probation with the same conditions and a $3000 fine. The defendant's conviction of tampering with a witness, which thereafter was upheld by the Appellate Court; see *State* v. *Liebenguth*, 181 Conn. App. 37, 58, 186 A.3d 39 (2018); is not the subject of this appeal. Unless otherwise noted, all references hereinafter to the defendant's conviction are to his conviction of breach of the peace in the second degree.

[4] The evidence adduced at trial also established that, on March 6, 2015, while his criminal case was pending, the defendant sent an e-mail to McCargo's supervisor at the New Canaan Parking Department indicating that he would press felony charges against McCargo and cause McCargo to lose his job if he appeared in court at the defendant's criminal trial and testified against him. See *State* v. *Liebenguth*, supra, 181 Conn. App. 42. The e-mail further stated that the defendant would not take such action against McCargo if he did not appear in court to testify against the defendant. Id. As the Appellate Court explained, "[t]he language of the defendant's e-mail clearly indicates that the defendant intended to induce McCargo not to appear in court, insofar as it stated: 'It goes without mention that if your meter maid [McCargo] does not show up in court this case will be over and everyone can go peacefully on their own way, no harm, no foul, no fallout' and '[p]erhaps the judge will remand him to custody right then and there from his witness chair? Obviously, not if he is not there.' " Id., 57–58. This evidence provided the basis for the trial court's guilty finding with respect

to the charge of tampering with a witness in violation of General Statutes § 53a-151. See footnote 3 of this opinion.

[5] We note that the Appellate Court read this statement by the trial court as reflecting a finding that the defendant took an aggressive stance, was walking toward McCargo, and moving his hands in an aggressive manner at the very same time he uttered the words "fucking niggers." (Internal quotation marks omitted.) *State* v. *Liebenguth*, supra, 181 Conn. App. 49. As the Appellate Court also observed; see id.; such a finding would be inconsistent with the trial testimony, which clearly established that the defendant was seated in his vehicle both times he directed that epithet at McCargo. In contrast to the Appellate Court, however, we do not understand the trial court to have found that the conduct referred to occurred simultaneously with the offensive utterances. Rather, we read the decision's reference to that conduct as consistent with the record; see, e.g., *Lauer* v. *Zoning Commission*, 220 Conn. 455, 470, 600 A.2d 310 (1991) (reviewing court reads arguably ambiguous trial court record to support, rather than to undermine, its judgment); that is, as reflecting a finding by the trial court only that the conduct was relevant to the broader context in which the defendant's epithets were uttered, which it certainly was. In any event, we, like the Appellate Court, resolve the issue on appeal predicated on the testimony adduced at trial, which is not disputed for purposes of this appeal.

[6] As we discuss more fully hereinafter, in *Baccala*, we concluded that the conviction of the defendant in that case—also for breach of the peace in the second degree in violation of § 53a-181 (a) (5)—had to be reversed, despite the vile and personally demeaning nature of the gender based epithets on which that conviction was predicated, in light of our determination that the defendant's speech was entitled to first amendment protection because it was not likely to evoke a violent response from a reasonable person under the circumstances presented. See *State* v. *Baccala*, supra, 326 Conn. 251–56.

[7] Specifically, we certified the following issue: "Did the Appellate Court properly conclude that the defendant's conviction for breach of the peace in the second degree had to be reversed in light of the holding in [*Baccala*] . . . ?" (Citation omitted.) *State* v. *Liebenguth*, supra, 330 Conn. 901.

[8] The defendant makes no claim that, in the event we disagree with the Appellate Court that his speech was protected by the first amendment to the United States constitution, his conviction nevertheless was barred by the free speech provisions of article first, §§ 4 and 5, of the Connecticut constitution. We therefore have no occasion to consider whether the fighting words exception to the protection afforded speech under the first amendment also constitutes an exception to the free speech guarantees of the state constitution and, if so, whether its scope is coextensive with that of the exception recognized under the first amendment.

[9] In this regard, we observed in *Baccala* that, "[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." (Emphasis omitted; internal quotation marks omitted.) *State* v. *Baccala*, supra, 326 Conn. 239. Although the United States Supreme Court has not upheld a conviction under the fighting words doctrine since *Chaplinsky*; e.g., C. Calvert, "First Amendment Envelope Pushers: Revisiting the Incitement-to-Violence Test with Messrs. Brandenburg, Trump, & Spencer," 51 Conn. L. Rev. 117, 149 (2019); and, despite scholarly criticism of the doctrine; see, e.g., W. Reilly, Note, "Fighting the Fighting Words Standard: A Call for Its Destruction," 52 Rutgers L. Rev. 947, 947–49 (2000); Note, "The Demise of the *Chaplinsky* Fighting Words Doctrine: An Argument for Its Interment," 106 Harv. L. Rev. 1129, 1140–46 (1993); the court has never disavowed the doctrine and, from time to time, has referred to it, albeit in dicta, as one of the few historic exceptions to the first amendment's prohibition against content based restrictions on speech. See, e.g., *Brown* v. *Entertainment Merchants Assn.*, 564 U.S. 786, 791, 131 S. Ct. 2729, 180 L. Ed. 2d 708 (2011) ("From 1791 to the present . . . the [f]irst [a]mendment has permitted restrictions [on] the content of speech in a few limited areas, and has never include[d] a freedom to disregard these traditional limitations. . . . These limited areas . . . such as . . . fighting words . . . represent well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any [c]onstitutional problem . . . ." (Citations omitted; internal quotation marks omitted.)); *Virginia* v. *Black*, 538 U.S. 343, 359, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003) ("[A] [s]tate may punish those words [that] by their very utterance inflict injury or tend to incite an immediate breach of the

peace. . . . [C]onsequently . . . fighting words—those personally abusive epithets [that], when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke a violent reaction—are generally proscribable under the [f]irst [a]mendment." (Citations omitted; internal quotation marks omitted.)). In any event, the defendant makes no claim that the fighting words doctrine is a dead letter for federal constitutional purposes; he claims, rather, that the words he used were not fighting words and, consequently, that his conviction based on those words is prohibited by the first amendment. In addition, as we previously noted; see footnote 8 of this opinion; the defendant does not raise a claim under the state constitution.

[10] New Dictionary of American Slang (R. Chapman ed., 1986) p. 151.

[11] The defendant relies on the following cases in which the court determined that certain words directed at a police officer were not fighting words: *Kennedy* v. *Villa Hills*, 635 F.3d 210, 215–16 (6th Cir. 2011) (calling police officer " 'son of a bitch' " and "a 'fat slob' "); *Johnson* v. *Campbell*, 332 F.3d 199, 203, 215 (3d Cir. 2003) (calling police officer who was conducting stop " 'son of a bitch' "); *Duran* v. *Douglas*, 904 F.2d 1372, 1377 (9th Cir. 1990) (shouting profanities and making obscene gestures at police officer); *Barboza* v. *D'Agata*, 151 F. Supp. 3d 363, 367, 371–72 (S.D.N.Y. 2015) ("[f]uck your shitty town bitches" written on payment form accompanying speeding ticket); *State* v. *Nelson*, 38 Conn. Supp. 349, 351 n.1, 355, 448 A.2d 214 (App. Sess. 1982) (calling police officer " 'fucking asshole, a fucking pig' ").

[12] We note, however, that there is nothing in the record to indicate that McCargo received any special training on how to deal with persons who become unusually irate or insulting upon being issued a parking ticket.

[13] We note that the defendant further contends that the trial court's requirement that he undergo a cultural diversity course prescribed and approved by his probation officer evidences that the trial court's guilty finding "constitutes a unique and unprecedented attempt to criminalize incivility or racist attitudes." We disagree. The probationary condition falls squarely within the court's considerable sentencing discretion, and, indeed, it is obviously well-founded in light of the defendant's conceded language and conduct.

Page 37

181 Conn.App. 37 (Conn.App. 2018)

186 A.3d 39

STATE of Connecticut

v.

David G. LIEBENGUTH

No. AC 39506

Appellate Court of Connecticut

April 17, 2018

Argued November 15, 2017

Appeal from Superior Court, Judicial District of Norwalk, Hernandez, J.

[186 A.3d 40] [Copyrighted Material Omitted]

[186 A.3d 41] [Copyrighted Material Omitted]

[186 A.3d 42]

Joseph M. Merly, New Haven, with whom, on the brief, was John R. Williams, New Haven, for the appellant (defendant).

Timothy F. Costello, assistant state's attorney, with whom, on the brief, were Richard J. Colangelo, Jr., state's attorney, and Nadia C. Prinz, deputy assistant state's attorney, for the appellee (state).

DiPentima, C.J., and Sheldon and Devlin, Js.

Opinion

SHELDON, J.

Page 39

The defendant, David G. Liebenguth, was convicted, following a bench trial, of breach of the peace in the second degree in violation of General Statutes § 53a-181 (a) (5) and tampering with a witness in violation of General Statutes § 53a-151. The charges were filed in connection with an angry confrontation between the defendant and a parking authority officer who had issued him a parking ticket, and a subsequent e-mail from the defendant to the officer's supervisor, suggesting why the officer should not appear in court to testify against him. The defendant now appeals, claiming that the evidence adduced at trial was insufficient to support his conviction of either charge. We affirm in part and reverse in part the judgment of the trial court.

The following evidence was presented at trial. Michael McCargo, a parking enforcement officer for the town of New Canaan, testified that he was patrolling the Morris Court parking lot on the morning of August 28, 2014, when he noticed that the defendant's vehicle was parked in a metered space for which no payment had been made. He first issued a ticket for the defendant's vehicle, then walked to another vehicle to issue a ticket, while his vehicle remained idling behind the defendant's vehicle. As McCargo was returning to his vehicle, he was approached by the defendant, whom he had never before seen or interacted with. The defendant said to McCargo,

"not only did you give me a ticket, but you blocked me in." Initially **[186 A.3d 43]** believing that the
Page 40
defendant was calm, McCargo jokingly responded that he didn't want the defendant getting away. When the defendant then attempted to explain why he had parked in the lot, McCargo responded that his vehicle was in a metered space for which payment was required, not in one of the lot's free parking spaces. McCargo testified that the defendant's demeanor then "escalated," with the defendant saying that the parking authority was "unfucking believable" and telling McCargo that he had given him a parking ticket "because my car is white.... [N]o, [you gave] me a ticket because I'm white." As the defendant, who is white, spoke with McCargo, who is African-American, he "flared" his hands and added special emphasis to the profanity he uttered. Even so, according to McCargo, the defendant always remained a "respectable" distance from him. Finally, as the defendant was walking away from McCargo toward his own vehicle, he spoke the words, "remember Ferguson."

After both men had returned to and reentered their vehicles, McCargo, whose window was rolled down, testified that he thought he heard the defendant say the words, "fucking niggers." This caused him to believe that the defendant's prior comment about Ferguson had been made in reference to the then recent shooting of an African-American man by a white police officer in Ferguson, Missouri. He thus believed that the defendant meant to imply that what had happened in Ferguson "was going to happen" to him. McCargo also believed that by uttering the racial slur and making reference to Ferguson, the defendant was trying to rile him up and escalate the situation. That, however, did not happen, for although McCargo found the remark offensive, and he had never before been the target of such language while performing his duties, he remained calm at all times and simply drove away to resume his patrol. Shortly thereafter, however, as he was driving away,
Page 41
the defendant drove past him. As he did so, McCargo testified that the defendant turned toward him, looked directly at him with an angry expression on his face, and repeated the slur, "fucking niggers." McCargo noted in his testimony that the defendant said the slur louder the second time than he had the first time.

After the defendant drove out of the parking lot, McCargo called his supervisor, who instructed him to report the incident to the New Canaan police. In his report, McCargo noted that there might have been a witness to the interaction, whom he described as a young white female. The defendant later was arrested in connection with the incident on the charge of breach of the peace in the second degree.

Next to testify was Mallory Frangione, the young white female witness to the incident whom McCargo had mentioned in his report. She testified that she parked in the Morris Court parking lot around 9:45 a.m. on the morning of August 28, 2014, and as soon as she opened her car door, she heard yelling. She then saw two men, McCargo and the defendant, who were standing outside of their vehicles about seventy feet away from her. She observed that the defendant was moving his hands all around, that his body movements were aggressive and irate, and that his voice was loud. She heard him say something about Ferguson, then say that something was "f'ing

unbelievable." She further testified that she saw the defendant take steps toward McCargo while acting in an aggressive manner. She described McCargo, by contrast, as calm, noting that he never raised his voice, moved his arms or gesticulated in any way. McCargo ultimately backed away from the defendant and got into his vehicle. The defendant, she recalled, drove in two circles around the **[186 A.3d 44]** parking lot before leaving. Frangione testified that witnessing the interaction made her feel nervous and upset.

Page 42

Karen Miller, McCargo's supervisor at the New Canaan Parking Department, also testified. Miller received an e-mail from the defendant at work on March 6, 2015. The e-mail, which was admitted into evidence, read as follows: "Please be advised that on March 12th at 2 p.m.[1] in a court of law in Norwalk, CT., I will prove beyond any reasonable doubt that your meter maid did in fact commit multiple crimes against me, including at least one FELONY, as well as breaking CT vehicular/ traffic laws in the operation of his vehicle and New Canaan town ordinances while on the job PRIOR to any false allegations of breach of peace in the second degree on my part. Additionally, as such, I also intend to subsequently invoke and pursue New Canaan town ordinances that would effectively require this meter maid to resign, or be terminated, from his position.

"Although it is not my desire to escalate this situation to the point a mans job, career, and lively hood is on the line, I must do what is necessary to prove my innocence. And in that course it will be proven your mater maid did in fact commit multiple crimes, including at least one FELONY, and infractions against me on that day BEFORE I was forced to react to his criminal actions against me.

"Of course if this is what you want to see happen I look forward to you and your meter maids presence in court next week. It goes without mention that if your meter maid does not show up in court this case will be over and everyone can go peacefully on their own way, no harm, no foul, no fallout.

"It's your choice now to make whatever recommendation you wish to your selectman. It will be MY CHOICE to defend myself from these false charges next

Page 43

week in court by proving (at minimum showing probable cause for an arrest!) your meter maid a criminal at best.a FELON at worst. Perhaps the judge will remand him to custody right then and there from his witness chair?

"Obviously not if he is not there."[2] (Footnote added.) Miller understood the e-mail to mean that McCargo should absent himself from court proceedings. McCargo also read the e-mail, the sending of which he described as a "scare tactic." He believed the defendant sent the e-mail in order to persuade him not to go to court and testify, and that if he did appear in court, the defendant would pursue negative repercussions as outlined in his e-mail.

After the state rested, the defendant moved for a judgment of acquittal on both counts, which the court denied. The defendant elected not to testify. The court, ruling from the bench, found the defendant guilty on both counts. It reasoned as follows: "In finding that the defendant's language and behavior is not protected speech, the court considers the words themselves, in

other words, the content of the speech, the context in which it was uttered, and all of the circumstances surrounding the defendant's speech and behavior.

"The court finds that the defendant's language, fucking niggers directed at Mr. McCargo twice ... is not protected speech.... The defendant's use of the particular racial epithet is in the American **[186 A.3d 45]** lexicon, there is no other racial epithet more loaded with racial animus, no other epithet more degrading, demeaning or dehumanizing. It is a word which is probably the most [vile] racial epithet a non-African-American can direct towards an African-American. [The defendant] is white. Mr. McCargo is African-American.

Page 44

"In light of this country's long and shameful history of state sanctioned slavery, Jim Crow segregation, state sanctioned racial terrorism, financial and housing discrimination, the word simply has ... no understanding under these circumstances other than as a word directed to incite violence. The word itself is a word likely to provoke a violent response.

"The defendant is not however being prosecuted solely for use of this word. All language must be considered in light of its context.

"The court finds that considering ... the content of the defendant's speech taken in context and in light of his belligerent tone, his aggressive stance, the fact that he was walking towards Mr. McCargo and moving his hands in an aggressive manner, there's no other interpretation other than these are fighting words. And he uttered the phrase not once but twice. It was directed— the court finds that it was directed directly at Mr. McCargo. There were no other African-Americans present ... in the parking lot when it happened, and indeed Mr. McCargo's unease and apprehension at hearing those words was corroborated by Mallory Frangione who ... said that she felt disconcerted by the defendant's tone of voice and his aggressive stance and actions.

"With respect to count two, the court has ... similarly considered the words that were used in the e-mail, the subject e-mail. It finds that there is nothing in the evidence which suggests that in sending the e-mail, the defendant intended to comment or bring attention to a matter of public concern in a public forum.[3] ...

"[T]he content ... of the communication ... itself was of an entirely personal nature. [The defendant] stated that he was willing to withdraw his claim

Page 45

which he now suggests was a matter of public interest, in exchange for a purely personal benefit, namely the withdrawal of criminal charges which were then pending against [him].

"So for those reasons, the court rejects the defendant's claim that either or both of these statements were protected first amendment speech." (Footnote added.) The court later sentenced the defendant as follows: on the charge of breach of the peace in the second degree, to a term of six months, execution suspended, followed by two years of probation on several special conditions, plus a $1000 fine; and on the charge of tampering with a witness, a consecutive term of four years incarceration, execution suspended, followed by four years of probation on the same special conditions and a $3000 fine. This appeal followed.

We begin with our standard of review. "It is well settled that a defendant who asserts an

insufficiency of the evidence claim bears an arduous burden.... [F]or the purposes of sufficiency review ... we review the sufficiency of the evidence as the case was tried .... [A] claim of insufficiency of the evidence must be tested by reviewing no less than, and no more than, the evidence introduced at trial.... In reviewing a sufficiency of the **[186 A.3d 46]** evidence claim, we apply a two part test. First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the [fact finder] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt .... This court cannot substitute its own judgment for that of the [fact finder] if there is sufficient evidence to support the [fact finder's] verdict....

Page 46

"[T]he [fact finder] must find every element proven beyond a reasonable doubt in order to find the defendant guilty of the charged offense, [but] each of the basic and inferred facts underlying those conclusions need not be proved beyond a reasonable doubt.... If it is reasonable and logical for the [fact finder] to conclude that a basic fact or an inferred fact is true, the [fact finder] is permitted to consider the fact proven and may consider it in combination with other proven facts in determining whether the cumulative effect of all the evidence proves the defendant guilty of all the elements of the crime charged beyond a reasonable doubt.... Moreover, it does not diminish the probative force of the evidence that it consists, in whole or in part, of evidence that is circumstantial rather than direct.... It is not one fact ... but the cumulative impact of a multitude of facts which establishes guilt in a case involving substantial circumstantial evidence.... In evaluating evidence, the [fact finder] is not required to accept as dispositive those inferences that are consistent with the defendant's innocence.... The [fact finder] may draw whatever inferences from the evidence or facts established by the evidence [that] it deems to be reasonable and logical....

"[O]n appeal, we do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that supports the [fact finder's] verdict of guilty.... [T]he trier of fact may credit part of a witness' testimony and reject other parts.... [W]e must defer to the [fact finder's] assessment of the credibility of the witnesses based on its firsthand observation of their conduct, demeanor and attitude ...." (Citation omitted; internal quotation marks omitted.) *State v. Raynor,* 175 Conn.App. 409, 424-26, 167 A.3d 1076, cert. granted, 327 Conn. 969, 173 A.3d 952 (2017).

Page 47

I

The defendant first claims that the evidence was insufficient to support his conviction for breach of the peace in the second degree because the words he uttered to McCargo were protected speech under the first amendment to the United States constitution[4] and thus did not violate § 53a-181 (a) (5).

"Ordinarily, a jury or trial court's findings of fact are not to be overturned on appeal unless they are clearly erroneous.... Thus, we [generally] review the findings of fact ... for clear error.

"In certain first amendment contexts, however, appellate courts are bound to apply a de novo standard of review.... [In such cases], the inquiry into the protected status of ... speech is one of law, not fact.... As such, an appellate court is compelled to examine for [itself] **[186 A.3d 47]** the ... statements [at] issue and the circumstances under which they [were] made to [determine] whether ... they ... are of a character [that] the principles of the [f]irst [a]mendment ... protect.... [I]n cases raising [f]irst [a]mendment issues [the United States Supreme Court has] repeatedly held that an appellate court has an obligation to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion [into] the field of free expression.... This rule of independent review was forged in recognition that a [reviewing] [c]ourt's duty is not limited to the elaboration of constitutional principles .... [Rather, an appellate court] must also in proper cases review the evidence to make certain that those principles have

Page 48

been constitutionally applied.... Therefore, even though, ordinarily ... [f]indings of fact ... shall not be set aside unless clearly erroneous, [appellate courts] are obliged to [perform] a fresh examination of crucial facts under the rule of independent review." (Citation omitted; internal quotation marks omitted.) *State v. Krijger,* 313 Conn. 434, 446-47, 97 A.3d 946 (2014). The court in *Krijger* also noted, however, that although an appellate court "review[s] de novo the trier of fact's ultimate determination that the statements at issue constituted a [breach of the peace], [the court] accept[s] all subsidiary credibility determinations and findings that are not clearly erroneous." *Id.,* at 447, 97 A.3d 946.

The defendant argues that the trial court's findings that he directed the phrase "fucking niggers" at McCargo "in context and in light of his belligerent tone, his aggressive stance, [and] the fact that he was walking toward Mr. McCargo and moving his hands in an aggressive manner" have no support in the evidence and, in fact, are contradicted by the evidence. Pursuant to *Krijger* , we must examine the statements at issue to determine whether they are of such a character as to be protected under the first amendment. See *State v. Krijger, supra,* 313 Conn. at 446, 97 A.3d 946. Upon conducting such an examination, we agree with the defendant that the court's findings are clearly erroneous.

"The starting point for our analysis is an examination of the statements at issue." *Id.,* at 452, 97 A.3d 946. The defendant does not contest the finding that he twice used the words "fucking niggers," or the finding that he directed those words at McCargo. Frangione, however, who was the only person to testify that the defendant ever walked toward McCargo while speaking to him, did not testify that she ever heard the defendant say the words "fucking niggers." McCargo, who did testify to hearing the defendant say those words, testified that the defendant "[stood] his ground" during the incident, staying at a

Page 49

"respectable" distance from him throughout. According to McCargo, the defendant was inside his car on both occasions when he said the words "fucking niggers." The trial court's finding that the defendant twice directed the phrase "fucking niggers" at McCargo, in a belligerent tone, with an aggressive stance and while walking toward him, is therefore clearly erroneous.

We continue our analysis to determine whether the defendant's speech, as supported by the evidence adduced at trial, could lawfully constitute a breach of the peace under the fighting words exception to the first amendment. Our Supreme Court recently discussed the type of speech that constitutes "fighting words," and thus is not protected by the first amendment, in *State v. Baccala,* 326 Conn. 232, 163 A.3d 1, cert. denied,
[186 A.3d 48] __ U.S. __, 138 S.Ct. 510, 199 L.Ed.2d 408 (2017). In *Baccala*, the defendant was convicted of breach of the peace in the second degree after a customer service dispute in a supermarket. *Id.,* at 233-34, 163 A.3d 1. The defendant customer called the supermarket to request that the store keep the customer service desk open until she arrived so that she could pick up a Western Union money transfer. *Id.,* 235, 163 A.3d 1. The manager who answered her telephone call informed her that the desk was already closed and the services she sought were currently unavailable. *Id*. "The defendant became belligerent, responded that she 'really didn't give a shit,' and called [the manager] '[p]retty much every swear word you can think of' before the call was terminated." *Id*. A few minutes after the telephone call, the defendant arrived at the store, went inside, and proceeded directly to the closed customer service desk, where she attempted to fill out a money transfer form. *Id*. After the manager with whom she had spoken on the telephone told her once again that the customer service desk was closed for the day, the defendant "proceeded to loudly call [the manager] a 'fat ugly bitch' and a 'cunt'
Page 50
and said 'fuck you, you're not a manager,' all while gesticulating with her cane." (Footnote omitted.) *Id.,* at 236, 163 A.3d 1. The manager remained calm during this outburst and responded to the defendant by telling her to have a good night, at which point the defendant left the store. *Id*. On appeal, our Supreme Court held that the foregoing evidence was insufficient to support the defendant's breach of peace conviction under settled first amendment principles; *id., at 237*, 163 A.3d 1; "[b]ecause the words spoken by the defendant were not likely to provoke a violent response under the circumstances in which they were uttered." *Id.,* at 234, 163 A.3d 1.

"[A] proper contextual analysis," the court in *Baccala* wrote, "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."[5] *Id.,* at 250, 163 A.3d 1.

"[I]t 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 [v. New Hampshire*, 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031 (1942)].... Because the fighting words exception is concerned only with preventing the likelihood of actual violence, an approach ignoring the
Page 51
circumstances of the addressee is antithetical and simply unworkable." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Id.,* at 248, 163 A.3d 1. "[T]he fighting

words exception is not concerned with creating symmetrical free speech rights by way of establishing a uniform set of words that are constitutionally proscribed.... Rather, because 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 **[186 A.3d 49]** are more or less likely to respond violently and speakers who are more or less likely to elicit such a response." (Citation omitted.) *Id.,* at 249, 163 A.3d 1.

The court applied a two part test "[i]n considering the defendant's challenge to the sufficiency of the evidence to support her conviction of breach of the peace in the second degree in accordance with her first amendment rights .... First, as reflected in the previous recitation of facts, we construe the evidence in the light most favorable to sustaining the verdict.... Second, we determine whether the trier of fact could have concluded from those facts and reasonable inferences drawn therefrom that the cumulative force of the evidence established guilt beyond a reasonable doubt.... Accordingly, to establish the defendant's violation of § 53a-181 (a) (5) ... in light of its constitutional gloss, the state was required to prove beyond a reasonable doubt that the defendant's words were likely to provoke an imminent violent response from an average store manager in [that woman's] position." (Citations omitted.) *Id.,* at 250-51, 163 A.3d 1.

The court continued: "At the outset of [our] 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 [the manager]. The
Page 52
defendant invoked one or more of the most vulgar terms known in our lexicon to refer to [the manager'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* .' ... Uttering a cruel or offensive word is not a crime unless it would tend to provoke a reasonable person in the addressee's position to immediately retaliate with violence under the circumstances." (Citation omitted; emphasis in original.) *Id.,* at 251-52, 163 A.3d 1.

In determining that the defendant's conduct in *Baccala* did not support a conviction for breach of the peace because the state did not prove beyond a reasonable doubt that the manager was likely to retaliate with violence, the court considered several factors. *Id.,* at 252, 163 A.3d 1. First, the court discussed the telephone call that preceded the in-person interaction: Because the defendant had already been belligerent to and directed swear words at the manager over the telephone, the manager "reasonably would have been aware of the possibility that a similar barrage of insults ... would be directed at her." *Id*. Second, the court noted that store managers are routinely confronted by frustrated customers, who often express themselves in angry terms, and are expected in such situations to model appropriate behavior and deescalate the situation. *Id.,* at 253, 163 A.3d 1. Additionally, the manager had a significant degree of control over the premises where the confrontation took place and could have resorted to lawful self-help tools if the defendant became abusive, rather than responding with violence herself. *Id*. The court concluded that "[g]iven the totality of the circumstances in the present case ... it would be unlikely for an on

duty store manager in [her] position to respond in kind to the defendant's
Page 53
angry diatribe with similar expletives." *Id*. Finally, the court noted that the manager did not respond with profanity or violence, observing that "[a]lthough the reaction of the addressee is not dispositive ... it is probative of the likelihood of a violent reaction." (Citation omitted.) *Id.,* at 254, 163 A.3d 1.

[186 A.3d 50] In this case, as in *Baccala*, the defendant used extremely vulgar and offensive language, meant to personally demean McCargo.[6] Under the circumstances in which he uttered this language, however, it was not likely to tend to provoke a reasonable person in McCargo's position immediately to retaliate with violence. Although the evidence unequivocally supports a finding that the defendant at one point walked toward McCargo while yelling and moving his hands, there is no evidence that the defendant simultaneously used the racial slurs. The evidence unequivocally shows, instead, that the defendant was in his car both times that he directed the racial slurs toward McCargo.[7] McCargo did
Page 54
testify that the defendant's use of the slurs shocked and appalled him, and that he found the remarks offensive. He also testified, however, that he remained calm throughout the encounter and felt no need to raise his voice to the defendant. A reasonable person acting in the capacity of a parking official would be aware that some level of frustration might be expressed by some members of the public who are unhappy with receiving tickets and would therefore not be likely to retaliate with immediate violence during such an interaction. In reviewing the entire context of the interaction, we therefore find that because McCargo was unlikely to retaliate with immediate violence to the conduct for which the defendant was charged, the defendant's words were not "fighting words," upon which he might appropriately be convicted of breach of the peace. The defendant's conviction of breach of the peace in the second degree must therefore be reversed.

II

The defendant next claims that the evidence was insufficient to prove him guilty of tampering with a witness in violation of § 53a-151. That statute provides: "A person is guilty of tampering with a witness if, believing that an official proceeding is pending or **[186 A.3d 51]** about to be instituted, he induces or attempts to induce a witness to testify falsely, withhold testimony, elude legal process summoning him to testify or absent himself from any official proceeding." General Statutes § 53a-151. "[T]he witness tampering statute has two requirements: (1) the defendant believes that an official proceeding is pending or about to be instituted; and (2) the defendant induces or attempts to induce a witness to engage in the proscribed conduct." (Internal quotation marks omitted.) *State v. O'Donnell,* 174 Conn.App. 675, 690, 166 A.3d 646, cert. denied, 327 Conn. 956, 172 A.3d 205 (2017).

Page 55
The defendant, however, has construed the state's charge as one of tampering with a witness by way of threatening conduct. He argues that his e-mail to McCargo's supervisor did not constitute a "true threat," and thus is entitled to first amendment protection, citing *State v. Sabato,* 321 Conn.

729, 742, 138 A.3d 895 (2016), for the proposition that "a defendant whose alleged threats form the basis of a prosecution under any provision of our Penal Code ... could be convicted as charged only if his statements ... constituted a true threat, that is, a threat that would be viewed by a reasonable person as one that would be understood by the person against whom it was directed as a serious expression of an intent to harm or assault, and not as mere puffery, bluster, jest or hyperbole." (Internal quotation marks omitted.) Because the state did not claim that the defendant tampered with a witness by threatening him, his argument that his words did not constitute a "true threat" is unavailing.

"The language of § 53a-151 plainly warns potential perpetrators that the statute applies to any conduct that is intended to prompt a witness ... to refrain from testifying in an official proceeding that the perpetrator believes to be pending or imminent. The legislature's unqualified use of the word 'induce' clearly informs persons of ordinary intelligence that *any conduct, whether it be physical or verbal, can potentially give rise to criminal liability* . Although the statute does not expressly mandate that the perpetrator intend to cause the witness to ... withhold his testimony, the implicit requirement is apparent when the statute is read as a whole.... The legislature's choice of the verb 'induce' connotes a volitional component of the crime of tampering that would have been absent had it employed a more neutral verb such as 'cause.' Furthermore, the statute's application to unsuccessful, as

Page 56

well as successful, attempts to induce a witness to render false testimony [or refrain from testifying] supports our conclusion that the statute focuses on the mental state of the perpetrator to distinguish culpable conduct from innocent conduct." (Citations omitted; emphasis added.) *State v. Cavallo,* 200 Conn. 664, 668-69, 513 A.2d 646 (1986). "Although *Cavallo* discusses § 53a-151 in the context of inducing someone to testify falsely or to refrain from testifying, we conclude that its holding that the language of § 53a-151 plainly warns potential perpetrators applies equally to situations in which a defendant attempts to induce someone to absent himself or herself from a proceeding." *State v. Bennett-Gibson,* 84 Conn.App. 48, 57-58 n.9, 851 A.2d 1214, cert. denied, 271 Conn. 916, 859 A.2d 570 (2004). "[A] defendant is guilty of tampering with a witness only if he intends that his conduct directly cause a particular witness to testify falsely or to refrain from testifying at all." *State v. Cavallo, supra,* at 672, 513 A.2d 646.

In *State v. Bennett-Gibson*, this court stated that "[t]o prove inducement or an attempt thereof, the evidence before the jury must be sufficient to conclude that the defendant's conduct was intended to prompt [the complainant] to absent herself from the proceeding.... Intent may be, and usually is, inferred from the defendant's verbal or physical conduct.... Intent may also be inferred from the surrounding circumstances.... The use of inferences based on circumstantial evidence is necessary because direct evidence of **[186 A.3d 52]** the accused's state of mind is rarely available.... Furthermore, it is a permissible, albeit not a necessary or mandatory, inference that a defendant intended the natural consequences of his voluntary conduct." (Citation omitted; emphasis omitted; footnote omitted; internal quotation marks omitted.) *State v. Bennett-Gibson, supra,* 84 Conn.App. at 53, 851 A.2d 1214.

A defendant need not contact a witness directly to be convicted under § 53a-151. In *State v. Carolina,* 143 Conn.App. 438, 69 A.3d 341, cert. denied, 310 Conn. 904, 75 A.3d 31 (2013), this court upheld the conviction of a defendant who had written a letter to his cousin in which he asked his cousin to pass along scripted false testimony to a potential witness against him. *Id.,* at 440-42, 69 A.3d 341. The letter was intercepted by a correction officer and did not reach the cousin; therefore, the witness did not become aware of the defendant's scripted testimony. *Id.,* at 444, 69 A.3d 341. The defendant claimed that "[t]he letter was an attempt to induce [his] cousin to induce [the witness] to testify falsely," but since the letter never reached the witness, the witness "was never aware of the defendant's attempts to induce her to testify falsely." (Internal quotation marks omitted.) *Id.,* at 442, 69 A.3d 341. This court upheld the defendant's conviction under § 53a-151, noting that "[t]he purpose of the statute would be thwarted if a defendant could avoid liability by inducing false testimony indirectly through an intermediary instead of communicating directly with the witness himself." *Id.,* at 445, 69 A.3d 341.

In this case, the trial court had ample evidence that the defendant intended to induce McCargo to absent himself from the court proceeding. The state presented evidence that the defendant sent an e-mail to McCargo's supervisor implying that he would press felony charges against McCargo and cause McCargo to lose his job if he appeared in court to testify, but that he would let the matter drop if McCargo did not appear in court to testify. The defendant's claim that his e-mail did not constitute a "true threat" against McCargo is unavailing. The state was not required to prove, nor was the trial court required to find, that the defendant threatened McCargo in order to establish that he sought to induce him not to testify. The language of the defendant's e-mail clearly indicates that the defendant intended to induce

McCargo not to appear in court, insofar as it stated: "It goes without mention that if your meter maid does not show up in court this case will be over and everyone can go peacefully on their own way, no harm, no foul, no fallout" and "[p]erhaps the judge will remand him to custody right then and there from his witness chair? Obviously not if he is not there." That is all that is required for a conviction on this charge. We therefore affirm the defendant's conviction of tampering with a witness.

The judgment is reversed only as to the defendant's conviction of breach of the peace in the second degree and the case is remanded with direction to render a judgment of acquittal on that charge and to resentence the defendant on the charge of tampering with a witness; the judgment is affirmed in all other respects.

In this opinion, DiPENTIMA, C. J., concurred.

DEVLIN, J., concurring in part and dissenting in part.

I agree with the majority that the evidence was sufficient to support the trial court's verdict of guilty on the charge of tampering with a witness in violation of General Statutes § 53a-151. I write separately because I also believe that the evidence was sufficient to support the guilty **[186 A.3d 53]** verdict on the charge of breach of the peace in the second degree in violation of General Statutes § 53a-181 (a) (5). Contrary to the majority, I do not believe that *State v. Baccala,* 326

Conn. 232, 163 A.3d 1, cert. denied, __ U.S. __, 138 S.Ct. 510, 199 L.Ed.2d 408 (2017) requires a different result.

As related to the breach of the peace charge, the trial court reasonably could have found the following facts. On August 28, 2014, between 9 a.m. and 9:30 a.m., New Canaan Parking Enforcement Officer Michael McCargo was patrolling a municipal parking lot in the town's commercial district. Although there were a few parking

Page 59

spaces that permitted up to fifteen minutes of free parking, the majority of parking spaces required that the motorist pay a fee to park. McCargo observed the defendant's car in space number two, which required payment of a parking fee that had not been paid by the defendant. Accordingly, McCargo stopped his parking enforcement vehicle in the parking lot's travel lane near the defendant's car and issued a parking ticket. McCargo noted a second unpaid vehicle parked in a space near the center of the parking lot. He left his vehicle, still parked near the defendant's car, and walked to the car at the center of the lot. McCargo was in the process of issuing a ticket for the second vehicle when the driver of that vehicle showed up. The driver said that she did not know that she had to pay to park there. The driver just left it at that.

McCargo then walked back to his parking enforcement vehicle. The defendant approached him stating: "[N]ot only did you give me a ticket, but you blocked me in." McCargo responded jokingly: "[T]hat's because I didn't want you to get away." The defendant explained why he was parked in the lot and McCargo stated why he had issued the ticket. McCargo noted the free fifteen minute parking spaces nearby. Unhappy with the explanation, the defendant said that the New Canaan Parking Department was "unfucking believable." As the defendant said this, his demeanor changed as he emphasized the profanities. At one point, McCargo advised the defendant to watch what he said, to which the defendant responded: "It's freedom of speech."

The encounter then escalated and the defendant said: "I know why you gave me a ticket.... [Y]ou gave me a ticket because my car is white." McCargo looked at the defendant. The defendant continued: "[N]o, you're giving me a ticket because I'm white."[1] The defendant

Page 60

then turned and walked back to his parked vehicle. As he walked, the defendant said "remember Ferguson."

McCargo understood "Ferguson" to reference the then recent incident in Ferguson, Missouri in which a police officer had shot a black male. McCargo believed the events in Ferguson had been quite recent— within a few days of the encounter with the defendant. McCargo considered the defendant's comment to be a threat and believed that the defendant was implying that what happened at Ferguson was going to happen to him. He felt that the defendant was trying to "rile [him] up" and "just take it to a whole other level."

Mallory Frangione, who was in the parking lot, witnessed the confrontation between the defendant and McCargo. She saw the defendant yelling and motioning with his hands back and forth and up and down in an aggressive manner and taking steps toward McCargo. She also overheard the defendant reference Ferguson and say "f'ing unbelievable." Even though she was approximately seventy feet away, witnessing **[186 A.3d 54]** the incident made her feel nervous

and upset.

After the "Ferguson" comment, the defendant and McCargo returned to their respective vehicles. As they were getting inside their vehicles, McCargo testified that he heard the defendant say "fucking niggers." McCargo pulled away and the defendant backed out of his space and drove behind McCargo. The defendant drove his vehicle around McCargo's vehicle and, as he passed, he looked at McCargo and again said: "[F]ucking niggers." This was said louder than the first time. While saying this, the defendant had an angry expression on his face and spoke in a loud and angry tone.

McCargo was shocked and appalled by the remarks. When McCargo advised his supervisor of the incident, he was clearly upset. His supervisor encouraged him to make a report to the New Canaan Police Department, and he did so.

Page 61

In considering the defendant's challenge to his conviction for breach of the peace in the second degree, we apply a two-part test. "First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the [finder of fact] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt." (Internal quotation marks omitted.) *State v. Cook,* 287 Conn. 237, 254, 947 A.2d 307, cert. denied, 555 U.S. 970, 129 S.Ct. 464, 172 L.Ed.2d 328 (2008). More specifically, as to the present case, to establish the defendant's violation of § 53a-181 (a) (5), the state was required to prove beyond a reasonable doubt that the defendant's words were "fighting words" that were likely to "induce immediate violence by the person or persons to whom [they were] uttered because of their raw effect." *State v. Caracoglia,* 78 Conn.App. 98, 110, 826 A.2d 192, cert. denied, 266 Conn. 903, 832 A.2d 65 (2003).

"In cases where [the line between speech unconditionally guaranteed and speech which may be legitimately regulated] must be drawn, the rule is that we examine for ourselves the statements in issue and the circumstances under which they were made to see if they are consistent with the first amendment.... We undertake an independent examination of the record as a whole to ensure that the judgment does not constitute a forbidden intrusion on the field of free expression." (Citations omitted; internal quotation marks omitted.) *State v. Baccala, supra,* 326 Conn. at 251, 163 A.3d 1.

The majority is correct that, in announcing its verdict, the trial court conflated the physically aggressive aspects of the encounter with the racial epithets that came later. The record is clear that the two aspects of the incident were separate. Notwithstanding the trial court's remarks, in my view, the evidence supports the

Page 62

defendant's conviction of breach of the peace in the second degree.

The first amendment constitutional right to freedom of speech, while generally prohibiting the government from proscribing speech based on disapproval of its content, does not protect "fighting words" that tend to incite a breach of the peace. (Internal quotation marks omitted.) *Chaplinsky v.*

New Hampshire, 315 U.S. 568, 571-72, 62 S.Ct. 766, 86 L.Ed. 1031 (1942). "[F]ighting words" are "personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction." (Internal quotation marks omitted.) *Cohen v. California,* 403 U.S. 15, 20, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971).

[186 A.3d 55] In *State v. Baccala, supra,* 326 Conn. 232, 163 A.3d 1, our Supreme Court considered whether the angry outbursts of a dissatisfied customer directed at a manager of a supermarket were sufficient to support her conviction for breach of the peace in the second degree. This was no ordinary dispute. The defendant became very angry when she became aware that she would not be able to pick up a Western Union money transfer. *Id.,* at 235-36, 163 A.3d 1. The defendant, in a loud voice, called the store manager a "fat ugly bitch" and a "cunt" and said "fuck you, you're not a manager" all the while gesticulating with a cane. (Internal quotation marks omitted.) *Id.,* at 236, 163 A.3d 1.

In concluding that the defendant's words were protected by the first amendment, our Supreme Court noted several concepts pertinent to the fighting words exception. First, the court noted that there are no per se fighting words but, rather, words may or may not be fighting words depending upon the circumstances of their use. *Id.,* at 238-39, 163 A.3d 1. Second, "[a] proper contextual analysis requires consideration of the actual circumstances as perceived by a reasonable speaker and

Page 63

addressee to determine whether there was a likelihood of violent retaliation.... A proper examination of context also considers those personal attributes of the speaker and the addressee that are reasonably apparent because they are necessarily a part of the objective situation in which the speech was made." (Citations omitted.) *Id.,* at 240-41, 163 A.3d 1. Finally, the court's task is to "determine on a case-by-case basis all of the circumstances relevant to whether a reasonable person in the position of the actual addressee would have been likely to respond with violence." *Id.,* at 245, 163 A.3d 1. It is the "tendency or likelihood of the words to provoke violent reaction that is the touchstone of the *Chaplinsky* test ...." (Internal quotation marks omitted.) *Id.,* at 247, 163 A.3d 1.

Given the *Baccala* decision, one may fairly pose the following question: If angrily calling a store manager a "fat ugly bitch" and a "cunt" is not breach of the peace, how can the words used in the present case be considered fighting words that would support a conviction for breach of the peace? This is essentially the position of the majority. The majority rests its reversal of the breach of the peace in the second degree conviction on two grounds. First, that, under the circumstances in which the defendant used the language, it was not likely to provoke a reasonable person in McCargo's position to immediately retaliate with violence. Second, that a parking official should expect frustration from persons who receive parking tickets and therefore not be likely to retaliate with immediate violence.

As to the second ground, there is nothing in the record to support the assertion that a "parking official" is less likely to respond to a provocative racial insult than any other person. In McCargo's experience, there were people who were not happy about receiving a parking ticket. He testified, however, that no one had ever used the level of language employed by the

defendant.

Page 64

Turning to the first ground, that the language was not likely to provoke a reasonable person to retaliate with violence, I believe that this does not account for the truly inflammatory and provocative language used. The word "nigger" is commonly used and understood as an offensive and inflammatory racial slur. See Merriam-Webster's Collegiate Dictionary (11th Ed. 2011) One commentator describes its effect this way: "American society remains deeply afflicted by racism. Long before slavery became the mainstay of the plantation society of the antebellum South, Anglo-Saxon **[186 A.3d 56]** attitudes of racial superiority left their stamp on the developing culture of colonial America. Today, over a century after the abolition of slavery, many citizens suffer from discriminatory attitudes and practices, infecting our economic system, our cultural and political institutions, and the daily interactions of individuals. The idea that color is a badge of inferiority and a justification for the denial of opportunity and equal treatment is deeply ingrained. *The racial insult remains one of the most pervasive channels through which discriminatory attitudes are imparted.* Such language injures the dignity and self-regard of the person to whom it is addressed, communicating the message that distinctions of race are distinctions of merit, dignity, status, and personhood. Not only does the listener learn and internalize the messages contained in racial insults, these messages color our society's institutions and are transmitted to succeeding generations." (Emphasis added; footnotes omitted.) R. Delgado, "Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling," 17 Harv. Civil Rights-Civil Liberties L.Rev. 133, 135-136 (1982).

In *Baccala,* the court recognized the particularly heinous nature of racial epithets in citing to *In re Spivey*, 345 N.C. 404, 480 S.E.2d 693 (1997) and *In re John M.*, 201 Ariz. 424, 36 P.3d 772 (Ariz.App. 2001).

Page 65

State v. Baccala, supra, 326 Conn. at 242-43, 163 A.3d 1. *In re Spivey, supra,* at 408, 480 S.E.2d 693, concerned a removal proceeding for a district attorney who repeatedly called a black bar patron "nigger." In denying the respondent's claim that his use of the word was protected by the first amendment, the Supreme Court of North Carolina took judicial notice of the following: "No fact is more generally known than that a white man who calls a black man 'a nigger' within his hearing will hurt and anger the black man and often provoke him to confront the white man and retaliate." *Id.,* at 414, 480 S.E.2d 693. The court went on to describe the respondent's repeated references to the bar patron as a "nigger" as a "classic case of the use of fighting words tending to incite an immediate breach of the peace ...." (Internal quotation marks omitted.) *Id.,* at 415, 480 S.E.2d 693.

In *In re John M., supra*, 201 Ariz. 424, 36 P.3d 772, a juvenile leaned out a car window and yelled "fuck you, you god damn nigger" to an African-American woman walking to a bus stop. *Id.,* at 425, 36 P.3d 772. In concluding that these words were not protected speech, the Court of Appeals of Arizona observed: "We agree with the [s]tate that few words convey such an inflammatory message of racial hatred and bigotry as the term nigger. According to Webster's New World Dictionary, the term is generally regarded as virtually taboo because of the legacy of

racial hatred that underlies the history of its use among whites, and its continuing use among a minority as a viciously hostile epithet." (Internal quotation marks omitted.) *Id.,* at 428, 36 P.3d 772. *In re Spivey* and *In re John M.* are by no means the only cases that have categorized the word "nigger" as a fighting word. See, e.g., *In re H.K.*, 778 N.W.2d 764, 767, 770 (N.D. 2010) (following a teenage girl of African-American ancestry into a bathroom during a dance, yelling at her and calling her a "nigger" and then "telling [her she doesn't] own this town, that they own this town, and they don't want niggers in their town and

Page 66

that [she needed] to watch out" were fighting words likely to incite a breach of the peace); *Lee v. Superior Court,* 9 Cal.App.4th 510, 518, 11 Cal.Rptr.2d 763 (1992) (denying request of African-American applicant to legally change his name to "Misteri Nigger" and stating: "We opine that men and women ... of common intelligence would understand

[186 A.3d 57] ... [the word, nigger] likely to cause an average addressee to fight" [internal quotation marks omitted]).

The present case falls within the "fighting words" exception to first amendment protection for several reasons. First, the words used by the defendant were personally provocative. This was not a situation like *Cohen v. California, supra,* 403 U.S. at 20, 91 S.Ct. 1780, in which the defendant's jacket bore the words "Fuck the Draft" directed at no one in particular. (Internal quotation marks omitted.) Here, the defendant was directing personally provocative insults at McCargo. Second, the racial animus expressed by the defendant was not restricted to the "fucking niggers" comments. The encounter between the defendant and McCargo almost immediately took on a racial tone when the defendant commented: "You're giving me a ticket because I'm white." The defendant's inflammatory reference to the highly controversial shooting of an African-American man by a white police officer— "remember Ferguson"— only raised the tension more. Third, a witness approximately seventy feet away saw the defendant motion with his hands back and forth, up and down in an aggressive manner. Although she could not hear everything, she heard the defendant reference Ferguson and say "f'ing unbelievable." She could tell that the defendant was yelling and it upset her. Finally, the defendant angrily and twice hurled the worst racial epithet in the English language at McCargo with the "fucking niggers" comment.[2]

Page 67

These were scathing insults that in many situations would provoke a reflexive visceral response. The fact that no such response occurred is not dispositive of whether words are fighting words. See *State v. Hoshijo ex rel. White,* 102 Haw. 307, 322, 76 P.3d 550 (2003) (fact that violence was not precipitated is of no consequence, as "proper standard is whether the words were *likely to provoke a violent response*, not whether violence occurred" [emphasis in original]). Also, the fact that the defendant was in his car at the moment that he yelled his "fucking niggers" epithets does not eviscerate their "fighting words" quality. Other cases have upheld breach of the peace convictions on similar facts. See *In re John M., supra*, 201 Ariz. at 428-29, 36 P.3d 772 (the words "fuck you, you god damn nigger" yelled at an African-American woman from a car as it pulled away were unprotected fighting words). Moreover, the cumulative effect of the entire incident

constituted a breach of the peace.

I recognize that there are those who advocate that no speech, however vile and provocative, should be subject to criminal sanction. See Note, "*The Demise of the Chaplinsky Fighting Words Doctrine: An Argument for its Internment," 106 Harv. L.Rev. 1129*, 1140 (1993) (recommending that *Chaplinsky* be overruled because "it is a hopeless anachronism that mimics the macho code of barroom brawls" [internal quotation marks omitted]); see also *State v. Tracy,* 200 Vt. 216, 237, 130 A.3d 196 (2015) ("[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" [emphasis in original]).

Steven Pinker, a psychology professor at Harvard University, reflected on this change in attitude and behavior when he wrote: "Centuries ago our ancestors may have had to squelch all signs of spontaneity and individuality in order to civilize **[186 A.3d 58]** themselves, but now
Page 68
that norms of nonviolence are entrenched, we can let up on particular inhibitions that may be obsolete. In this way of thinking, the fact that ... men curse in public is not a sign of cultural decay. On the contrary, it's a sign that they live in a society that is so civilized that they don't have to fear being harassed or assaulted in response. As the novelist Robert Howard put it, '[c]ivilized men are more discourteous than savages because they know they can be impolite without having their skulls split.' " S. Pinker, The Better Angels of Our Nature (Penguin Books 2011) p. 128.

In *Baccala*, our Supreme Court left for another day "the continued vitality of the fighting words exception ...." *State v. Baccala, supra,* 326 Conn. at 240, 163 A.3d 1. In my view, if angrily calling an African-American man a "fucking [nigger]" after taunting him with references to a recent police shooting of a young African-American man by a white police officer is not breach of the peace, then that day has come.

Because I believe that the evidence was sufficient to support the defendant's conviction of breach of the peace in the second degree, I would affirm the judgment of the trial court on that count.

Notes:

[1] The court took judicial notice that there was a scheduled court date related to the breach of peace charge on March 12, 2015.

[2] The spelling and capitalization in the e-mail as quoted are per the original.

[3] On appeal, the defendant did not pursue his claim that his e-mail was protected speech as a matter of public concern.

[4] The defendant also claims his conduct was protected by article first, § § 3, 4 and 14, of the Connecticut constitution. Because this claim is not independently briefed, we do not reach the defendant's claim pursuant to the Connecticut constitution. See, *e.g., State v. Outlaw,* 216 Conn. 492, 501 n.6, 582 A.2d 751 (1990).

[5] Our Supreme Court also noted that "[a] proper examination of the context also considers those personal attributes of the speaker and the addressee that are reasonably apparent because they are necessarily a part of the objective situation in which the speech was made.... Courts have, for

example, considered the age, gender, race, and status of the speaker." (Citations omitted.) *Id.,* at 241-42, 163 A.3d 1.

[6] Our dissenting colleague notes, as did the trial court, that the word "nigger" is vile and offensive, and that its use perpetuates historically discriminatory attitudes about race that regrettably persist in modern society. We agree entirely with those observations. We reiterate, however, that, under our law, it is the context in which such slurs are uttered that determines whether or not their utterance is so likely to provoke a violent response as to constitute fighting words, for which criminal sanctions may constitutionally be imposed.

[7] The dissent also points to two cases cited in *Baccala*, in which it contends that the word "nigger" was held to constitute a constitutionally unprotected fighting word. The *Baccala* court cited the two cases, *In re Spivey*, 345 N.C. 404, 480 S.E.2d 693 (1997), and *In re John M.*, 201 Ariz. 424, 36 P.3d 772 (Ariz.App. 2001), for the related propositions that a proper contextual evaluation of speech as alleged fighting words involves consideration of: the personal characteristics of the speaker and the person to whom his words are addressed, such as their ages, genders, races and respective statuses; *State v. Baccala,* supra, 326 Conn. at 241-43, 163 A.3d 1; and the likelihood that the average listener with those personal characteristics would respond with violence to such speech if it were addressed to him in the circumstances of the case before the court. *Id.,* at 243, 163 A.3d 1. We respectfully submit that in those two cases, it was the particular circumstances in which the word "nigger" was uttered that made its use unprotected by the first amendment, and that nothing in those cases suggests that that word is always an unprotected fighting word.

[1] The defendant is a white male and McCargo is an African-American male.

[2] "The experience of being called ‘nigger’ ... is like receiving a slap in the face. The injury is instantaneous." (Internal quotation marks omitted.) *Taylor v. Metzger,* 152 N.J. 490, 503, 706 A.2d 685 (1998).

Page 232
326 Conn. 232 (Conn. 2017)
163 A.3d 1
STATE OF CONNECTICUT
v.
NINA C. BACCALA
SC 19717
Supreme Court of Connecticut
July 11, 2017
[163 A.3d 2] Argued November 10, 2016

Appeal from Superior Court in the judicial district of Tolland, Graham, J.

Damian K. Gunningsmith, with whom were John L. Cordani, Jr., and, on the brief, Martin B. Margulies, for the appellant (defendant).

Mitchell S. Brody, senior assistant state's attorney, with whom, on the brief, were Matthew C. Gedansky, state's attorney, and Andrew R. Durham, assistant state's attorney, for the appellee (state).

Rogers, C. J., and Palmer, Eveleigh, McDonald, Espinosa, Robinson and D'Auria, Js.[*]

McDONALD, J. In this opinion PALMER, ROBINSON and D'AURIA, Js., concurred. EVELEIGH, J., with whom ROGERS, C. J., and ESPINOSA, J., join, concurring in part and dissenting in part.

OPINION

[163 A.3d 3]

Page 233

McDONALD, J.

The defendant, Nina C. Baccala, was convicted of breach of the peace in the second degree

Page 234

in violation of General Statutes § 53a-181 (a) (5)[1] solely on the basis of the words that she used to denigrate the manager of a supermarket in the course of a customer service dispute. 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."

[163 A.3d 4] *Texas v. Johnson*, 491 U.S. 397, 414, 109 S.Ct. 2533, 105 L.Ed.2d 342 (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." (Internal quotation marks omitted.) *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573, 62 S.Ct. 766, 86 L.Ed. 1031 (1942). The broad language of Connecticut's breach of the peace statute; see footnote 1 of this opinion; has been limited accordingly. See *State v. Indrisano*, 228 Conn. 795, 812, 640 A.2d 986

(1994). Because the words spoken by the defendant were not likely to provoke a violent response under the circumstances in which they were uttered, they cannot be proscribed
Page 235
consistent with the first amendment. Accordingly, we reverse the judgment of the trial court.[2]

The jury reasonably could have found the following facts. On the evening of September 30, 2013, the defendant telephoned the Stop & Shop supermarket in Vernon to announce that she was coming to pick up a Western Union money transfer so they would not close the customer service desk before she arrived. The defendant spoke with Tara Freeman, an experienced assistant store manager who was in charge of the daily operations at the supermarket, which spanned approximately 65,000 square feet. Freeman informed the defendant that the customer service desk already had closed and that she was unable to access the computer that processed Western Union transactions. The defendant became belligerent, responded that she " really didn't give a shit," and called Freeman " [p]retty much every swear word you can think of" before the call was terminated.

Despite Freeman's statements to the contrary, the defendant believed that as long as she arrived at the supermarket before 10 p.m., she should be able to obtain the money transfer before the customer service desk closed. Accordingly, a few minutes after she telephoned, the defendant arrived at the supermarket, which was occupied by customers and employees. The defendant proceeded toward the customer service desk located in proximity to the registers for grocery checkout and began filling out a money transfer form, even though the lights at the desk were off. Freeman approached the defendant, a forty year old woman who used a cane due to a medical condition that caused severe swelling in her lower extremities, and asked her
Page 236
if she was the person who had called a few minutes earlier. Although the defendant denied that she had called, Freeman recognized her voice. After Freeman informed the defendant, as she had during the telephone call, that the customer service desk was closed, the defendant became angry and asked to speak with a manager. Freeman replied that she was the manager and pointed to her name tag and a photograph on the wall to confirm her status. Some employees, including the head of the cashier department, Sarah Luce, were standing nearby as this exchange took place.

The defendant proceeded to loudly call Freeman a " fat ugly bitch" and a " cunt," [3] and said " fuck you, you're not a manager," all while gesticulating with her cane.
[163 A.3d 5] Despite the defendant's crude and angry expressions directed at her, Freeman remained professional. She simply responded, " [h]ave a good night," which prompted the defendant to leave the supermarket.

Thereafter, the defendant was arrested and charged with breach of the peace in the second degree.[4] Following a jury trial, the defendant was convicted of that charge and sentenced to twenty-five days incarceration. The defendant appealed, and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-2.

On appeal, the defendant claims that the evidence was insufficient to support her conviction of breach of
Page 237

the peace in the second degree because the words she uttered to Freeman did not constitute fighting words. Although the defendant asserts that her speech is protected under the first amendment to the federal constitution, her principal argument is that we should construe article first, § § 4 and 5, of the Connecticut constitution to provide greater free speech protection than the first amendment so as to limit the fighting words exception to express invitations to fight. We conclude that it is unnecessary to decide whether the state constitution would afford greater protection because the evidence was plainly insufficient to support the defendant's conviction under settled federal constitutional jurisprudence.[5]

This court has not considered the scope and application of the fighting words exception for more than two decades. See *State v. Szymkiewicz*, 237 Conn. 613, 678 A.2d 473 (1996). Accordingly, it is appropriate for us to consider the exception's roots and its scope in light of more recent jurisprudential and societal developments.

The fighting words exception was first articulated in the seminal case of *Chaplinsky v. New Hampshire*, supra, 315 U.S. 568. After noting that the right of free speech is not absolute, the United States Supreme Court broadly observed: " There are certain well-defined and

Page 238

narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any [c]onstitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words--those which by their very utterance inflict injury or tend to incite an immediate **[163 A.3d 6]** breach of the peace." (Footnote omitted.) *Id.,* 571-72.

Unlike George Carlin's classic 1972 comedic monologue, " Seven Words You Can Never Say on Television," [6] it is well settled that there are no per se fighting words. See *Downs v. State* , 278 Md. 610, 615, 366 A.2d 41 (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" ; (internal quotation marks omitted) *Chaplinsky v. New Hampshire*, supra, 315 U.S. 569, 574; subsequent case law eschewed the broad implications of such a per se approach. See *People v. Stephen*, 153 Misc.2d 382, 387, 581 N.Y.S.2d 981 (1992) (" [w]hile the original *Chaplinsky* formulation of 'fighting words' may have given some impression of establishing a category of words which could be proscribed regardless of the context in which they were used, developing [f]irst [a]mendment doctrine in the half century since *Chaplinsky* was decided has continually resorted to analyzing provocative expression contextually"); see also *Texas v. Johnson*, supra, 491 U.S. 409; *Gooding v. Wilson*, 405 U.S. 518, 525, 92 S.Ct. 1103, 31 L.Ed.2d 408 (1972); *Cohen v. California*, 403 U.S. 15, 20, 23, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971); L. Tribe, American Constitutional Law (2d Ed. 1988) § 12-10, pp. 850-51. Rather, " words may or may not be 'fighting words,' depending upon the circumstances of their utterance." *Lewis v. New Orleans*, 415 U.S. 130, 135,

Page 239

94 S.Ct. 970, 39 L.Ed.2d 214 (1974) (Powell, J., concurring); see *R. A. V. v. St. Paul*, 505 U.S. 377, 432, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992) (Stevens, J., concurring) (" [w]hether words are fighting words is determined in part by their context"); *Hammond v. Adkisson*, 536 F.2d 237, 239 (8th Cir. 1976) (first amendment requires " determination that the words were used 'under such

circumstances' that they were likely to arouse to immediate and violent anger the person to whom the words were addressed" [emphasis omitted]); *State v. Szymkiewicz*, supra, 237 Conn. 620 (considering both " the words used by the defendant" and " the circumstances in which they were used"); *State v. Hoskins*, 35 Conn.Supp. 587, 591, 401 A.2d 619 (1978) (" The 'fighting words' concept has two aspects. One involves the quality of the words themselves. The other concerns the circumstances under which the words are used.").

This context based view is a logical reflection of the way the meaning and impact of words change over time. See *R.I.T. v. State*, 675 So.2d 97, 99 (Ala.Crim.App. 1995); *People v. Stephen*, supra, 153 Misc.2d 387; *State v. Harrington*, 67 Or.App. 608, 613 n.5, 680 P.2d 666, cert. denied, 297 Or. 547, 685 P.2d 998 (1984); see also *Towne v. Eisner*, 245 U.S. 418, 425, 38 S.Ct. 158, 62 L.Ed. 372, T.D. 2634, 15 Ohio L.Rep. 562 (1918) (" [a] word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used"). 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 **[163 A.3d 7]** immediately respond with physical violence is highly problematic." (Emphasis in

Page 240

original.) *State v. Tracy*, 200 Vt. 216, 237, 130 A.3d 196 (2015); accord *People ex rel. R.C.*, 2016 COA 166, 2016 WL 6803065, *4 (Colo.App. 2016). 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. See *Texas v. Johnson*, supra, 491 U.S. 409; *Lewis v. New Orleans*, supra, 415 U.S. 135 (Powell, J., concurring); *Gooding v. Wilson*, supra, 405 U.S. 528; *Cohen v. California*, supra, 403 U.S. 20, 23. This necessarily includes a consideration of a host of factors.

For example, the manner and circumstances in which the words were spoken bears on whether they were likely to incite a violent reaction. Even the court in *Chaplinsky* acknowledged that words which are otherwise profane, obscene, or threatening might not be deemed fighting words if said with a " 'disarming smile.'" *Chaplinsky v. New Hampshire*, supra, 315 U.S. 573; see also *Lamar v. Banks*, 684 F.2d 714, 718-20 (11th Cir. 1982) (remanding for evidentiary hearing because there was no factual record as to circumstances in which alleged fighting words were made, noting that " the tone of voice may have been jocular rather than hostile, and we do not know . . . what the rest of the conversation was like"); *State v. Harrington*, supra, 67 Or.App. 613 n.5 (" Forms of expression vary so much in their contexts and inflections that one cannot specify particular words or phrases as being always fighting. What is gross insult in one setting is crude humor in

Page 241

another." [Internal quotation marks omitted.]). The situation under which the words are uttered also impacts the likelihood of a violent response. See, e.g., *Klen v. Loveland*, 661 F.3d 498, 510 (10th Cir. 2011) (considering that words were spoken in context of plaintiffs' attempts to obtain building permit and that city employee addressees " did not consider the . . . behavior particularly shocking or memorable, given the rough-and-tumble world of the construction trade"); *People v. Prisinzano* , 170 Misc.2d 525, 531-32, 648 N.Y.S.2d 267 (1996) (considering that words were spoken by union worker to several replacement workers during course of labor dispute); *Seattle v. Camby*, 104 Wn.2d 49, 54, 701 P.2d 499 (1985) (en banc) (" Looking at the actual situation presented in this case, we find an intoxicated defendant being escorted out of a restaurant by a mild mannered, unaroused doorman-host with a police officer present. Given the specific context in which the words were spoken, it was not plainly likely that a breach of the peace would occur."). Thus, whether the words were preceded by a hostile exchange or accompanied by aggressive behavior will bear on the likelihood of such a reaction. See *State v. Szymkiewicz*, supra, 237 Conn. 615-16; *Landrum v. Sarratt*, 352 S.C. 139, 143, 572 S.E.2d 476 (App. 2002); see also *State v. James M.*, 1990- NMCA 135, 111 N.M. 473, 476, 806 P.2d 1063 (App. 1990) (noting that fighting words were uttered during course of hostile argument), cert. denied, 111 N.M. 529, 807 P.2d 227 (1991); *In re S.J.N-K.*, 2002 SD 70, 647 N.W.2d 707, 709 (S.D. 2002) (noting that **[163 A.3d 8]** fighting words were uttered in course of speaker's vehicle tailgating addressee's vehicle as latter drove away from scene).

A proper examination of context also considers those personal attributes of the speaker and the addressee that are reasonably apparent because they are necessarily a part of the objective situation in which the speech was made. See *In re Nickolas S.*, 226 Ariz. 182, 188, 245 P.3d 446

Page 242

(2011); *State v. John W.*, 418 A.2d 1097, 1104 (Me. 1980); *Seattle v. Camby*, supra, 104 Wn.2d 54. Courts have, for example, considered the age, gender, race, and status of the speaker. See, e.g., *Lewis v. New Orleans*, supra, 415 U.S. 135 (Powell, J., concurring) (" [i]t is unlikely . . . that the words said to have been used . . . would have precipitated a physical confrontation between the middle-aged woman who spoke them and the police officer in whose presence they were uttered"); *Hammond v. Adkisson*, supra, 536 F.2d 240 (" the trier of fact might well conclude . . . that there was no likelihood that a [nineteen year old] young woman's words would provoke a violent response from the particular officer involved"); *In re Nickolas S.*, supra, 188 (determining there was no likelihood of violent response when student addressed coarse remark to teacher in classroom); *In re Spivey*, 345 N.C. 404, 414-15, 480 S.E.2d 693 (1997) (holding that racial slur directed at African-American man by white man will cause " hurt and anger" and " often provoke him to confront the white man and retaliate"). Indeed, common sense would seem to suggest that social conventions, as well as special legal protections, could temper the likelihood of a violent response when the words are uttered by someone less capable of protecting themselves, such as a child, a frail elderly person, or a seriously disabled person.[7]

Page 243

Although the United States Supreme Court has observed that the speech must be of such a

nature that it is " likely to provoke the *average* person to retaliation" ; (emphasis added; internal quotation marks omitted) *Texas v. Johnson*, supra, 491 U.S. 409; when there are objectively apparent characteristics that would bear on the likelihood of such a response, many courts have considered the average person with those characteristics. Thus, courts also have taken into account the addressee's age, gender, and race. See, e.g., *Bethel v. City of Mobile*, Docket No. 10-0009-CG-N, 2011 WL 1298130, *7 (S.D. Ala. April 5, 2011) (" [t]here can be little doubt that repeatedly calling a [thirteen year old] girl a 'whore' and a 'slut' in the presence of the girl's mother serves no purpose other than to provoke a confrontation"); *In re John M.*, 201 Ariz. 424, 428, 36 P.3d 772 (App. 2001) (holding that racial slurs were " likely to provoke a violent reaction when addressed to an ordinary citizen of African-American descent"); *Svedberg v. Stamness*, 525 N.W.2d 678, 684 (N.D. 1994) (observing that " it is proper to **[163 A.3d 9]** consider the age of the addressee when determining the contextual setting" and that " [n]o one would argue that a different reaction is likely if a [thirteen year old] boy and a [seventy-five year old] man are confronted with identical fighting words"); see also *People ex rel. R.C.*, supra, 2016 COA 166, 2016 WL 6803065, *7 (concluding that " the average person--even an average [fourteen year old]--would not be expected to fly into a violent rage upon being shown a photo of himself with a penis drawn over it").

Similarly, because the fighting words exception is concerned with the likelihood of violent retaliation, it properly distinguishes between the average citizen and those addressees who are in a position that carries with it an expectation of exercising a greater degree of restraint. In *Lewis v. New Orleans*, supra, 415 U.S. 135, Justice Powell, in concurrence, suggested that " a properly

Page 244

trained [police] 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." (Internal quotation marks omitted.) The Supreme Court later recognized the legitimacy of this principle, observing that the fighting words exception " might require a narrower application in cases involving words addressed to a police officer" for the reason articulated by Justice Powell.[8] *Houston v. Hill*, 482 U.S. 451, 462, 107 S.Ct. 2502, 96 L.Ed.2d 398 (1987). The Supreme Court did not have occasion to formally adopt the narrower standard in either *Lewis* or *Hill* because those cases turned on facial challenges, not as applied challenges that would require analyzing the speaker and the police officer addressee. Nevertheless, a majority of courts, including ours, hold police officers to a higher standard than ordinary citizens when determining the likelihood of a violent response by the addressee. See, e.g., *State v. Williams*, 205 Conn. 456, 474 n.7, 534 A.2d 230 (1987); *State v. Nelson*, 38 Conn.Supp. 349, 354, 448 A.2d 214 (1982); *Harbin v. State*, 358 So.2d 856, 857 (Fla.App. 1978); *State v. John W.*, supra, 418 A.2d 1104.

Page 245

The Supreme Court has not weighed in on the question of whether positions other than police officers could carry a greater expectation of restraint than the ordinary citizen. Indeed, since *Texas v. Johnson*, supra, 491 U.S. 409, the Supreme Court has not considered the fighting words exception as applied to any addressee in more than twenty-five years. Nevertheless, several

courts have considered as part of the contextual inquiry whether the addressee's position **[163 A.3d 10]** would reasonably be expected to cause him or her to exercise a higher degree of restraint than the ordinary citizen under the circumstances. See, e.g., *In re Nickolas S.*, supra, 226 Ariz. 188 (" we do not believe that [the student's] insults would likely have provoked an ordinary teacher to 'exchange fisticuffs' with the student or to otherwise react violently"); *In re Louise C.*, 197 Ariz. 84, 86, 3 P.3d 1004 (App. 1999) (juvenile's derogatory language to principal did not constitute fighting words because " [it] was not likely to provoke an ordinary citizen to a violent reaction, and it was less likely to provoke such a response from a school official"); *State v. Tracy*, supra, 200 Vt. 238 n.19 (determining that " average person in the coach's position would [not] reasonably be expected to respond to [the] defendant's harangue with violence" where defendant was parent of player on coach's junior high school girls' basketball team); but see *People v. Stephen*, supra, 153 Misc.2d 390 (distinguishing earlier fighting words case involving defendant commenting to both police officer and private security guard, latter being " a civilian from whom [the remarks] might conceivably have evoked a retaliatory response").

In sum, these cases affirm the fundamental principle that there are no per se fighting words; rather, courts must determine on a case-by-case basis all of the circumstances relevant to whether a reasonable person in the position of the actual addressee would have been likely to respond with violence. This principle is consistent

Page 246

with the contextual approach taken when considering other categories of speech deemed to fall outside the scope of first amendment protection, such as true threats and incitement. See, e.g., *State v. Krijger*, 313 Conn. 434, 450, 97 A.3d 946 (2014) (" In the context of a threat of physical violence, [w]hether a particular statement may properly be considered to be a [true] threat is governed by an objective standard--whether a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm or assault. . . . [A]lleged threats should be considered in light of their entire factual context, including the surrounding events and reaction of the listeners." [Internal quotation marks omitted.]); id., 453-54 (" [a]n important factor to be considered in determining whether a facially ambiguous statement constitutes a true threat is the prior relationship between the parties"); *In re S.W.*, 45 A.3d 151, 157 (D.C. 2012) (" [A] determination of what a defendant actually said is just the beginning of a threats analysis. Even when words are threatening on their face, careful attention must be paid to the context in which those statements are made to determine if the words may be objectively perceived as threatening."); see also *Texas v. Johnson*, supra, 491 U.S. 409 (in considering whether public burning of American flag constituted unprotected incitement, Supreme Court observed that " we have not permitted the government to assume that every expression of a provocative idea will incite a riot, but have instead required careful consideration of the *actual circumstances* surrounding such expression, asking whether the expression is directed to inciting or producing imminent lawless action and is likely to incite or produce such action" [emphasis added; internal quotation marks omitted]).

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 **[163 A.3d 11]** addressee, e.g., occupation, in considering whether he or she is more or less likely to respond with immediate violence. *See, e.g.*, *State v. Robinson*, 2003 MT 364, 319 Mont. 82, 87, 82 P.3d 27 (2003) (declining to apply heightened standard to police officers); *State v. Matthews*, 111 A.3d 390, 401 n.12 (R.I. 2015) (same). 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." *People v. Prisinzano*, supra, 170 Misc.2d 529. 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 . . . ." [9] *Lamar v. Banks*, supra,

684 F.2d 718; see also S. Gard, " Fighting Words as Free Speech," 58 Wash. U. L.Q. 531, 558 (1980) (" [I]t is certainly consistent with an objective [fighting words] test to apply a more specific standard of 'the ordinary reasonable police officer' in appropriate situations. Indeed, the adoption of a standard of the ordinary reasonable professional has never been deemed inconsistent with an objective standard of liability." [Footnote omitted.]); cf. *State v. Krijger*, supra, 313 Conn. 450 (describing " objective" standard for analyzing true threats considering " their entire factual context, including the surrounding events and reaction of the listeners" [internal quotation marks omitted]).

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* . (Internal quotation marks omitted.) *Cohen v. California*, supra, 403 U.S. 23; see also *Gooding v. Wilson*, supra, 405 U.S. 528 (declaring statute facially overbroad because, as construed, it was applicable " to utterances where there was no likelihood that the person addressed would make an immediate violent response"). Because the fighting words exception is concerned only with preventing the likelihood of actual violence, an approach ignoring the circumstances of the addressee is antithetical and simply unworkable. For example, applying **[163 A.3d 12]** such an approach in this case would require us to engage in the following legal fiction: although Freeman was insulted on the basis of her gender, appearance, and apparent suitability for her position as a store manager, the fact finder would be

required to assess how some hypothetical " ordinary" addressee with no apparent gender,

appearance, or profession would likely respond. See F. Kobel, " The Fighting Words Doctrine--Is There a Clear and Present Danger to the Standard?," 84 Dick. L.Rev. 75, 94 (1979) (describing average addressee standard, which emphasizes words themselves, as " an attractive one because of its equitable overtones," but nevertheless " inherently faulty" because " [a]bsent from the standard is criteria by which to judge what is average").

Finally, as alluded to previously in this opinion, the fighting words exception is not concerned with creating symmetrical free speech rights by way of establishing a uniform set of words that are constitutionally proscribed. See *Cohen v. California*, supra, 403 U.S. 22-23 (rejecting as " untenable" idea that " [s]tates, acting as guardians of public morality, may properly remove [an] offensive word from the public vocabulary"). Rather, because 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. See *Conkle v. State*, 677 So.2d 1211, 1217 (Ala.Crim.App. 1995) (" [P]resumably, statements made to classes of victims who may not be perceived as persons who would likely respond with physical retaliation . . . may seem to require a higher level of 'low speech' to constitute 'fighting words.' However, this possible discrimination as to victims is explainable in that the purpose . . . is to ensure public safety and public order."); A. Wertheimer, note, " The First Amendment Distinction between Conduct and Content: A Conceptual Framework for Understanding Fighting Words Jurisprudence," 63 Fordham L.Rev. 793, 815-16 (1994) (applying standard of reasonable person in position of actual

Page 250

addressee " is consistent with the idea that words themselves are innocent until exploited in circumstances where particular addressees are likely to retaliate"); note, " The Demise of the *Chaplinsky* Fighting Words Doctrine: An Argument for Its Interment," 106 Harv. L.Rev. 1129, 1136 (1993) (" [b]ecause the [Supreme] Court is concerned with the likelihood that speech will actually produce violent consequences, it logically distinguishes between addressees who are more or less prone to respond with violence").

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. Indeed, one matter on which both parties agree is that our inquiry must focus on the perspective of an average store manager in Freeman's position. With this framework in place to guide a proper, contextual analysis, we turn to the issue in the present case.

In considering the defendant's challenge to the sufficiency of the evidence to support her conviction of breach of the peace in the second degree in accordance with her first amendment rights, we apply a two part test. First, as reflected in the **[163 A.3d 13]** previous recitation of facts, we construe the evidence in the light most favorable to sustaining the verdict. See *State v. Cook*, 287 Conn. 237, 254, 947 A.2d 307, cert. denied, 555 U.S. 970, 129 S.Ct. 464, 172 L.Ed.2d 328

(2008). Second, we determine whether the trier of fact could have concluded from those facts and reasonable inferences drawn therefrom that the cumulative force of the evidence established guilt beyond a reasonable doubt. See id. Accordingly,

Page 251

to establish the defendant's violation of § 53a-181 (a) (5); see footnote 1 of this opinion; in light of its constitutional gloss, the state was required to prove beyond a reasonable doubt that the defendant's words were likely to provoke an imminent violent response from an average store manager in Freeman's position. Cf. *State v. Krijger*, supra, 313 Conn. 448 (" [t]o establish the defendant's violation of [General Statutes (Rev. to 2007)] § § 53a-62 [a] and 53a-181 [a] on the basis of his statements to [the town attorney], the state was required to prove beyond a reasonable doubt that those statements represented a true threat").

" In cases where [the line between speech unconditionally guaranteed and speech which may be legitimately regulated] must be drawn, the rule is that we examine for ourselves the statements in issue and the circumstances under which they were made to see" if they are consistent with the first amendment. (Internal quotation marks omitted.) *State v. DeLoreto*, 265 Conn. 145, 153, 827 A.2d 671 (2003); see also *DiMartino v. Richens*, 263 Conn. 639, 661, 822 A.2d 205 (2003) (" inquiry into the protected status of . . . speech is one of law, not fact" [internal quotation marks omitted]). We undertake an independent examination of the record as a whole to ensure " that the judgment does not constitute a forbidden intrusion on the field of free expression." (Internal quotation marks omitted.) *State v. DeLoreto*, supra, 153.

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

Page 252

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*." (Emphasis in original.) *State v. Krijger*, 130 Conn.App. 470, 485, 24 A.3d 42 (2011) (*Lavine, J.*, dissenting), rev'd, 313 Conn. 434, 97 A.3d 946 (2014) (adopting Appellate Court dissent's position). Uttering a cruel or offensive word is not a crime unless it would tend to provoke a reasonable person in the addressee's position to immediately retaliate with violence under the circumstances. See *People ex rel. R.C.*, supra, 2016 COA 166, 2016 WL 6803065, *6-7 (concluding that mere utterance of " 'cocksucker,'" although vulgar and profane, did not constitute fighting words). Given the context of the defendant's remarks, we cannot conclude that the insults were " akin to dropping a match into a pool of gasoline." *State v. Tracy*, supra, 200 Vt. 237.

Several factors bear on our conclusion that the state did not prove beyond a reasonable doubt that Freeman was likely to retaliate with violence. We begin with the fact that the confrontation in the supermarket did not happen in a vacuum; it was preceded by a telephone call in which the defendant was belligerent and used **[163 A.3d 14]** many of the " swear word[s]" that she would later say to Freeman in person. After the defendant arrived at the supermarket a few

minutes later, Freeman correctly surmised that she was the woman who had just called. Consequently, when Freeman approached the defendant to reiterate a message that she knew the defendant did not want to hear, Freeman reasonably would have been aware of the possibility that a similar barrage of insults, however unwarranted, would be directed at her. Freeman's position of authority at the supermarket, however, placed her in a role in which she had to approach the defendant.

In addition, as the store manager on duty, Freeman was charged with handling customer service matters.

Page 253

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 de-escalating 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

Page 254

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." Although the reaction of the addressee is not dispositive; see *Lamar v. Banks*, supra, 684 F.2d 718-19; it is probative of the likelihood of a violent reaction. See *Klen v. Loveland*, supra, 661 F.3d 510 (" [t]he reaction of actual hearers of the words constitutes significant probative evidence concerning whether the speech was inherently likely to cause a violent reaction"); *Seattle v. Camby*, supra, 104 Wn.2d 54 (" the addressee's reaction or failure to react is not the sole criteria, but is a factor to

be considered in evaluating the actual situation in which the words were spoken"). There is no reason to believe that Freeman's reaction was uncharacteristic of **[163 A.3d 15]** a reasonable professional in a like situation. Therefore, on the basis of our independent review of the record, we cannot conclude that an average store manager in Freeman's position would have responded to the defendant's remarks with imminent violence.

Nonetheless, the state contends that " courts in sister states and in Connecticut have found comparable abusive epithets to constitute 'fighting words' where they have been directed at police officers who, because they are 'properly trained,' 'may reasonably be expected to exercise a higher degree of restraint than the average citizen,'" quoting this court's decision in *State v. Szymkiewicz*, supra, 237 Conn. 620 n.12, as one such example. We disagree that this case law is sufficiently relevant or persuasive. We observe that all of the cases cited were decided two or three decades ago, and therefore do not consider case law recognizing that public sensitivities have been dulled to some extent by the

Page 255

devolution of discourse.[10] With regard to *Szymkiewicz*, a case not involving words directed at a police officer, although there are superficial factual similarities to the present case in that the expletive fuck you was directed at an employee of a Stop & Shop supermarket; id., 615; that is where the similarities end. Significantly, the majority in *Szymkiewicz* pointed to a " heated exchange" that had ensued between the store detective and the defendant after the former accused the latter of shoplifting and to a threatening remark directed to the store detective as part of the " cumulative" evidence supporting the application of the fighting words exception. *Id.,* 623. Thus, the majority's conclusion in that case is consistent with others that considered whether the words at issue were preceded by a hostile exchange or accompanied by aggressive behavior when determining the likelihood of a violent reaction. See *State v. James M.*, supra, 111 N.M. 476; *Landrum v. Sarratt*, supra, 352 S.C. 143; *In re S.J.N-K.*, supra, 647 N.W.2d 709. Indeed, precisely for these reasons, the defendant in *Szymkiewicz* was convicted under a different subdivision of the breach of the peace statute than the one at issue in the present case; see *State v. Szymkiewicz*, supra, 614; requiring the defendant to have engaged " in fighting or in violent, tumultuous or threatening behavior . . . ." General Statutes § 53a-181 (a) (1).

Page 256

Insofar as there is dictum in a footnote in *Szymkiewicz* suggesting that, in order for the heightened expectation of restraint applicable to police officers to apply to another type of addressee, the addressee must have received the same level of training as that of a police officer; see *State v. Szymkiewicz*, supra, 237 Conn. 620 n.12; we need not consider the propriety of that conclusion. We do not rest our decision on the nature of the training received by the average supermarket manager; rather, we focus on **[163 A.3d 16]** the expectations attendant to such positions under the particular circumstances of the present case. We observe that the court in *Szymkiewicz* recognized that it did not have the benefit of briefing on this issue, as the defendant had made no such claim. See id. We further observe that the court in *Szymkiewicz* relied on the actual training afforded to the particular store detective, a focus that appears to be in tension with the established

objective standard of the average listener in the addressee's position. Cf. *In re Nickolas S.*, supra, 226 Ariz. 188 (considering how ordinary teacher would respond to insults from student in classroom setting). Accordingly, *Szymkiewicz* does not dictate a contrary conclusion.

In sum, the natural reaction of an average person in Freeman's position who is confronted with a customer's profane outburst, unaccompanied by any threats, would not be to strike her. We do not intend to suggest that words directed at a store manager will never constitute fighting words. Rather, we simply hold that under these circumstances the defendant's vulgar insults would not be likely to provoke violent retaliation. Because the defendant's speech does not fall within the narrow category of unprotected fighting words, her conviction of breach of the peace in the second degree on the basis of pure speech constitutes a violation of the first amendment to the United States constitution.

Page 257

The judgment is reversed and the case is remanded with direction to render a judgment of acquittal.

In this opinion PALMER, ROBINSON and D'AURIA, Js., concurred.

CONCUR

EVELEIGH (In Part)

DISSENT

EVELEIGH, J., with whom ROGERS, C. J., and ESPINOSA, J., join, concurring in part and dissenting in part.

I respectfully dissent from the majority's conclusion that the speech at issue in the present case did not constitute unprotected fighting words under the first amendment to the United States constitution. In my view, *State v. Szymkiewicz*, 237 Conn. 613, 678 A.2d 473 (1996), is binding on this court. Indeed, the facts underlying present case, in my view, provide even stronger support for a breach of peace conviction. Furthermore, the defendant, Nina C. Baccala, represented to this court in her brief that she " does not . . . challenge . . . the scope of the fighting words exception under the first amendment." We should take her at her word. While I acknowledge that the defendant has argued that this court should do its own analysis under the first amendment, she never retracted this position. The briefing was cast in the light of a claim that our state constitution provided greater protection than the federal constitution and, accordingly, contained an analysis pursuant to this court's opinion in *State v. Geisler*, 222 Conn. 672, 684-86, 610 A.2d 1225 (1992). The majority does not deem such an analysis necessary in view of its position that the first amendment controls. I am of the opinion that the briefing of this issue was woefully inadequate for a constitutional claim. Therefore, I would not have reached that issue. Further, after conducting an analysis under *Geisler*, I would conclude that our state constitution does not afford greater protection then the federal constitution. In the final section, I agree with the defendant that the charge was not sufficient on the issue of imminence and, therefore, I

Page 258

would reverse the trial court's judgment and remand the case for a new trial.

I

FIRST AMENDMENT ANALYSIS

The jury reasonably could have found the following facts. On the evening of September **[163 A.3d 17]** 30, 2013, the defendant drove to a grocery store in Vernon with the intention of retrieving a money transfer. Prior to arriving at the store, the defendant phoned ahead to inquire whether she would be able to retrieve the money transfer.[1] After arriving at the store, the defendant proceeded to the service desk where she began to fill out a money transfer form. Tara Freeman, an assistant manager at the store, approached the defendant and informed her that she would be unable to retrieve her money transfer because she lacked the authority to access the money transfer machine. The defendant became very upset and asked to speak to the manager. Freeman replied that she was the manager, pointing to her name tag and picture on the wall as proof. At this point, the defendant became belligerent, raised her cane toward Freeman,[2] and began directing every swear word " in the book" at Freeman. The defendant said " fuck you" to Freeman, stated that Freeman was not the manager, and called

Page 259

Freeman a " fat ugly bitch" and a " cunt." The defendant, who did not substantially controvert this account of her tirade,[3] testified that she directed such language at Freeman because she felt hurt as a result of purportedly being misled about the availability of money order services and " was trying to hurt back." Freeman replied by saying " have a good night" to the defendant, who responded by mumbling and saying some " choice words" as she departed the store. The entire encounter lasted between fifteen and twenty minutes.

After an investigation by the police, the defendant was arrested and charged with, inter alia, [4] breach of the peace in the second degree in violation of General Statutes § 53a-181 (a) (5). The case was tried to a jury, which rendered a verdict of guilty on that charge. The trial court rendered a corresponding judgment of conviction and **[163 A.3d 18]** sentenced the defendant to twenty-five days of incarceration.

In my view, even if this court were to reach the merits of a claim under the first amendment, it should fail. Indeed, it is readily apparent that the defendant did not raise such a claim under the federal constitution as an

Page 260

alternative to her state constitutional analysis because *State v. Szymkiewicz*, supra, 237 Conn. 613, would be dispositive of such a claim.

The facts of *Szymkiewicz* 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. *Id.,* 615. The detective asked the defendant to accompany her to the store manager's office on the mezzanine level. *Id*. In the office, the detective accused the defendant of shoplifting certain items from the store. *Id*. Upon hearing the accusation, the defendant " became loud and abusive," and, consequently, the police were called. (Internal quotation marks omitted.) *Id*. After arriving and conducting a brief investigation, a police officer arrested the defendant for shoplifting. *Id*. The officer handcuffed the defendant and led her down the stairs. *Id*. 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. (Internal quotation marks omitted.) *Id*. In addition, she said the

following to the store detective: " You fucking bitch. I hope you burn in hell for all eternity." (Internal quotation marks omitted.) *Id.,* 616. She also made an unspecified threat to the store detective. *Id*. It was also observed that a crowd had begun to form at the bottom of the stairs. *Id.,* 623. On the basis of those facts, the defendant was convicted of violating § 53a-181 (a) (1).[5]

Page 261

In affirming the breach of the peace conviction, this court concluded that the defendant's speech constituted fighting words. *Id*. 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. *Id*. The defendant was described as " heated," made an unspecified threat,[6] and directed her hateful, provocative language to those around her as she was escorted outside. *Id*. Because the test is whether the speech would have caused an average person to respond with violence, the court did not discuss the circumstances of the addressees or the extent to which such circumstances implicated the likelihood of the addressees to respond with immediate violence. *Id.,* 620-24.

In the present case, even if the defendant had adequately briefed her sufficiency of the evidence claim under the federal **[163 A.3d 19]** fighting words standard, on the basis of *Szymkiewicz*, I would conclude that the evidence is sufficient to sustain a conviction. The defendant, in a belligerent and angry manner, used harsh and scornful language designed to debase Freeman. The defendant insulted Freeman on the basis of her gender, body composition, and apparent suitability for her position as a manager of the store. The defendant said " fuck you" to Freeman and called her a " fat ugly bitch." The defendant also used the word " cunt," which is generally recognized as a powerful, offensive, and vile term. During this encounter, the defendant gesticulated her cane at Freeman. Freeman testified that, as a result of her encounter with the defendant, both inside the store and as the result of a later telephone call, she was provided additional security. I would conclude, consistent with *Szymkiewicz*, that the evidence was sufficient to sustain the defendant's conviction.

Page 262

The majority, however, despite the fact that the defendant disclaimed a first amendment argument, reverses the judgment of conviction on that basis. I do not dispute that the factual circumstances surrounding the speech at issue are relevant. See *State v. Szymkiewicz*, supra, 237 Conn. 620 (" the words used by the defendant here and the circumstances in which they were used classify them as 'fighting words'"). The majority's granular level dissection of the circumstances of the addressee in the present case, however, is inconsistent with our case law and is maladapted to the nature of fighting words. From its inception, the federal fighting words standard has embraced a context based approach to determining whether speech constitutes fighting words. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573, 62 S.Ct. 766, 86 L.Ed. 1031 (1942) (noting that certain speech may constitute fighting words when " said without a disarming smile" [internal quotation marks omitted]). Nevertheless, the test is whether the language would provoke an " average person" to respond with immediate violence. (Internal quotation marks omitted.) *Texas v.*

Johnson, 491 U.S. 397, 409, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989); see also *State v. Szymkiewicz*, supra, 237 Conn. 620. Context is, of course, critical to understanding what the speaker is expressing. First and foremost, the fighting words must be personally provocative. See *Cohen v. California*, 403 U.S. 15, 20, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971) (noting that speech was not used " in this instance" in personally provocative manner). Directing the words " fuck the draft" to no one in particular and burning a flag are examples of speech that, in context, would not be deemed unprotected fighting words because such speech is not the communication of a personally provocative insult. *Texas v. Johnson*, supra, 398; see also *Cohen v. California*, supra, 20. When the abusive language is directed to a particular person, the level of

Page 263

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. See *In re Spivey*, 345 N.C. 404, 414, 480 S.E.2d 693 (1997) (" [n]o fact is more generally known than that a white man who calls a black man a 'nigger' within his hearing will hurt and anger the black man and often provoke him to confront the white man and retaliate"). Context is necessary to determine if and to **[163 A.3d 20]** what extent speech is offensive and provocative to the addressee.

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. See *Hershfield v. Commonwealth*, 14 Va.App. 381, 384, 417 S.E.2d 876, 8 Va. Law Rep. 2867 (1992) (distance and barriers between defendant and addressee precluded immediate violent reaction); see also *Anniskette v. State*, 489 P.2d 1012, 1014-15 (Alaska 1971) (finding abusive language uttered to state police officer over phone not fighting words); *State v. Dugan*, 2013 MT 38, 369 Mont. 39, 54, 303 P.3d 755 (holding speech not to be fighting words when defendant called victim services advocate " 'fucking cunt'" over the phone), cert. denied, __ U.S. __, 134 S.Ct. 220, 187 L.Ed.2d 143 (2013). Without this physical proximity, there is simply no threat of immediate violence from abusive language.

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

Page 264

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." (Emphasis added; internal quotation marks omitted.) *Lewis v. New Orleans*, 415 U.S. 130, 135, 94 S.Ct. 970, 39 L.Ed.2d 214 (1974). Thirteen years later, Justice Brennan, writing for the court, took note of Justice Powell's suggestion, but couched his language in extreme caution. *Houston v. Hill*, 482

U.S. 451, 462, 107 S.Ct. 2502, 96 L.Ed.2d 398 (1987). Far from embracing a narrower rule for speech directed at police officers, the court observed that " in *Lewis*, Justice Powell *suggested* that even the fighting words exception recognized in *Chaplinsky*. . . *might* require a narrower application in cases involving words addressed to a police officer, because a properly trained officer *may* reasonably be expected to exercise a higher degree of restraint than the average citizen . . . ." (Emphasis added; internal quotation marks omitted.) *Id*. The court demonstrated this reluctance for a narrower application despite stressing the importance of individual freedom to challenge police action. See id., 462-63. (" [t]he freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state"). Nevertheless, this court has expressly adopted a narrower application of the fighting words standard for speech addressed to police officer, at least with respect to § 53a-181 (a) (3). See *State v. DeLoreto*, 265 Conn. 145, 169, 827 A.2d 671 (2003).[7]

[163 A.3d 21]

Page 265

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*, 78 Conn.App. 98, 110, 826 A.2d 192, cert. denied, 266 Conn. 903, 832 A.2d 65 (2003); see also *State v. Swoboda*, 658 S.W.2d 24, 26 (Mo. 1983) (" such words must be likely to incite the *reflexive* response in the person to whom, individually, the remark is addressed" [emphasis added]). 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. For this reason, a post hoc analysis of the circumstances of the addressee will not accurately

Page 266

reflect whether an ordinary person would reflexively respond with some degree of violence[8] to a defendant's abusive language.

There is simply no evidence in the record regarding what the average store manager knows or does not know. It is interesting that the majority uses the store as a line of demarcation, noting 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 [store], depending on the circumstances presented." Such a demarcation was never mentioned in *Szymkiewicz*. The majority further concludes that " 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" and that " [i]t would be considerably more unlikely for a person in Freeman's position . . . to respond with a physical act of violence." It is interesting that the jury in the present case found precisely what the majority deems so unlikely. This is a new test for fighting words directed at the position of the person to whom the

words are directed. The United States Supreme Court has not gone this far. In view of the fact that this matter is analyzed under the first amendment, I would follow the case law of the United States Supreme Court and require that the test be restricted to that of the average person. See *Texas v. Johnson*, supra, 491 U.S. 409.[9]

[163 A.3d 22] II

INADEQUATE BRIEFING

I next turn to whether the evidence was sufficient to sustain the defendant's conviction for violation of § 53a-181 (a) (5).

Page 267

The state claims that the evidence is sufficient to sustain the conviction because the defendant's abusive epithets were likely to provoke an ordinary person to respond with immediate violence. The defendant, however, rested her entire sufficiency of the evidence claim on her position that the state constitution protected the defendant's speech because she did not expressly challenge Freeman to a fight. Indeed, the defendant expressly represented that she " does not . . . challenge . . . the scope of the fighting words exception under the first amendment." Thereafter, in a mere footnote, the defendant indicates that she " does not concede" that her speech was unprotected by the first amendment and claims that we must analyze the sufficiency of the evidence under the first amendment standard if that standard is adopted as a matter of state constitutional law. The defendant, however, does not provide such an analysis herself. Similarly, in her reply brief, the defendant claims, without citing a single case, that whether her speech is protected in this case is based on whether an ordinary store manager, rather than an ordinary person, would have responded with immediate 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.

" We repeatedly have stated that [w]e are not required to review issues that have been improperly presented to this court through an inadequate brief. . . . Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . . [F]or this court judiciously and efficiently to consider claims of error raised on appeal . . . the parties must clearly and fully set forth their arguments in their briefs." (Citation omitted; internal

Page 268

quotation marks omitted.) *State v. Buhl*, 321 Conn. 688, 724, 138 A.3d 868 (2016). " Claims are also inadequately briefed when they . . . consist of conclusory assertions . . . with no mention of relevant authority and minimal or no citations from the record." (Internal quotation marks omitted.) *Rock v. University of Connecticut*, 323 Conn. 26, 33, 144 A.3d 420 (2016); see also *Getty Properties Corp. v. ATKR, LLC*, 315 Conn. 387, 413-14, 107 A.3d 931 (2015).

Moreover, we have recently emphasized the importance of adequate briefing of free speech issues due to the analytic complexity of the subject matter. See *State v. Buhl*, supra, 321 Conn. 726. " [F]irst [a]mendment jurisprudence is a vast and complicated body of law that grows with each passing day and involves complicated and nuanced constitutional concepts." (Internal

quotation marks omitted.) *Id*. In *Buhl*, this court affirmed the Appellate Court's decision not to review the defendant's free speech claims because those claims were inadequately briefed. *Id*. Specifically, we noted that the defendant in that case dedicated one and one-half pages and cited three to six cases for each of two separate expressive liberties issues. *Id.,* 726-27.

In the present case, the defendant provided a thorough and thoughtful *Geisler* analysis in support of her claim that the free speech provisions of the Connecticut constitution provided additional protections that encompassed her speech. As the **[163 A.3d 23]** defendant acknowledges, the federal constitutional standard is the floor for individual rights. *Trusz v. UBS Realty Investors, LLC*, 319 Conn. 175, 191, 123 A.3d 1212 (2015). Naturally, if the defendant truly contended this minimum standard was unmet, an analysis of the governing law under the first amendment would be necessary to evaluate that claim. Instead, the defendant simply maintains that she " does not concede" that her language was not protected by the first amendment. In a mere footnote,

Page 269

she maintains that if this court " concludes that the Connecticut constitution is coextensive with the [United States] constitution, [it] must still decide whether the evidence was sufficient under the standard that it delineates." Similarly, in her reply brief and without citation to any case law, the defendant claims that this court should consider whether an ordinary grocery store manager would have responded to the defendant's speech with imminent violence. The defendant does not, however, cite any case law in support of this formulation of the first amendment standard. Even in her reply brief, after the state had made its claim that the standard under the first amendment is whether an *ordinary person* would respond with immediate violence, the defendant declined to respond with any analysis or authority to the contrary. Given the foregoing circumstances, I would conclude that any federal constitutional claim has been waived as a result of inadequate briefing. [10]

III

GEISLER ANALYSIS

The defendant claims that the evidence was not sufficient to support her conviction of breach of peace. Specifically, the defendant claims that the jury could not have properly determined that her speech fell within the scope of the fighting words exception to the Connecticut constitution's free speech provisions.[11] The

Page 270

defendant claims that the Connecticut constitution affords broader protection for speech than the United States constitution in that the scope of the fighting words doctrine is narrowly circumscribed under the Connecticut constitution to speech that challenges the listener to fight. According to the defendant, because the record is devoid of any evidence of a challenge to fight, there was not sufficient evidence to support her conviction. The state maintains that the fighting words doctrine under the state constitution is coterminous with the **[163 A.3d 24]** United States constitution and, therefore, the evidence is sufficient to support the defendant's conviction. I agree with the state.

I begin by setting forth this court's standard of review in free speech cases. The " inquiry into the protected status of . . . speech is one of law, not fact." (Internal quotation marks omitted.)

DiMartino v. Richens, 263 Conn. 639, 661, 822 A.2d 205 (2003); see also *Connick v. Myers*, 461 U.S. 138, 148 n.7, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983). " This [c]ourt's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied. This is such a case, particularly since the question is one of alleged trespass across the line between speech unconditionally guaranteed and speech which may legitimately be regulated." (Internal quotation marks omitted.) *State v. DeLoreto*, supra, 265 Conn. 152-53.

Page 271

In cases where the line must be drawn, this court undertakes an examination of the speech at issue, along with the circumstances under which it was made, to see whether it is of a nature which the relevant constitutional free speech provisions protect. See id., 153. This court " must make an independent examination of the whole record . . . so as to [be sure] that the judgment does not constitute a forbidden intrusion on the field of free expression." (Internal quotation marks omitted.) *Id*. Although the ultimate conclusion with respect to whether the speech at issue constitutes fighting words is subject to de novo review, this court accepts " all subsidiary credibility determinations and findings that are not clearly erroneous." *State v. Krijger*, 313 Conn. 434, 447, 97 A.3d 946 (2014).

To the extent that § 53a-181 (a) (5) proscribes conduct consisting of pure speech, this court and the Appellate Court have applied a judicial gloss in order to ensure that the statute comports with the strictures of the first amendment. See *State v. Caracoglia*, supra, 78 Conn.App. 110; see also *State v. Szymkiewicz*, supra, 237 Conn. 620-21 (applying fighting words construction to § 53a-181 [a], which prohibits " violent, threatening or tumultuous behavior"); cf. *State v. Indrisano*, 228 Conn. 795, 812, 640 A.2d 986 (1994) (applying fighting words construction to provision of disorderly conduct statute, General Statutes § 53a-182 [a], prohibiting " violent, threatening or tumultuous behavior").

The fighting words exception to the broad free speech protection afforded by the first amendment was first articulated in *Chaplinsky v. New Hampshire*, supra, 315 U.S. 568. In that case, the United States Supreme Court held that states are permitted to punish the use of certain narrow classes of speech, including " 'fighting' words--those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Id.,* 572. As discussed previously in this concurring

Page 272

and dissenting opinion, fighting words are " speech that has a direct tendency to cause imminent acts of violence or an immediate breach of the peace. Such speech must be of such a nature that it is likely to provoke the average person to retaliation." (Internal quotation marks omitted.) *State v. Szymkiewicz*, supra, 237 Conn. 620; see also *Texas v. Johnson*, supra, 491 U.S. 409. In order to constitute fighting words, the abusive language must be " directed to the person of the hearer." (Internal quotation marks omitted.) *Cohen v. California*, supra, 403 U.S. 20. Accordingly, in order to comport with the requirements **[163 A.3d 25]** of the first amendment, § 53a-181 (a) (5) " proscribes fighting words that tend to induce immediate violence by the person or persons to whom the words are uttered because of their raw effect." *State v. Caracoglia*, supra, 78 Conn.App.

110.

" [F]ederal constitutional and statutory law establishes a minimum national standard for the exercise of individual rights and does not inhibit state governments from affording higher level of protection for such rights." (Internal quotation marks omitted.) *Trusz v. UBS Realty Investors, LLC* , supra, 319 Conn. 191. In order to determine whether the Connecticut constitution affords broader protection than the national minimum, this court analyzes the familiar *Geisler* factors: " (1) the 'textual' approach--consideration of the specific words in the constitution; (2) holdings and dicta of this court and the Appellate Court; (3) federal precedent; (4) the 'sibling' approach--examination of other states' decisions; (5) the 'historical' approach--including consideration of the historical constitutional setting and the debates of the framers; and (6) economic and sociological, or public policy, considerations." *State v. Linares*, 232 Conn. 345, 379, 655 A.2d 737 (1995).[12]

Page 273

A

I begin my analysis by looking at the text of the relevant constitutional provisions. Article first, § 4, of the Connecticut constitution provides that " [e]very citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that liberty." Article first, § 5, of the Connecticut constitution provides that " [n]o law shall ever be passed to curtail or restrain the liberty of speech or of the press." The defendant contends that the protection of speech " on all subjects" extends to the " profane name-calling" in which the defendant indulged in the present case. The state points out that the protection afforded by article first, § 4, of the Connecticut constitution is not unbounded, but rather is circumscribed by the qualifying language " being responsible for the abuse of that liberty."

Broadly speaking, we have previously observed " that because, unlike the first amendment to the federal constitution: (1) article first, § 4, of the Connecticut constitution includes language protecting free speech on all subjects; [and] (2) article first, § 5, of the Connecticut constitution uses the word ever, thereby providing additional emphasis to the force of the provision . . . and therefore sets forth free speech rights more emphatically than its federal counterpart . . . ." (Citations omitted; internal quotation marks omitted.) *Trusz v. UBS Realty Investors, LLC*, supra, 319 Conn. 192-93. Specifically, this court noted that the state constitutional liberty to speak freely *on all subjects* set forth in § 4 " support[ed] the conclusion that the state constitution protects employee speech in the public workplace on the widest possible range of topics, as long as the speech does not undermine the employer's legitimate interest in maintaining discipline, harmony and efficiency in the workplace." *Id.,* 193.

Page 274

Nevertheless, the liberty to speak freely on all subjects is qualified by the plain terms of article first, § 4, of the Connecticut constitution, which holds each citizen " responsible for the abuse of that liberty." This court has observed that this **[163 A.3d 26]** provision operates as a limitation upon the broad protections otherwise afforded by permitting the enforcement of laws regulating speech that tended to cause a breach of the peace such as defamation or sedition. See *Cologne v. Westfarms Associates*, 192 Conn. 48, 64 n.9, 469 A.2d 1201 (1984).[13] Therefore, this court has interpreted

the text of § 4 to permit punishment, within certain bounds, of abuse of the freedom of speech. Additionally, the text of § § 4 and 5 in no way suggests that the legislature's authority to punish abuses of expressive liberties was limited to then prevailing statutory criminal law. Thus, while the language of § § 4 and 5 provides for broader protection than afforded under the federal constitution, the language of § 4 more directly pertains to the state's authority to punish the abuse of expressive liberties. Accordingly, I find that the text of § § 4 and 5 does not support the
Page 275
defendant's position that our state constitution defines the concept fighting words more narrowly.

B

I turn next to historical analysis to further clarify the scope of the state's expressive rights protections. The historical analysis is the central focus of the defendant's constitutional claim. She advances the theory that the only exceptions to the broad expressive rights protections afforded by the Connecticut constitution are those extant at the time of the ratification of the Connecticut constitution in 1818, and that there was no statute proscribing profane name calling at that time.[14] As a result,

[163 A.3d 27] according to the defendant, in light of the statutory law at the time of ratification, the state may only punish abusive language that includes a challenge to fight. The state, on other hand, points to preconstitutional records
Page 276
that, in very general terms, support the qualified character of the civil liberties.[15] I agree with the state.

Contrary to the defendant's contention, ratification era constitutional law is not the sole source of state constitutional principles. Indeed, the common law provides valuable insight to inform our understanding of constitutional principles. See E. Peters, " Common Law Antecedents of Constitutional Law in Connecticut," 53 Alb. L.Rev. 259, 264 (1989) (" In defining and enacting constitutional bills of rights, state and national constituencies would, of course, have drawn upon the experience of the common law. . . . Just as the precepts of the common law influence the style of constitutional adjudication in common law courts, so common law case law itself is part of our 'usable past.'" [Footnote omitted.]). In 1828, this court observed that when a person sends a letter containing " abusive language" to another person, it was " an indictable offence, because it tends to a breach of the peace." *State v. Avery*, 7 Conn. 266, 269 (1828).[16] The court noted that, while the letter would not constitute libel because it was not published to a third party, it was " clearly an offence of a public nature, and punishable as such, as it tends to create ill-blood, and cause a disturbance of the public peace." *Id*. This common law offense originated in England where it was observed that sending an " infamous"
Page 277
letter to another person constituted an " offense to the King, and is a great motive to revenge, and tends to the breaking of the peace . . . ." *Edwards v. Wooton*, 77 Eng. Rep. 1316, 1316-17 (K.B. 1655); see also *Hickes's Case*, 79 Eng. Rep. 1240, 1240-41 (K.B. 1682). Chief Justice Zephaniah Swift included the common-law offense of provocation to breach of the peace in the second volume of his digest published in 1823. See 2 Z. Swift, A Digest of the Laws of the State of

Connecticut (1823) pp. 340-41.[17] At the very least, Connecticut **[163 A.3d 28]** common law embraced the principle that speech that tended to cause a breach of the peace was illegitimate, even if it did not acknowledge such conduct as a basis for criminal liability.[18] Indeed, this very rationale undergirds the fighting words doctrine. See *Chaplinsky v. New Hampshire*, supra, 315 U.S. 573 (noting that it is within domain of state power to punish " words likely to cause a breach of the peace").

Additionally, the defendant has failed to articulate a persuasive rationale for relying strictly upon historical exceptions in any form. The defendant correctly points out that this court previously has recognized that " our

Page 278

constitution's speech provisions reflect a unique historical experience and a move toward enhanced civil liberties, particularly those liberties designed to foster individuality. . . . This historical background indicates that the framers of our constitution contemplated vibrant public speech, and a minimum of governmental interference . . . ." (Internal quotation marks omitted.) *Trusz v. UBS Realty Investors, LLC*, supra, 319 Conn. 206. However, this broad observation about the historical context in which the declaration of rights was adopted does not support any particular analytic framework for delineating the scope of expressive rights doctrine, let alone the one advanced by the defendant. In sum, there is no basis for the 1818 code alone to serve as the lodestar of present day state constitutional expressive rights doctrine. Accordingly, I find this factor supports the state.

C

I next turn to the state precedents factor of the *Geisler* analysis. The defendant contends that, because this court has yet to delineate the scope of the fighting words doctrine under the Connecticut constitution, this court writes on a " clean slate." [19]

[163 A.3d 29] The state claims that,

Page 279

while this court's cases have expressly held that the Connecticut constitution " bestows greater expressive rights on the public than that afforded by the federal constitution" ; see *State v. Linares* , supra, 232 Conn. 380; appellate cases discussing state freedom of expression principles evince a philosophy that balances individual expressive liberties and the responsibility not to abuse such liberties.[20] I agree with the state.

This court's more recent state constitutional expressive rights cases show that Connecticut's constitution provides broader freedom of expression protections than the federal counterpart. See, e.g., *Trusz v. UBS Realty Investors, LLC*, supra, 319 Conn. 196; *State v. Linares*, supra, 232 Conn. 382. In *Linares*, this court was called upon to determine proper state constitutional analytic framework for time, place, and manner restrictions upon expression in a case challenging a statute prohibiting disturbances in the General Assembly. This court rejected the more modern, categorical federal forum analysis in favor of the older, flexible, case-by-case approach set forth in *Grayned v. Rockford*, 408 U.S. 104, 115-21, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). Likewise, in *Trusz*, this court rejected the more

Page 280

recent--and more restrictive--federal standard analyzing employee expressive rights claims set forth in *Garcetti v. Ceballos*, 547 U.S. 410, 418-20, 126 S.Ct. 1951, 164 L.Ed.2d 689 (2006), in favor of a modified version of the older, more flexible *Connick/Pickering* [21] standard.[22] As mentioned previously, both *Trusz* and *Linares* denote a state constitutional preference for preserving individual liberties when the United States Supreme Court diminishes the scope of such liberties under the federal constitution. See footnote 19 of this concurring and dissenting opinion. In contrast, in *Cologne v. Westfarms Associates*, supra, 192 Conn. 66, this court rejected the novel theory that private shopping malls were required to permit solicitation under the Connecticut constitution. Thus, while it is true that Connecticut's constitution guarantees broad expressive rights--a broader guarantee than the United States constitution--it does not provide additional protection in each and every facet of the broad field of expressive rights.

[163 A.3d 30] The appellate case law analyzing state constitutional principles with respect to content based regulation of speech embraces a philosophy that balances the expressive liberties with the responsibility not to abuse such liberties. In *State v. McKee*, 73 Conn. 18, 28, 46 A. 409 (1900), this court affirmed the denial of a demurrer

Page 281

challenging, inter alia, the validity of a statute punishing the publication of " criminal news, police reports, or pictures and stories of deeds of bloodshed, lust, or crime." (Internal quotation marks omitted.) Rather than looking to the substantive criminal law extant at the time of ratification of the state constitution in 1818 to determine the validity of this more recent statutory offense as the defendant urges, Justice Hamersley relied on the broader principles of expressive liberty to sustain the statute. *Id.,* 28. Speaking for a unanimous court, he elaborated that expressive liberties are " essential to the successful operation of free government," and acknowledged " free expression of opinion on any subject as essential to a condition of civil liberty." *Id*. Nevertheless, Justice Hamersley acknowledged the qualified nature of expressive liberties, noting that " [i]mmunity in the mischievous use is as inconsistent with civil liberty as prohibition of the harmless use. Both arise from the equal right of all to protection of law in the enjoyment of individual freedom of action, which is the ultimate fundamental principle." *Id.,* 28-29. He continued, " [f]reedom of speech and press does not include the abuse of the power of tongue or pen, any more than freedom of other action includes an injurious use of one's occupation, business, or property." *Id.,* 29. On this issue, Justice Hamersley concluded that the notion that the state constitution created a refuge for those who sought to abuse expressive liberties to the detriment of society " belittle[d] the conception of constitutional safeguards and implie[d] ignorance of the essentials of civil liberty." *Id.*

These principles of civil liberty are interwoven into this court's reasoning in subsequent cases rejecting state constitutional free speech challenges to statutes proscribing abuse of expressive liberties. In *State v. Pape*, 90 Conn. 98, 103, 96 A. 313 (1916), this court reversed a demurrer that had dismissed an information

Page 282

filed against the defendant alleging that the defendant had published, if proven untrue, abusive and scurrilous allegations of corruption and breach of office by indicating that a public official " had

sold out his constituents and traded their wishes and interests and his own soul for an office." This court reasserted that the legislature may not " curtail the liberty of speech or of the press, guaranteed as it is by our [c]onstitution." *Id.,* 105. The court also noted that expressive rights principles derive from the common law, and that it was a common law principle that " free and fair criticism on any subject reasonably open to public discussion is not defamation and is not libelous . . . ." *Id*. In other words, " [l]iberty of speech and of the press is not license, not lawlessness, but the right to fairly criticize and comment." *Id*. The court noted that it was a right for the defendant to fairly comment upon the conduct of the public official, but the defendant would bear the responsibility for the abuse of that right. *Id.*

Similarly, in *State v. Sinchuk*, 96 Conn. 605, 616, 115 A. 33 (1921), this court upheld a seditious libel law[23] challenged on **[163 A.3d 31]** state expressive rights grounds. The defendants advanced the theory that the statute punished expression irrespective of harmful consequence. *Id.,* 607. This court conceded that publication of scurrilous or abusive matter concerning the federal government does not necessarily result in direct incitement to lawlessness, but, nevertheless, the legislature was permitted to declare that such expression endangers public peace and safety unless the court found such conclusion to be plainly unfounded. *Id.,* 609-10. In so

Page 283

reasoning, the court acknowledged the breadth of legislative authority to regulate speech that may be harmful to public peace. *Id.*

The defendant correctly points out that the narrow holdings of these early twentieth century expressive rights cases would not likely withstand modern constitutional scrutiny.[24] The defendant is incorrect, however, that because the cases provide no evidence of the scope of expressive rights protection in 1818, that they provide no meaningful insight to our analysis.[25] With respect to the issue at hand, these cases evince a philosophy not dissimilar from that prevailing in 1818--namely, the belief that citizens should be free to express themselves, but that they bear responsibility for the abuse of that right. Moreover, this court's reliance on preconstitutional common-law principles to inform the scope of state constitutional rights undercuts the defendant's theory that early nineteenth century *statutory* criminal law delineates the scope of expressive rights. For these reasons, the state precedents factor favors the state's position.

D

Next, I turn to the sister state precedents factor of the *Geisler* analysis. The defendant urges this court to

Page 284

adopt the approach followed by Oregon. The state does not rely on this factor for its position, but asserts that the Oregon approach is inconsistent with Connecticut constitutional jurisprudence. I agree with the state.

The Oregon Supreme Court has concluded that its constitutional expressive rights provision [26] " forecloses the enactment of any law written in terms directed to the substance of any 'opinion' or any 'subject' of communication, unless the **[163 A.3d 32]** scope of the restraint is wholly confined within some historical exception that was well established when the first American

guarantees of freedom of expression were adopted and that the guarantees then or in 1859 demonstrably were not intended to reach." *State v. Robertson*, 293 Or. 402, 412, 649 P.2d 569 (1982). Applying this test, the Oregon Court of Appeals held a harassment statute under which the defendant had been convicted for calling another person a " fucking nigger" to be unconstitutional because using abusive language was not a historical exception to speech rights at the time of ratification of the Oregon constitution. (Internal quotation marks omitted.) *State v. Harrington*, 67 Or.App. 608, 610, 615-16, 680 P.2d 666, cert. denied, 297 Or. 547, 685 P.2d 998 (1984). *Harrington* concluded that the *Chaplinsky* standard employed a balancing test to determine whether speech was protected whereas the Oregon constitution prohibited " restricting the right to speak freely on *any subject whatever*." (Internal quotation marks omitted; emphasis in original.) *Id.,* 614.

The Oregon approach is inapposite to determining the protections afforded by the Connecticut constitution because that state employs a different analytic approach to delineating the scope of state constitutional

Page 285

provisions. The Oregon approach is a mechanistic, single-factor approach that focuses solely on statutory substantive criminal law extant contemporaneously with ratification of its constitution. Connecticut, by relying upon the *Geisler* factors, embraces a " structured and comprehensive approach to state constitutional interpretation . . . ." (Internal quotation marks omitted.) *Connecticut Coalition for Justice in Education Funding, Inc. v. Rell*, 295 Conn. 240, 272 n.26, 990 A.2d 206 (2010). This multifactor approach provides a more extensive toolkit to fashion appropriate, principled constitutional rules. See also *Honulik v. Greenwich*, 293 Conn. 641, 648, 980 A.2d 845, (2009) (noting that the factors are " to be considered in construing the contours of our state constitution so that we may reach reasoned and principled results as to its meaning"). Additionally, the defendant has done little to persuade why Oregon's historical exception approach, other than her own conclusion that it is " logical," is the appropriate test to delineate the scope of expressive rights under the Connecticut constitution. Nor does the Oregon Supreme Court articulate a persuasive basis for adopting such an approach. Indeed, *Robertson* appears to have adopted it strictly from the plain language of the relevant constitutional provision, which differs at least in form, if not substance, from Connecticut's relevant constitutional text. *State v. Robertson*, supra, 293 Or. 412; see also footnote 26 of this opinion.

The only other state to have considered the fighting words doctrine under its own expressive rights provisions is Vermont, and the Vermont Supreme Court determined, in a challenge to the " abusive language" prong of its disorderly conduct statute, that its state constitution does not offer broader protection that the federal constitution with respect to the fighting words doctrine. (Internal quotation marks omitted.) *State v. Read*, 165 Vt. 141, 156, 680 A.2d 944 (1996). The court

Page 286

began its discussion by noting that, while Vermont's constitution " may afford greater protection to individual rights than do the provisions of the federal charter," the court had previously indicated that expressive rights are coterminous under the state and federal constitution but had reserved final judgment on the issue. (Internal quotation marks omitted.) *Id.,* 153. In *Read*, the defendant

had made textual, comparative, and historical arguments that his speech was protected. *Id.,* 152-53.

[163 A.3d 33] The court rejected his argument that the Vermont constitution offers broader protection by virtue of the fact that it contains no fewer than four speech provisions and that none of those provisions qualify expressive rights with the imposition of responsibility for the abuse thereof. *Id.,* 153-54. The defendant in *Read* further contended that Vermont was historically tolerant of abusive language.[27] *Id.,* 154. While the court generally accepted the defendant's characterization of contemporary social norms, it rejected the defendant's historical argument by relying principally upon a statement by the Vermont governor and council, made in response to Kentucky and Virginia resolutions espousing nullification of the Sedition Act, that strongly indicated that Vermont's constitutional expressive rights provisions afforded no broader protection than the first amendment.[28] *Id.,* 155. The court concluded that the defendant

Page 287

had failed to satisfy its burden of showing that the Vermont constitution protected his speech. *Id.,* 156.

My research reveals that, other than Oregon, no other state's constitution provides additional protection with respect to fighting words. Additionally, I find Oregon law to be unpersuasive. Accordingly, the sister state precedent factor favors the state.

E

I next address the federal precedents factor of *Geisler*. The defendant claims that one of the principal theoretical underpinnings of the fighting words doctrine has diminished since the inception of the doctrine. Specifically, the defendant claims that the United States Supreme Court acknowledges the expressive value of fighting words, whereas the court previously had found fighting words to be of little value at all. The state, on the other hand, points to the fact that the United States Supreme Court has not strayed from *Chaplinsky* and that the doctrine continues to endure. The state also maintains that, while the United States Supreme Court did acknowledge the expressive value of fighting words, it also reasoned that such words may be proscribed because they constitute a " 'nonspeech' element of communication . . . analogous to a noisy sound truck . . . ." *R. A. V. v. St. Paul*, 505 U.S. 377, 386, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992). Finally, the state points to *Cantwell v. Connecticut*, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1940), which is the antecedent of *Chaplinsky*, as evidence that the scope of the fighting words doctrine under the state and federal constitutions **[163 A.3d 34]** is coextensive. I find this factor favors the state.

Page 288

I begin by addressing *Cantwell v. Connecticut*, supra, 310 U.S. 296,[29] which arose out of the proselytization activities of a group of Jehovah's Witnesses. See *State v. Cantwell*, 126 Conn. 1, 3, 8 A.2d 533 (1939), rev'd, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1940). The information alleged that a group, a father and his two children, ambulated Cassius Street in New Haven soliciting, without prior approval, the sale of books or donations by offering to play a phonograph recording as part of the pitch. *Id*. Ninety percent of the residents of the neighborhood were Roman

Catholic, and the phonographic recording contained attacks upon the Catholic religion. *Id*. The defendants in that case were arrested, charged, and convicted of soliciting without a permit and breach of the peace. *Id.,* 2-3 and n.1. The defendants appealed to this court challenging the sufficiency of the evidence supporting the conviction of breach of the peace.[30] *Id.,* 5-6. This court upheld, inter alia, the conviction of one of the three defendants for breach of peace, observing that " [t]he doing of acts or the use of language which, under circumstances of which the person is or should be aware, are calculated or likely to provoke another person or other persons to acts of immediate violence may constitute a breach

Page 289

of the peace. . . . The effect or tendency of words or conduct depends largely upon the circumstances, and is a question of fact. . . . It is apparent from the facts found that the playing for audition by loyal Catholics of a record violently attacking their religion and church could well be found to constitute the offense charged, and they warrant finding [of] guilty." (Citations omitted.) *Id.,* 7.[31] This court noted the constitutional implications of their reasoning by stating that " the right to propagate religious views is not to be denied," but nevertheless concluded that " one will not be permitted to commit a breach of the peace, under the guise of **[163 A.3d 35]** preaching the gospel." [32] (Internal quotation marks omitted.) *Id*. That defendant then filed a petition for certification to appeal to the United States Supreme Court, which was granted. *Cantwell v. Connecticut*, 309 U.S. 626, 626-27, 60 S.Ct. 589, 84 L.Ed. 987 (1940).

On appeal, the United States Supreme Court reversed on the remaining conviction for breach of the peace. *Cantwell v. Connecticut*, supra, 310 U.S. 311. The court found that it would be inconsistent with the principles of expressive liberties to punish the defendant for the content of the phonographic recording. *Id.,* 310. The court reasoned that in a diverse society, religious as well as political discourse will produce sharp differences of

Page 290

belief. *Id*. " In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement." *Id*. Part of the essence of citizenship, the court observed, is the right to express even offensive beliefs. See id. (" [b]ut the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy").

But the United States Supreme Court also acknowledged the state's interest in preserving peace. *Id.,* 311. The court, in striking a balance between the competing interests, acknowledged that in some circumstances it is appropriate for the state to punish certain speech that tends to provoke violence, noting as follows: " One may, however, be guilty of the offense if he commit acts or make statements likely to provoke violence and disturbance of good order, even though no such eventuality be intended. Decisions to this effect are many, but examination discloses that, in practically all, the provocative language which was held to amount to a breach of the peace consisted of profane, indecent, or abusive remarks directed to the person of the hearer. Resort to

epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the [United States constitution], and its punishment as a criminal act would raise no question under that instrument." *Id.,* 309-10. Thus, the United States Supreme Court acknowledged Connecticut's well established authority to regulate speech that tends to provoke violence, but refined that authority to conform to federal free speech principles by permitting regulation of only profane, indecent, or abuse remarks likely to

Page 291

provoke violence. It was this principle that would become the foundation of the fighting words doctrine in *Chaplinsky*.

The factual background of *Chaplinksy*, as in *Cantwell v. Connecticut*, supra, 310 U.S. 296, involves proselytization activity by a Jehovah's Witness. *Chaplinsky v. New Hampshire*, supra, 315 U.S. 569. On the busy streets of Rochester, New Hampshire, the defendant was distributing the literature of his religion and denouncing other religions as a " racket." (Internal quotation marks omitted.) *Id.,* 569-70. The crowd complained to the city marshal, who informed the crowd that the defendant was engaged in lawful activity, but also warned the defendant that the crowd was becoming restless. *Id.,* 570.

[163 A.3d 36] After some time, a disturbance ensued, and a nearby traffic officer escorted the defendant toward the police station. *Id*. En route, the defendant encountered the marshal who was going to the scene of the disturbance. *Id*. Upon seeing the marshal, the defendant said " [y]ou are a [g]od damned racketeer and a damned [f]ascist and the whole government of Rochester are [f]ascists or agents of [f]ascists . . . ." (Internal quotation marks omitted.) *Id.,* 569. According to the defendant, before uttering the language that predicated the criminal offense, he complained to the marshal about the disturbance and requested that those responsible be arrested. *Id.,* 570. The defendant was charged and convicted under a state statute making it a crime to address any " offensive, derisive or annoying" words at the person of another.[33] (Internal quotation marks omitted.) *Id.,* 569.

Page 292

In setting forth the applicable expressive rights principles, the United States Supreme Court sketched out their qualified nature. The court observed that it was " well understood that the right of free speech is not absolute at all times and under all circumstances." *Id.,* 571. " There are certain [well defined] and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any [c]onstitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words--those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." (Footnote omitted.) *Id.,* 571-72. The court's rationale for exempting certain categories of speech from protection is that " such utterances are 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 order and morality." *Id.,* 572. *Chaplinsky* drew further support by quoting *Cantwell v. Connecticut*, supra, 310 U.S. 309-10, for the proposition that " [r]esort to epithets or personal abuse" is not protected speech and would raise no question as to its punishment under

the constitution. See *Chaplinsky v. New Hampshire*, supra, 315 U.S. 572.

Consistent with the principle set forth in *Cantwell*, the court was careful to reiterate that any law punishing pure speech must be narrowly drawn to punish only that speech which tends to cause a breach of the peace. *Id.,* 573. The court noted that the New Hampshire Supreme Court had authoritatively construed the statute in a fashion to conform to this principle by limiting the statute's scope to words that have " direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed," which is to be determined by inquiring whether " men of common intelligence would understand would be words likely

Page 293

to cause an average addressee to fight." (Internal quotation marks omitted.) *Id*. With respect to the defendant's speech itself, the court concluded, " [a]rgument is unnecessary to demonstrate that the appellations 'damn racketeer' and 'damn Fascist' are epithets likely to provoke the average **[163 A.3d 37]** person to retaliation, and thereby cause a breach of the peace." *Id.,* 574. Thus, the fighting words doctrine itself as articulated in *Chaplinsky* is a step in the evolution of a principle of expressive liberty that draws its very essence from Connecticut, which acknowledges the authority of the state, within narrow limits, to punish pure speech that tends to cause a breach of the peace.

The defendant claims that, since *Chaplinsky*, the United States Supreme Court has viewed the value of fighting words more favorably. Compare *Chaplinsky v. New Hampshire*, supra, 315 U.S. 572 (" [r]esort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the [c]onstitution" [internal quotation marks omitted]), with *R. A. V. v. St. Paul*, supra, 505 U.S. 384-85 (" [i]t is not true that fighting words have at most a de minimis expressive content . . . or that their content is in *all respects* worthless and undeserving of constitutional protection . . . sometimes they are quite expressive indeed" [internal quotation marks omitted; citations omitted; emphasis in original]). Fighting words, like offensive language more generally, has an emotive communicative function. See *Cohen v. California*, supra, 403 U.S. 26 (" [i]n fact, words are often chosen as much for their emotive as their cognitive force"). In other words, the use of offensive language serves as a means to convey the passion with which one holds ideas or beliefs he or she seeks to exchange. Even acknowledging this value, the court maintained that fighting words " constitute no essential part of any exposition of ideas." (Internal quotation marks omitted; emphasis omitted.)

Page 294

R. A. V. v. St. Paul, supra, 385. Nevertheless, the federal fighting words doctrine admits the expressive value of abusive words or epithets by protecting such speech and permitting regulation only when such speech would provoke an ordinary person to respond with immediate violence. *Gooding v. Wilson*, 405 U.S. 518, 528, 92 S.Ct. 1103, 31 L.Ed.2d 408 (1972). On the basis of the foregoing, I conclude that federal precedent does not support the defendant's claim that our state constitution permits the punishment fighting words only if the defendant directly invites a fight.

F

Finally, I turn to the public policy factor of the *Geisler* analysis. The defendant asserts that the fighting words doctrine reflects an archaic conception of honor according to which it is normative for ordinary people to respond to name calling with violence. Additionally, the defendant

claims that the Connecticut citizenry is generally peaceable, relying principally upon the state's relatively low incidence of assault for support. In addition, the defendant claims that the fighting words doctrine presents a shifting standard that is ascertained by the " unpredictable" determinations of judges and juries. The state responds that the defendant has failed to sever the connection between abusive language and the likelihood of immediate violence because the statistics she cites do not shed light on the precipitating circumstances of the assaults. Finally, the state claims that the question of whether fighting words actually lead to violent responses is best left to the legislature. I conclude that the fighting words doctrine is consonant with the public policy of the state.

To begin with, abusive language and epithets are not entirely harmless expression. Indeed, there is certain speech that does more than just offend sensibilities or merely cause someone to bristle. One commentator has

Page 295

observed the following **[163 A.3d 38]** about abusive language: " Often a speaker consciously sets out to wound and humiliate a listener. He aims to make the other feel degraded and hated, and chooses words to achieve that effect. In what they accomplish, insults of this sort are a form of psychic assault; they do not differ much from physical assaults, like slaps or pinches, that cause no real physical hurt. Usually, the speaker believes the listener possesses the characteristics that are indicated by his humiliating and wounding remarks, but the speaker selects the most abusive form of expression to impose the maximum hurt. His aim diminishes the expressive importance of the words." (Footnotes omitted.) K. Greenawalt, " Insults and Epithets: Are They Protected Speech?" 42 Rutgers L.Rev. 287, 293 (1990); see also *Taylor v. Metzger*, 152 N.J. 490, 503, 706 A.2d 685 (1998) (" 'The experience of being called " nigger," " spic," " Jap," or " kike" is like receiving a slap in the face. The injury is instantaneous.'"). " It is precisely because fighting words inflict injury that they tend to incite an immediate breach of the peace. Fighting words cause injury through visceral aggression and by attacking the target's rights. Individuals who are injured in this way have a strong tendency to respond on the same level, even though that response may itself be wrongful." (Emphasis omitted; internal quotation marks omitted.) S. Heyman, " Righting the Balance: An Inquiry into the Foundations and Limits of Freedom of Expression," 78 B.U.L.Rev. 1275, 1372 (1998). Indeed, I agree with the Appellate Court's observation that deterring such speech does not limit the freedom of expression, but rather the breach of the peace statute, as limited by the fighting words doctrine, fosters freedom of expression. See *State v. Weber*, 6 Conn.App. 407, 416, 505 A.2d 1266 (" [t]he public policy inherent in this statute is not to prevent the free expression of ideas, but to promote a peaceful environment wherein all human endeavors,

Page 296

including the expression of free ideas, may flourish"), cert. denied, 199 Conn. 810, 508 A.2d 771 (1986).

The defendant claims that the law should not embrace an assumption that reasonable people will respond to abusive language with violence and claims that the people of Connecticut are peaceable, citing a low incidence of assault. This argument has received some traction, principally among commentators. See, e.g., B. Caine, " The Trouble with 'Fighting Words,'" 88

Marq. L.Rev. 441, 506 (2004) (noting a lack of evidence to support the " highly dubious assumption" that fighting words lead to violence); see also *State v. Read*, supra, 165 Vt. 156 (Morse, J., dissenting) (describing fighting words doctrine as " archaic relic, which found its genesis in more chauvinistic times when it was considered bad form for a man to back down from a fight"). First, as the state points out, the defendant has not severed the connection between abusive language, including epithets, and violence. The assault statistics provided by the defendant shed no light on the precipitating circumstances of the assault cases. In any case, the fighting words doctrine, by requiring the jury to determine whether an *ordinary person* would respond to the abusive language with immediate violence, already contemplates a fluid community standard for fighting words that naturally includes the extent to which the people of this state are peaceable.[34]

Ultimately, I conclude that the fighting words doctrine strikes the appropriate balance. It permits the state to regulate **[163 A.3d 39]** 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.

G

In resolving this issue, I conclude that the *Geisler* factors do not support the theory advanced by the defendant. This state's constitution expressly contemplates holding a citizen responsible for the abuse of expressive liberty. See Conn. Const., art. I, § 4. As previously discussed in this concurring and dissenting opinion, this state has historically embraced a civil libertarian philosophy that is permissive of government regulation of the abuse of expressive liberties when such abuse tends toward a breach of the peace. The defendant has not advanced a persuasive theory to adopt a historical exception approach to delineating the scope of expressive liberties. Moreover, while there was no statute criminalizing fighting words at the time the Connecticut constitution was ratified, common law principles embraced punishing such abusive language. The defendant's reliance on Oregon case law is unpersuasive because that state employs a different analytic framework to delineate the scope of expressive rights. Also, federal precedents demonstrate that the fighting words doctrine draws its essence from Connecticut law, further supporting a conclusion that protection in this area is coextensive.[35]

[163 A.3d 40]

Finally, the public policy factor does not demand additional protection for fighting words. I acknowledge that " [t]he Connecticut constitution is an instrument of progress, it is intended to stand for a great length of time and should not be interpreted too narrowly or too literally so that it

fails to have contemporary effectiveness for all of our citizens." *State v. Dukes*, 209 Conn. 98, 115, 547 A.2d 10 (1988). This progressive principle surely counsels against an interpretation that seeks to apply the mores and norms of yesteryear to modern constitutional law. To be sure, our society's discourse has become progressively coarser. This does not mean, however, that this state's constitution should be converted into a license to gratuitously inflict psychic injury and push people to their limits. The present case makes this point crystal clear. The defendant testified that she
Page 299
did not believe that her tirade would achieve her original goal of retrieving the money transfer. To the contrary, she explained that she felt hurt by the fact that she was purportedly misled about her ability to retrieve the money transfer and she wanted to hurt Freeman back. Perhaps implicit in her purposely hurtful speech was an emotive expression--the strength of her desire to retrieve her money transfer. Nevertheless, the Connecticut constitution does not demand that citizens should be forced to bear extreme personal denigration--abuse that pushes a person to the brink of violence--so that others may freely employ wanton vilification as a form of expression.

On the basis of the foregoing, I conclude that, under the state constitution, speech directly challenging the listener to a fight is not a necessary element of the fighting words doctrine. Rather, the standard is whether the speech at issue is so abusive that it would provoke an ordinary person to respond with immediate violence.

I next turn to whether the evidence was sufficient to sustain the defendant's conviction under § 53a-181 (a) (5). I conclude that the cumulative force of the evidence in the present case is sufficient to support such a conviction.[36] The defendant, in a belligerent and angry manner, used harsh and scornful language designed to debase Freeman. She insulted her on the basis of her gender, body composition, and apparent suitability for her position as a manager of the store. She utilized the word " cunt," which is generally recognized as a powerfully offensive term. I cannot say that, as a matter of law,
Page 300
this evidence is insufficient to find that the defendant's speech was so offensive that it would provoke an ordinary person to immediately respond with violence.

IV

CHARGE

Next, I address whether the issue of whether the trial court properly instructed the jury on the elements of the fighting words gloss placed on the abusive language prong of § 53a-181 (a) (5). The state claims that the defendant impliedly waived her instructional impropriety claim by pursuant to *State v. Kitchens*, 299 Conn. 447, 10 A.3d 942 (2011). The defendant claims that there is insufficient evidence in the record to support an implied waiver under *Kitchens*. Alternatively, the defendant **[163 A.3d 41]** claims that the trial court's failure to properly instruct the jury on the elements of the fighting words doctrine resulted in manifest injustice necessitating reversal under the plain error doctrine. On the basis of this court's recent decision in *State v. McClain*, 324 Conn. 802, 155 A.3d 209 (2017), I agree with the defendant that she is entitled to plain error review and a reversal thereunder. Accordingly, I need not decide whether the defendant impliedly waived review under *Kitchens*.

The record reveals the following additional facts. After the jury departed on the first day of the defendant's two day trial, the judge furnished to counsel a first draft of the jury charge. The draft charge was marked as an exhibit and dated September 11, 2014. The judge discussed with counsel an issue pertaining to the jury instruction on the two counts of threatening on which the defendant was ultimately not convicted. See footnote 4 of this concurring and dissenting opinion. The judge indicated that he had drafted additional language regarding those counts over lunch, read the language into the record, and indicated that he would

Page 301

provide counsel a hard copy of that language the following day. Thereafter, the judge considered a request to charge on the breach of the peace count. Specifically, defense counsel had requested that the jury be instructed that swearing alone is not enough to convict on that count. After a brief colloquy on the issue, the judge stated that his " inclination" was not to give the requested charge and that the " committee charge available online comes at it quite properly . . . ." The judge stated that he was " satisfied that it's sufficient to tell [the jury] what does constitute the crime of breach of the peace." Wrapping up those two issues, the judge stated he had " a pretty good idea of what [his] charge [was going to] consist of." As defense counsel began to raise other issues pertaining to the jury charge, the judge requested that counsel point out any typographical errors in the draft because " [t]he jury [is] getting a copy of this." Defense counsel raised an issue with respect to the instruction on the obscene language prong of § 53a-181 (a) (5). Defense counsel specifically indicated that she was referring to language on page nineteen of the first draft. The judge permitted the jury to be instructed that there was " no evidence of language that meets the legal definition of obscenity . . . ." There was additional discussion regarding the draft instructions and then court adjourned for the day.

The next day, before resuming the presentation of evidence, an off the record supplemental charging conference was held at which a number of the defendant's requests to charge were considered. The defendant's request to charge, a written copy of which was filed with the court that morning, contained citations to the draft charge disseminated the previous day. During the charging conference, the judge discussed with counsel some changes that were made to the first draft and rejected the defendant's requests to charge. The jury instruction relevant to this appeal that was ultimately

Page 302

provided to the jury was precisely the same as it appeared in the first draft. The challenged instruction is as follows: " Language is 'abusive' if it is so coarse and insulting as to create a substantial risk of provoking violence. The state must prove that the defendant's language had a substantial tendency to provoke violent retaliation or other wrongful conduct. The words used must be 'fighting words,' which is speech that has a direct tendency to cause immediate acts of violence or portends violence. Such speech must be of such a nature that it is likely to provoke the average person to retaliation."

As a threshold matter, I address the proper standard of review for this issue. In her opening brief, the defendant seeks review **[163 A.3d 42]** of her unpreserved claim of instructional impropriety pursuant to *State v. Golding*, 213 Conn. 233, 239-40, 567 A.2d 823 (1989). The state

claims that the defendant cannot satisfy the third prong of *Golding* in light of her trial counsel's implied waiver of the claim pursuant to our holding in *Kitchens*. The defendant requests in her brief, in the alternative to *Golding* review, that this court review her instructional impropriety claim for plain error. This court recently addressed the question whether a *Kitchens* waiver precludes review under the plain error doctrine. *State v. McClain*, supra, 324 Conn. 804. This court answered that question in the negative, concluding that a defendant may seek plain error review of unpreserved claims of instructional impropriety. *Id*. Because I conclude that the defendant is entitled to relief under the plain error doctrine, I need not decide whether the defendant impliedly waived her right to *Golding* review under *Kitchens*.[37]

Page 303

I begin with a review of the legal principles that govern review of this issue. " [The plain error] doctrine, codified at Practice Book § 60-5, is an extraordinary remedy used by appellate courts to rectify errors committed at trial that, although unpreserved, are of such monumental proportion that they threaten to erode our system of justice and work a serious and manifest injustice on the aggrieved party. [T]he plain error doctrine . . . is not . . . a rule of reviewability. It is a rule of reversibility. That is, it is a doctrine that this court invokes in order to rectify a trial court ruling that, although either not properly preserved or never raised at all in the trial court, nonetheless requires reversal of the trial court's judgment, for reasons of policy. . . . In addition, the plain error doctrine is reserved for truly extraordinary situations [in which] the existence of the error is so obvious that it affects the fairness and integrity of and public confidence in the judicial proceedings. . . . Plain error is a doctrine that should be invoked sparingly. . . . Implicit in this very demanding standard is the notion . . . that invocation of the plain error doctrine is reserved for occasions requiring the reversal of the judgment under review." (Internal quotation marks omitted.) *State v. Sanchez*, 308 Conn. 64, 76-77, 60 A.3d 271 (2013).

Plain error review is effectuated by application of a two prong test. First, a reviewing court " must determine if the error is indeed plain in the sense that it is patent [or] readily discernable on the face of a factually adequate record, [and] also . . . obvious in the sense of not debatable. . . . This determination clearly requires a review of the plain error claim presented in light of the record." (Internal quotation marks omitted.) *Id.,* 77. Second, " the reviewing court must examine that error for the grievousness of its consequences in order to determine whether reversal under the plain error doctrine is appropriate. A party cannot prevail under plain

Page 304

error unless it has demonstrated that the failure to grant relief will result in manifest injustice." (Internal quotation marks omitted.) *Id*. In other words, the defendant is not entitled relief under the plain error doctrine unless she " demonstrates that the claimed error is both so clear and so harmful that a failure to reverse the judgment would result in manifest **[163 A.3d 43]** injustice." (Emphasis omitted; internal quotation marks omitted.) *Id.,* 78.

" It is . . . constitutionally axiomatic that the jury be [properly] instructed on the essential elements of a crime charged." (Internal quotation marks omitted.) *State v. Johnson*, 316 Conn. 45, 58, 111 A.3d 436 (2015). " The due process clause of the fourteenth amendment [to the United

States constitution] protects an accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. . . . Consequently, the failure to instruct a jury on an element of a crime deprives a defendant of the right to have the jury told what crimes he is actually being tried for and what the essential elements of those crimes are." (Internal quotation marks omitted.) *State v. Padua*, 273 Conn. 138, 166, 869 A.2d 192 (2005). " A jury instruction is constitutionally adequate if it provides the jurors with a clear understanding of the elements of the crime charged, and . . . afford[s] proper guidance for their determination of whether those elements were present." (Internal quotation marks omitted.) *State v. Valinski*, 254 Conn. 107, 120, 756 A.2d 1250 (2000).

The constitutional dimension of the instructional impropriety in the present case is magnified by the fact that a precise articulation of the element of the substantive offense is necessary to satisfy the requirements of the first amendment. In order for the state to properly punish pure speech, such speech must fall within one of a few exceedingly narrow classes of speech. *Gooding v. Wilson*, supra, 405 U.S. 521-22

Page 305

(" [t]he constitutional guarantees of freedom of speech forbid the [s]tates to punish the use of words or language not within narrowly limited classes of speech" [internal quotation marks omitted]) " Even as to such a class, however . . . the line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn . . . ." (Internal quotation marks omitted.) *Id.,* 522. Therefore, it is vital that " [i]n *every case* the power to regulate must be so exercised as not . . . unduly to infringe the protected freedom . . . ." (Citation omitted; emphasis added; internal quotation marks omitted.) *Id*. Consistent with this principle, the United States Supreme Court has consistently struck down statutes that purported to criminalize speech in excess of first amendment limits. See, e.g., *Houston v. Hill*, supra, 482 U.S. 451; *Lewis v. New Orleans*, supra, 415 U.S. 130; *Gooding v. Wilson*, supra, 522. Properly maintaining a constitutionally adequate boundary between legitimate and illegitimate speech demands the utilization of " sensitive tools . . . ." (Internal quotation marks omitted.) *Gooding v. Wilson*, supra, 528.

In the present case, the necessary tool for constitutional consonance is a simple, yet narrowly drawn definition of fighting words: abusive language likely to provoke an ordinary person, as the recipient of such abusive language, to respond with imminent violence. See id. Indeed, *Gooding* explicitly rejected any construction that diminished the imminence and violence aspects of the standard. *Id.,* 526.[38] Consistent with

[163 A.3d 44] *Gooding*,

Page 306

the Appellate Court has placed a judicial gloss on § 53a-181 (a) (5) to save the provision from a facial overbreadth attack, concluding that " subdivision (5) proscribes fighting words that tend to induce immediate violence by the person or persons to whom the words are uttered because of their raw effect." *State v. Caracoglia*, supra, 78 Conn.App. 110.[39] This authoritative construction of § 53a-181 (a) (5) is succinct, accurate, and comports comfortably with the federal constitutional rule. It is precisely the kind of sensitive tool *Gooding* required to properly punish illegitimate

speech. The efficacy of this tool is illusory, however, if it is not implemented in the form of a properly articulated jury instruction. Accordingly, the failure to charge the jury to limit the application of the crime to the constitutional rule deprives the defendant of a fundamental constitutional right. See *State v. Anonymous (1978-4*), 34 Conn.Supp. 689, 695, 389 A.2d 1270 (App. Sess. 1978), overruled on other grounds by *State v. Moulton*, 310 Conn. 337, 351-63, 78 A.3d 55 (2013).

Against this backdrop, it is clear that the jury instruction in the present case failed to accurately describe the legal standard for fighting words. The relevant instruction comprises four sentences. While the instruction excels in verbosity, it fails in accuracy. The instruction impermissibly describes the state's burden of proof

Page 307

to be proof of a broader class of speech than that which would provoke an ordinary person, as recipient of the abusive language, to respond with immediate violence. The second sentence begins the instruction on the legal standard that the state must satisfy with respect to this element of the substantive offense. That sentence starts by stating that " [t]he state must prove that the defendant's language had a substantial tendency to provoke violent retaliation . . . ." If the sentence stopped there, it would be redundant of the first sentence, which defines abusive language to be " so coarse . . . as to create a substantial risk of provoking violence." Instead of stopping there, the instruction impermissibly broadens the scope by indicating that the state could prove the element by showing that the speech tended to provoke " other wrongful conduct." The third sentence does not limit the speech to that which provokes an immediate violent response, but broadens it to speech that " portends violence." [40] The final sentence describes **[163 A.3d 45]** that speech as that which merely provokes " retaliation." Moreover, to the extent the instruction even conveys that the response to the speech must also be violent, it fails to convey that the jury must find that such violence be *imminent*. None of the four sentences that illustrate that standard indicates that a violent response *must* be imminent. The only sentence that does suggest immediacy is the third sentence, but that sentence employs a disjunctive thereby broadening the class of speech.

To a lay juror, the instruction used in the present case describes the legal standard in broad terms. Read together, the jury's instruction was that the state must

Page 308

show, at a minimum, that the defendant's language " portend[ed] violence" and was likely to " provoke the average person to retaliation" in the form of " wrongful conduct." In other words, this instruction apprised the jury that it could find that the state met its burden if an ordinary person would respond to the defendant's speech--which could have portended violence by coupling the insulting language with the raising of her cane--with threats or fighting words, not necessarily violence. Therefore, this description of the legal standard that the state must satisfy clearly broadens the class of speech deemed illegitimate beyond constitutionally permissible bounds. [41]

Next, there is no doubt that this jury instruction was manifestly unjust. The harm in permitting a jury to criminally sanction such an impermissibly broad class of speech is readily apparent. It is

inimical to our system of justice to punish speech that a properly instructed jury may well have found to be constitutionally protected. The state claims that the language used by the defendant was so abusive that any instructional impropriety was harmless. I disagree. The standard for fighting words is an objective one; it asks the jury to make a finding with respect to the degree of offensiveness of the speech. As previously discussed in this concurring and dissenting opinion, permitting a properly instructed to jury to assess the offensiveness of the speech accounts for the evolution in normative values and culture. See part III G of this concurring and dissenting opinion. In the present case, the dispositive issue for the jury with respect to this count was principally the degree of offensiveness of the defendant's language; the defendant admitted berating Freeman and did not stridently dispute the testimony of the state's

Page 309

witnesses regarding the precise language she used. The instruction in the present case apprised the jury of a standard that permitted it to consider an impermissibly broad class of speech sufficient to find guilt. The federal constitution--as well as fundamental fairness--demands that a finding with respect to the degree of offensiveness of the speech--i.e., whether the speech would provoke an ordinary person, as the recipient of the abusive language, to respond with immediate violence--be made, in the first instance, by a properly instructed jury. Accordingly, I would reverse the judgment of the trial court and remand the case to that court for a new trial.

In conclusion, I would decline to review whether there was sufficient evidence to sustain the defendant's conviction under the federal fighting words standard because she has failed to adequately brief her sufficiency claim under this standard. Even if I were to reach the issue, however,

[163 A.3d 46] I would conclude that the test proposed by the majority--that is, a test that evaluates the individual circumstances of the addressee at a granular level--is not appropriate and is contrary to United States Supreme Court precedent regarding the " ordinary person" test. *Gooding v. Wilson*, supra, 405 U.S. 528. Moreover, I would reject the defendant's claim that the Connecticut constitution affords greater protections than the first amendment in this context. Finally, 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.

Therefore, I concur with the majority to the extent that it reverses the judgment of the trial court, but would remand the matter for a new trial.

Notes:

[*]This case was originally argued before a panel of this court consisting of Chief Justice Rogers and Justices Palmer, Eveleigh, McDonald, Espinosa and Robinson. Thereafter, Justice D'Auria was added to the panel and has read the briefs and appendices, and listened to a recording of the oral argument prior to participating in this decision.

[1]General Statutes § 53a-181 (a) provides in relevant part: " A person is guilty of breach of the peace in the second degree when, with intent to cause inconvenience, annoyance or alarm, or recklessly creating the risk thereof, such person . . . (5) in a public place, uses abusive . . . language . . . ." The defendant does not contest the sufficiency of the evidence to support her

conviction under the statutory language, but only the sufficiency of the evidence to establish that her speech constituted constitutionally unprotected fighting words. Accordingly, we need not consider the statutory language in connection with our review of the evidence.

[2]Because we conclude there is insufficient evidence to sustain the defendant's conviction for breach of the peace in the second degree, we need not reach her claim that the jury was improperly instructed on that charge.

[3]In her testimony, Freeman spelled out this word.

[4]The state also charged the defendant with two counts of threatening in the second degree in violation of General Statutes § 53a-62 (a) (2) and (3) for conduct that it alleged had occurred after the incident giving rise to the present appeal. Specifically, the state alleged that after she left the supermarket, the defendant telephoned a second time, told the employee answering the telephone to " come outside," and " that there was a gun waiting for [her]." The jury found the defendant not guilty of one of the threatening counts and was unable to reach a verdict on the other count. The court declared a mistrial on the latter.

[5]Although this court recently has explained that it is appropriate to consider a state constitutional claim first " when the issue presented is one of first impression under both the state and federal constitutions" ; *State v. Kono*, 324 Conn. 80, 82 n.3, 152 A.3d 1 (2016); the issue in the present case is not one of first impression under the federal constitution. Moreover, because the established federal standard is clearly dispositive, to resolve the case on this basis is in accord with jurisprudence under which " we eschew unnecessarily deciding constitutional questions . . . ." (Citations omitted.) *Hogan v. Dep't. of Children & Families*, 290 Conn. 545, 560, 964 A.2d 1213 (2009). Finally, we note that the briefs of both parties examine federal jurisprudence on this question. We therefore leave for another day the question of whether the state constitution is more protective of speech than the federal constitution with regard to fighting words.

[6]G. Carlin, Class Clown (Little David Records 1972). We note that two of those seven words were uttered by the defendant in the present case.

[7]The defendant did not adduce evidence at trial to establish the extent to which her physical impairment was objectively apparent to Freeman, other than the fact that she carried a cane. In light of special legal protections and societal conventions dictating that violent behavior is more reprehensible when committed against a physically disabled person than against a person without a physical impairment; see, e.g., General Statutes § 53a-59a (a) (1) (creating separate offense for assault in first degree against physically disabled person); a question arises whether the possibility that an average person in Freeman's position would strike a person with such impairments for leveling verbal insults is even more remote than if the person did not have such a disability. Given our conclusion that a person in Freeman's position would not be likely to respond with violence to an ordinary customer under the circumstances, however, we need not express an opinion on this question.

[8]In *Lewis*, Justice Powell in his concurrence also observed that the Louisiana statute under which the defendant had been convicted " confer[red] on police a virtually unrestrained power to arrest and charge persons with a violation" because for the majority of arrests, which occur in one-on-one situations, " [a]ll that is required for conviction is that the court accept the testimony of the

officer that obscene or opprobrious language had been used toward him while in performance of his duties." *Lewis v. New Orleans*, supra, 415 U.S. 135. " The opportunity for abuse" was thus " self-evident." *Id.,* 136 (Powell, J., concurring).

Thereafter, the Supreme Court relied on this language in concluding that a Houston, Texas ordinance prohibiting speech that " in any manner . . . interrupt[s]" a police officer was substantially overbroad. (Internal quotation marks omitted.) *Houston v. Hill*, 482 U.S. 451, 463-65, 467, 107 S.Ct. 2502, 96 L.Ed.2d 398 (1987). The court also noted that " [t]he freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state" ; id., 462-63; but that such freedom could be restricted when the speech constitutes fighting words. See id., 464 n.12.

[9]Consideration of only those objectively discernible traits of the speaker and the addressee " is consistent with the degree of subjectivity that the [Supreme] Court has used in its police officer cases, in order to avoid some of the pitfalls of requiring the speaker or fact-finder to 'calculat[e] . . . the boiling point of a particular person' in each case. *Ashton v. Kentucky*, 384 U.S. 195, 200 [86 S.Ct. 1407, 16 L.Ed.2d 469] (1966). By specifying only limited and obvious traits, such as the fact that the addressee is a police officer--and the same could be said of the fact that the addressee is a woman or a disabled elderly man--the [c]ourt refines its test of the likelihood that violence will ensue without requiring difficult litigation of the state of mind of both the speaker and addressee." Note, " The Demise of the *Chaplinsky* Fighting Words Doctrine: An Argument for Its Interment," 106 Harv. L.Rev. 1129, 1136-37 n.58 (1993).

[10]The state cites cases from other jurisdictions in which convictions were sustained when the defendant had shouted " fuck you" to a police officer or called an officer a " fuckhead" or " motherfucker." Those cases are either distinguishable on the facts and procedural posture; see, e.g., *State v. Wood*, 112 Ohio App.3d 621, 628-29, 679 N.E.2d 735 (1996) (state was not required to establish fighting words beyond reasonable doubt because defendant pleaded no contest; prosecutor recited on record that defendant continued using loud and abusive language for several minutes despite several requests to stop); or because the courts did not apply a heightened standard despite the fact that the words were directed at police officers. See, e.g., *C.J.R. v. State*, 429 So.2d 753, 754 (Fla. App.), cert. denied, 440 So.2d 351 (Fla. 1983); *State v. Groves*, 219 Neb. 382, 386, 363 N.W.2d 507 (1985).

[1]There is some dispute as to what transpired during this phone call. The defendant testified that she was told that she would be able to retrieve her money transfer if she were to arrive prior to 10 p.m. Tara Freeman, an assistant manager at the store with whom the defendant spoke on the phone, testified that she informed the defendant that it would not be possible for the defendant to retrieve her money transfer because the employee with authority to operate the money transfer machine was not present in the store. Freeman further testified that the defendant told her that " she really didn't give a shit" and proceeded to unleash a tirade of profane language upon Freeman during the phone call. It is unclear which version of the phone conversation was credited by the jury because such a factual finding was not necessary for the jury to reach its verdict.

[2]Freeman testified that the defendant raising her cane perhaps " was part of her talking . . . ."

[3]The defendant conceded that she had yelled and cursed at the manager using terms such as "

bitch" and " shove it." She testified that she had " probably" used the term " fat fucking bitch" and " might have" said " cunt." She said she " wouldn't doubt" that she had said " fuck you."

[4]The defendant was also charged with two counts of criminal threatening for events that took place after she departed the store. She was acquitted on one of the threatening counts and the state entered a nolle on the remaining threating count after the jury was unable to reach a verdict. At a pretrial hearing, the state clarified that the threatening charges arose out of conduct alleged to have occurred after the defendant walked out of the store. Specifically, the state alleged that the defendant called the store from the parking lot, employed more coarse language and, believing she was speaking to Freeman, told another store employee to come outside where " there was a gun waiting . . . ." With respect to the breach of the peace count pertinent to this appeal, the state confirmed that the conduct giving rise to the count took place solely in the store. Consequently, the facts set forth herein pertain only to the breach of the peace count.

[5]General Statutes § 53a-181 (a) provides in relevant part: " A person is guilty of breach of the peace in the second degree when, with intent to cause inconvenience, annoyance or alarm, or recklessly creating a risk thereof, such person: (1) Engages in fighting or in violent, tumultuous or threatening behavior in a public place; or (2) assaults or strikes another; or (3) threatens to commit any crime against another person or such other person's property; or (4) publicly exhibits, distributes, posts up or advertises any offensive, indecent or abusive matter concerning any person; or (5) in a public place, uses abusive or obscene language or makes an obscene gesture; or (6) creates a public and hazardous or physically offensive condition by any act which such person is not licensed or privileged to do. . . ."

[6]It is not clear if the threat was a threat of violence.

[7]" [T]o avoid invalidation of § 53a-181 (a) (3) on grounds of overbreadth, we adopt, by way of judicial gloss, the conclusion that, when a police officer is the only person upon whose sensibilities the inflammatory language could have played, a conviction can be supported only for [e]xtremely offensive behavior supporting an inference that the actor wished to provoke the policeman to violence." (Internal quotation marks omitted.) *State v. DeLoreto*, supra, 265 Conn. 169.

The majority relies on *In re Nickolas S.*, 226 Ariz. 182, 245 P.3d 446 (2011), in support of its position that we should consider the addressee's position of a store manager. In that case, the Arizona Supreme Court held that it was not likely an average teacher would respond to a student's " profane and insulting outburst" with violence. *Id.,* 188. Perhaps a compelling case could be made for adopting a narrower rule with respect to speech directed at teachers by their students. Like police officers, teachers hold a unique role in society. Teachers undergo extensive training and certification in order to serve in their role. See General Statutes § 10-144o et seq. Given such training, certification, and public regulation, society could reasonably expect a teacher to " exemplify a higher level of professionalism . . . ." *In re Nickolas S.*, supra, 188. If a case implicating speech directed at a teacher by a student were to arise, perhaps we would consider a categorical rule like the one we adopted with respect to speech directed at police officers in *DeLoreto*. This question, however, does not arise in the present case.

[8]Violence, of course, occurs on a spectrum. The test is not whether an ordinary person would immediately kill, pummel, or punch the speaker if addressed with fighting words. It is whether an

ordinary person would respond with any immediate violence, even a weak slap or grab.
[9]I reject the majority's attempt to distinguish *Szymkiewicz* on the ground that the defendant in that case was convicted under a different section of the breach of peace statute. Nevertheless, the court still analyzed the case under the fighting words doctrine.
[10]It is of no moment that the state addressed whether the evidence was sufficient under the first amendment standard in its brief. *State v. Buhl*, supra, 321 Conn. 728-29 (" [a]n appellant cannot, however, rely on the appellee to decipher the issues and explain them [on appeal]").
[11]The defendant seeks review of her unpreserved state constitutional claim pursuant to *State v. Golding*, 213 Conn. 233, 239-40, 567 A.2d 823 (1989). " Under *Golding*, a defendant may prevail on an unpreserved claim only if the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt." (Internal quotation marks omitted.) *State v. Saturno*, 322 Conn. 80, 89-90, 139 A.3d 629 (2016); see *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015) (modifying third prong of *Golding*). The state concedes that the first and second conditions are met in the present case, but maintains that the defendant cannot prevail because she has failed to prove that a constitutional violation exists. In view of the conclusion reached in part III of this concurring and dissenting opinion, I agree with the state that the defendant has failed to prove that a constitutional violation exists under our state constitution.
[12]I address each factor somewhat out of order to maintain a logical structure to the analysis of this issue in the present case.
[13]This interpretation of § 4 is based upon an understanding of the framers' sentiments during constitutional debates. See *Cologne v. Westfarms Associates*, supra, 192 Conn. 63-64 n.9. Specifically, this court noted that, although there were some during debate that " would leave out" that provision " consider[ing] the whole purpose of it answered in the next section," there were others that disagreed. (Internal quotation marks omitted.) *Id*. Specifically, this court took note of the following point made during debate: " Every citizen has the liberty of speaking and writing his sentiments freely, and it should not be taken away from him; there was a very great distinction between taking away a privilege, and punishing for an abuse of it--to take away the privilege, is to prevent a citizen from speaking or writing his sentiments--it is like appointing censors of the press, who are to revise before publication--but in the other case, every thing may go out, which the citizen chooses to publish, though he shall be liable for what he *does* publish [and that] the [section] was important . . . ." (Emphasis in original; internal quotation marks omitted.) *Id*. In so doing, this court also noted that " [a] broader proposal which prohibited the molestation of any person for his opinions on any subject whatsoever was considered at the convention but rejected." *Id.,* 64 n.9.
[14]The defendant claims that fighting words did not fall within the ambit of the extant statutory offenses implicating pure speech at the time of the ratification of the constitution. In her brief, the defendant adumbrates the following closely related statutory offenses: (1) " An Act to prevent the

practice of Duelling" ; Public Statute Laws of the State of Connecticut (1808) tit. LIII, § 1, p. 241; (2) " An Act against breaking the Peace" ; Public Statute Laws of the State of Connecticut (1808) tit. CXXV, § 1, p. 545; and (3) " An Act against profane Swearing and Cursing" ; Public Statute Laws of the State of Connecticut (1808) tit. CLVI, § 1, p. 639.

The provision against dueling punished challenging another person to fight with a dangerous weapon. Public Statute Laws of the State of Connecticut (1808) tit. LIII, § 1, p. 241. The provision against profane swearing and cursing proscribed imprecation of future divine vengeance against another person. Public Statute Laws of the State of Connecticut (1808) tit. CLVI, § 1, p. 639; see also *Holcomb v. Cornish*, 8 Conn. 375, 380 (1831).

" An Act against breaking the Peace," which the most analogous statute to § 53a-181 (a) (5), made it a crime to " disturb, or break the peace, by tumultuous and offensive carriages, [threatening], traducing, quarrelling, challenging, assaulting, beating, or striking another person . . . ." Public Statute Laws of the State of Connecticut (1808) tit. CXXV, § 1, p. 545. According to the defendant, the dictionary definitions of these key words that comprise the statutory language reveal that only violent conduct or defamation would have been sufficient to make out a violation.

[15]The state notes that the Ludlow Code of 1650 recognized liberties, but only of " [every] man in his place and proportion . . . ." 1 Colonial Records of Connecticut 1636-1665, p. 509. The state also cites Chief Justice Zephaniah Swift's statement with respect to the qualified nature of individual liberty that human nature cannot " bear total servitude, or total liberty." (Emphasis omitted.) 1 Z. Swift, A System of the Laws of the State of Connecticut (1795) p. 31.

[16]Although *Avery* postdates ratification of the constitution by ten years, this court has previously acknowledged that it is appropriate to look to case law in close temporal proximity to 1818 to better understand the original intent of the constitutional framers. *State v. Joyner*, 225 Conn. 450, 462, 625 A.2d 791 (1993); see also *State v. Lamme*, 216 Conn. 172, 180-81, 579 A.2d 484 (1990) (relying on case from 1837 for guidance).

[17]The preface to volume I of Swift's Digest of 1823 notes that the principles cited therein were " the most important principles of the common law applicable in this [s]tate . . . ." The relevant theory of criminal liability was listed under the heading " of Breach of the Peace" and further classified under the subheading " of Libel." 2 Z. Swift, A Digest of the Laws of the State of Connecticut (1823) pp. 337, 340. Swift does state at the beginning of the subpart on the subject of libel that while " the common law on this subject is in force here," prosecutions for libel had not been brought in the state. *Id.,* p. 340. In *Avery*, this court controverted Swift's observation regarding the lack of libel prosecutions, pointing to prosecutions in 1806 and 1818. *State v. Avery*, supra, 7 Conn. 269-70.

[18]In 1865, the General Assembly passed a law making the use of abusive language a statutory offense. Public Acts 1865, Chap. LXXXVI, pp. 80-81. The underlying rationale for the statute was that " in the exercise of a malicious ingenuity one person could insult another, injure his character, wound his feelings, and *provoke him to violence*, in a mode against which there existed no precise and adequate provision of law . . . ." (Emphasis added.) *State v. Warner*, 34 Conn. 276, 278-79 (1867).

[19]The defendant is incorrect that, because of the absence of appellate case law discussing the

scope of the fighting words doctrine under the Connecticut constitution, this court simply writes on a blank slate, unguided by state appellate precedents. First, the absence of case law on the matter strongly suggests that this factor does not support the defendant's position. See *State v. Skok*, 318 Conn. 699, 709, 122 A.3d 608 (2015) (" because Connecticut courts have not yet considered whether article first, § 7, [of the Connecticut constitution] provides greater protection than the federal constitution with respect to recording telephone conversations with only one party's consent, the second *Geisler* factor also does not support the defendant's claim"). Second, in *Trusz v. UBS Realty Investors, LLC*, supra, 319 Conn. 195-97, this court looked to appellate precedents not for controlling authority on the precise legal issue at hand; rather, it looked to appellate authority for broader principles that underpin this state's expressive rights jurisprudence to inform the analysis. In *Trusz*, this court looked to *State v. Linares*, supra, 232 Conn. 386, for the state constitutional expressive rights principle of favoring flexible, case-by-case analytic frameworks over rigid, categorical tests. See *Trusz v. UBS Realty Investors, LLC*, supra, 195. Additionally, this court looked to the Appellate Court decision in *State v. DeFusco*, 27 Conn.App. 248, 256, 606 A.2d 1 (1992), aff'd, 224 Conn. 627, 620 A.2d 746 (1993), for the broad proposition that the Connecticut constitution has tended to preserve civil liberty protections previously afforded by the federal constitution, but from which the United States Supreme Court has retreated. See *Trusz v. UBS Realty Investors, LLC*, supra, 196-97.

[20]The state also points out that the Appellate Court has incorporated the fighting words doctrine into the expressive rights provisions of the state constitution. See *State v. Caracoglia*, supra, 78 Conn.App. 110. In *Caracoglia*, the court held that that § 53a-181 (a) was not facially overbroad under the state constitution. *Id.,* 110-11. In that case, however, the defendant did not appear to advance the theory that the Connecticut constitution afforded broader protection relative to fighting words than the federal constitution. *Id*. Accordingly, I conclude that case adds little to the analysis of the scope of the fighting words doctrine.

[21]See *Connick v. Myers*, supra, 461 U.S. 142 (in determining scope of public employee's right to free speech in workplace, court must seek " a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the [s]tate, as an employer, in promoting the efficiency of the public services it performs through its employees" [internal quotation marks omitted]); *Pickering v. Board of Education*, 391 U.S. 563, 568, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968) (same).

[22]The standard adopted in *Trusz* is, at least arguably, not quite as permissive as the *Connick* / *Pickering* test. The test adopted in *Trusz* allows an employee to prevail only if " he speaks on a matter of unusual importance and satisfies high standards of responsibility in the way he does it." (Internal quotation marks omitted.) *Trusz v. UBS Realty Investors, LLC*, supra, 319 Conn. 204; but see id., 204 n.19 (discussing whether the test adopted was actually a modification of the *Pickering* test).

[23]The statute at issue in *Sinchuk* was entitled " An Act Concerning Sedition," and, on its face, appeared " to penalize three classes of publications: (1) disloyal, scurrilous or abusive matter concerning the form of government of the United States, its military forces, flag or uniform; (2) any matter intended to bring them into contempt; (3) or which creates or fosters opposition to

organized government." (Internal quotation marks omitted.) *State v. Sinchuk*, supra, 96 Conn. 607.
[24]Indeed, in *Winters v. New York*, 333 U.S. 507, 520, 68 S.Ct. 665, 92 L.Ed. 840 (1948), the United States Supreme Court invalidated a New York statute similar to that at issue in *McKee* on the basis of vagueness. The court noted that the statute at issue in *McKee* was determined by this court to be in conformity with state constitutional expressive rights provisions, but that the law was not challenged under the United States constitution. *Id.,* 512. The narrow holdings of *Pape* and *Sinchuk* are likewise dubious in light of *Brandenburg v. Ohio*, 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969), and *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964).
[25]To the contrary, these cases provide highly relevant insight into the expressive rights principles that animate this state's more modern state constitutional expressive rights jurisprudence. Indeed, in *State v. Linares*, supra, 232 Conn. 382, this court favorably cited *State v. McKee*, supra, 73 Conn. 28-29, for its insight into the importance of free expression in democratic society.
[26]Article first, § 8, of the Oregon constitution provides: " No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right."
[27]The defendant cited the fact that in early Vermont " the language of profanity was the common dialect" and that the state reelected an incarcerated congressman who was convicted under the Sedition Act of 1798. (Internal quotation marks omitted.) *State v. Read*, supra, 165 Vt. 154.
[28]That statement provided in relevant part as follows: " 'In your . . . resolution you . . . severely reprehend the act of [c]ongress commonly called " the [s]edition bill." If we possessed the power you assumed, to censure the acts of the [g]eneral [g]overnment, we could not consistently construe the [s]edition bill unconstitutional; because our own constitution guards the freedom of speech and the press in terms as explicit as that of the United States, yet long before the existence of the [f]ederal [c]onstitution, we enacted laws which are still in force against sedition, inflicting severer penalties than this act of [c]ongress. And although the freedom of speech and of the press are declared unalienable in our bill of rights, yet the railer against the civil magistrate, and the blasphemer of his [m]aker, are exposed to grievous punishment. And no one has been heard to complain that these laws infringe our state [c]onstitution.'" (Emphasis omitted.) *State v. Read*, supra, 165 Vt. 155.
[29]I discuss *Cantwell v. Connecticut*, supra, 310 U.S. 296, under the federal precedent prong because it is an important foundation of the federal fighting words doctrine. Additionally, the defendants in that case did not make a constitutional claim with respect to the relevant charge, they made a sufficiency of the evidence claim. *State v. Cantwell*, 126 Conn. 1, 5-6, 8 A.2d 533 (1939), rev'd, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1940). Accordingly, with respect to this state's constitutional expressive rights jurisprudence, this case is of little value and does not fit as well with the cases directly implicating state constitutional principles.
[30]The defendants in that case did not challenge the breach of the peace conviction on state constitutional grounds. See footnote 29 of this concurring and dissenting opinion. The absence of even a constitutional argument with respect to that conviction is particularly noteworthy given the fact that, though not relevant to this discussion, the defendants in that case challenged their

conviction of solicitation without a permit on state constitutional expressive rights grounds. See *State v. Cantwell*, supra, 126 Conn. 4-5.

[31]Specifically, this court found sufficient evidence to support the breach of peace conviction against one of the defendants, Jessie Cantwell. *State v. Cantwell*, supra, 126 Conn. 6-8. This conclusion was based on the following facts: " Jesse Cantwell stopped John Ganley and John Cafferty, both of whom are Catholics, and receiv[ed] permission [to play a] phonograph record . . . which attacked that religion and church. On hearing it, Ganley felt like hitting Cantwell and told him to take his bag and victrola and be on his way. If he had remained he might have received physical violence. Cafferty's mental reaction was to put Jesse [Cantwell] off the street and he warned him that he had better get off before something happened to him." *State v. Cantwell*, supra, 126 Conn. 6.

[32]The court overturned the breach of peace conviction of the other two defendants because the record revealed only that they had been engaged in simple canvassing. *State v. Cantwell*, supra, 126 Conn. 7-8.

[33]The defendant in *Chaplinsky* was convicted under a statute providing as follows: " No person shall address any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name, nor make any noise or exclamation in his presence and hearing with intent to deride, offend or annoy him, or to prevent him from pursuing his lawful business or occupation." (Internal quotation marks omitted.) *Chaplinsky v. New Hampshire*, supra, 315 U.S. 569.

[34]Additionally, a defendant is protected from punishment for negligently using fighting words by virtue of the fact that the breach of the peace statute has a scienter requirement.

[35]The defendant has also suggested that the standard should be a more subjective one, looking at the circumstances of the recipient of the abusive language. The United States Supreme Court has observed that the fighting words doctrine may require a narrower scope in cases involving police officers because, in light of their training and experience, they may be expected to exercise a higher degree of restraint. *Houston v. Hill*, supra, 482 U.S. 462; *Lewis v. New Orleans*, supra, 415 U.S. 135 (Powell, J., concurring); see also Model Penal Code § 250.1, Comment 4 (c) (Tent. Draft No. 13, 1960). Indeed, this court has placed such a judicial gloss on § 53a-181 (a) (3). See *State v. DeLoreto*, supra, 265 Conn. 168-69. I conclude that it would not be appropriate to implement a more subjective test. The flaw in such a standard is twofold: (1) it invites the speaker to make value judgments about the proclivity for violence of the individuals involved, and (2) creates corresponding asymmetry in expressive liberty. The first flaw is that it invites the fact finder to make judgments about the circumstances of the individuals involved and the general likelihood that the recipient would respond violently, which invites judgments about the violent tendencies based on traits such as profession, size, age, physical capability, or even gender and race. Second, the asymmetry in expressive liberty is created by virtue of the fact that abusive language against those less likely to respond violently such as the feeble would be protected, whereas abusive language directed against a strong, chauvinistic person would not be protected. See T. Shea, " 'Don't Bother to Smile When You Call Me That'--Fighting Words and the First Amendment," 63 Ky. L.J. 1, 22 (1975); see also K. *Greenawalt, supra,* 42 Rutgers L.Rev. 297-98.

Additionally, a more subjective inquiry would convert the rule from one predicated on a community standard to one that measures free speech protection by the individualized violent proclivities of the recipient of the abusive language, and the touchstone would be whether the recipient did, in fact, respond with violence.

[36]Even though I would reverse the judgment of the trial court on the basis of instructional impropriety; see part IV of this concurring and dissenting opinion; I " must address a defendant's insufficiency of the evidence claim, if the claim is properly briefed and the record is adequate for the court's review, because resolution of the claim may be dispositive of the case and a retrial may be a wasted endeavor." (Internal quotation marks omitted.) *State v. Padua*, 273 Conn. 138, 179, 869 A.2d 192 (2005).

[37]The defendant also urges this court to overrule the implied waiver rule set forth in *Kitchens*, incorporating by reference the arguments of the defendant in *State v. Herring*, 323 Conn. 526, 147 A.3d 653 (2016). We recently considered the implied waiver rule's continuing vitality in *State v. Bellamy*, 323 Conn. 400, 402-403, 147 A.3d 655 (2016). For the reasons set forth therein, I would reject the defendant's request to overrule *Kitchens*.

[38]The United States Supreme Court concluded that state appellate authority construing the relevant breach of peace statute was unconstitutional where it was construed as follows: " [W]ords of description, indicating the kind or character of opprobrious or abusive language that is penalized, and the use of language of this character is a violation of the statute, even though it be addressed to one who, on account of circumstances or by virtue of the obligations of office, cannot actually then and there resent the same by a breach of the peace . . . .

" Suppose that one, at a safe distance and out of hearing of any other than the person to whom he spoke, addressed such language to one locked in a prison cell or on the opposite bank of an impassable torrent, and hence without power to respond immediately to such verbal insults by physical retaliation, could it be reasonably contended that, because no breach of the peace could then follow, the statute would not be violated? . . .

" [T]hough, on account of circumstances or obligations imposed by office, one may not be able at the time to assault and beat another on account of such language, it might still tend to cause a breach of the peace at some future time, when the person to whom it was addressed might be no longer hampered by physical inability, present conditions, or official position." (Internal quotation marks omitted.) *Gooding v. Wilson*, supra, 405 U.S. 526, quoting *Elmore v. State*, 15 Ga.App. 461, 461-63, 83 S.E. 799 (1914).

[39]The state does not dispute the contours of the federal fighting words doctrine or the substance of the judicial gloss placed on § 53a-181 (a) (5).

[40]Portend is defined as follows: (1) " to give an omen or anticipatory sign of," and (2) " indicate, signify." Merriam-Webster's Collegiate Dictionary (11th Ed. 2003). In other words, the language could be an anticipatory sign or indicate violence from the speaker or others at any time, but not necessarily an immediate violent response from the recipient of the abusive language.

[41]The instruction also fails to expressly state that the speech must provoke a violent response from the person to whom the abusive language was directed.

KAHN, J. I agree with and join the majority's opinion, reversing the judgment of the Appellate Court with respect to the conviction of the defendant, David G. Liebenguth, of breach of the peace in the second degree and remanding the case with direction to affirm the trial court's judgment of conviction on that charge. I write separately, however, to reiterate my opinion that "[t]he continuing vitality of the fighting words exception is dubious and the successful invocation of that exception is so rare that it is practically extinct." *State* v. *Parnoff*, 329 Conn. 386, 411, 186 A.3d 640 (2018) (*Kahn, J.*, concurring in the judgment). Despite the diminished scope of the fighting words doctrine, "I assume that the . . . exception remains valid for now, but [remain] . . . mindful that the exception is narrowly construed . . . ." Id., 414. To the extent that the doctrine is viable, I agree with the majority, as well as Justice Ecker's concurring opinion and Judge Devlin's well reasoned view, that when the " 'viciously hostile epithet,' which has deep roots in this nation's long and deplorable history of racial bigotry and discrimination," is used to demean and humiliate a person,[1] it constitutes fighting words. See *State* v. *Liebenguth*, 181 Conn. App. 37, 64–65, 186 A.3d 39 (2018) (*Devlin, J.*, concurring in part and dissenting in part). I also note, in particular, that I disagree with the holding and reasoning of *State* v. *Baccala*, 326 Conn. 232, 241–42 and n.7, 163 A.3d 1, cert. denied, U.S. , 138 S. Ct. 510, 199 L. Ed. 2d 408 (2017), to the extent that the case stands for the proposition that personal attributes of the addressee such as age, gender, race, and status should be considered when determining whether a reasonable person with those characteristics was likely to respond with violence. Regardless of my ongoing reservations, the majority has correctly applied precedent from the United States Supreme Court and this court to which we remain beholden.

It is axiomatic that the right to free speech is a bedrock principle of the United States, one so essential that the formation of our nation was predicated on its inclusion in the first amendment of the United States constitution. See U.S. Const., amend. I. The right to free speech, however, is not absolute, and the United States Supreme Court has delineated the circumstances under which words fall outside the protections of the first amendment. One such circumstance is speech that constitutes fighting words. The United States Supreme Court first articulated the doctrine in the seminal case of *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 572, 62 S. Ct. 766, 86 L. Ed. 1031 (1942). In that case, the court carved out an exception to protections afforded free speech for words "which by their very utterance inflict injury or tend to incite [violence] . . . ." Id.; see

also *Cohen* v. *California*, 403 U.S. 15, 20, 91 S. Ct. 1780, 29 L. Ed. 2d 284 (1971); *State* v. *Baccala*, supra, 326 Conn. 237. In the more than seventy-five years since *Chaplinsky* was decided, both the United States Supreme Court and the dictates of changing societal norms have diminished the scope and applicability of the fighting words exception.[2] See Note, "The Demise of the *Chaplinsky* Fighting Words Doctrine: An Argument for Its Interment," 106 Harv. L. Rev. 1129, 1129 (1993).

The United States Supreme Court has narrowed the application of the fighting words doctrine, including limiting it to "those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction"; *Cohen* v. *California*, supra, 403 U.S. 20; thereby "seemingly abandon[ing] the suggestion in *Chaplinsky* that there are words that by their very utterance inflict injury . . . ." (Internal quotation marks omitted.) *State* v. *Parnoff*, supra, 329 Conn. 411–12 (*Kahn*, *J.*, concurring in the judgment); see also Note, supra, 106 Harv. L. Rev. 1129. Contemporaneous with judicial constriction of the fighting words exception, societal norms have also evolved, rendering "public discourse . . . more coarse . . . [and resulting in] fewer combinations of words and circumstances that are likely to fit within the fighting words exception. Indeed, given some of the examples of egregious language that have not amounted to fighting words following *Chaplinsky*, it is difficult to imagine examples that rise to the requisite level today." (Citation omitted; internal quotation marks omitted.) *State* v. *Parnoff*, supra, 413 (*Kahn*, *J.*, concurring in the judgment); see also *State* v. *Baccala*, supra, 326 Conn. 239 (calling someone racketeer or fascist, deemed fighting words in *Chaplinsky*, "would be unlikely to even raise an eyebrow today"); *State* v. *Tracy*, 200 Vt. 216, 237, 130 A.3d 196 (2015) ("in 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" (emphasis in original)).

This judicial constriction, overlaid with current societal norms, calls into question the continued vitality of the fighting words exception. See Note, supra, 106 Harv. L. Rev. 1146. Regardless, "against this small and tortured canvas, the fighting words exception resurfaces occasionally," and the United States Supreme Court "continues to list fighting words among the exceptions to first amendment protection. . . . Therefore, I assume that the fighting words exception remains valid for now, but [remain] . . . mindful that the exception is narrowly construed and poses a significant hurdle for the state to overcome." (Citation omitted.) *State* v. *Parnoff*, supra, 329 Conn. 413–14 (*Kahn*, *J.*, concurring in the judgment).

When determining whether the fighting words exception applies in a given case, the court must consider both "the words used by the defendant" and "the circumstances in which they were used . . . ." *State* v. *Szymkiewicz*, 237 Conn. 613, 620, 678 A.2d 473 (1996). This court recently stated that "[a] proper examination of context also considers those personal attributes of the speaker and the addressee that are reasonably apparent because they are necessarily a part of the objective situation in which the speech was made." *State* v. *Baccala*, supra, 326 Conn. 241. "[W]hen there are objectively apparent characteristics that would bear on the likelihood of [a violent] response, many courts have considered the average person with those characteristics. Thus, courts also have taken into account the addressee's age, gender, and race." Id., 243. The majority in the present case agrees that, "because 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." (Internal quotation marks omitted.), quoting *State* v. *Baccala*, supra, 249. I disagree with this proposition to the extent that it allows for consideration of the addressee's characteristics beyond "whether the addressee's position would reasonably be expected to cause him or her to exercise a higher degree of restraint than the ordinary citizen under the circumstances" when determining whether he or she would respond violently.[3] *State* v. *Baccala*, supra, 245.

The ultimate inquiry of the fighting words exception is whether a speaker's words would reasonably result in a violent reaction by its intended recipient. See, e.g., *Cohen* v. *California*, supra, 403 U.S. 20. Considering the stereotypes associated with immutable characteristics of the addressee, however, produces discriminatory results "because its application depends on assumptions about how likely a listener is to respond violently to speech." W. Reilly, "Fighting the Fighting Words Standard: A Call for Its Destruction," 52 Rutgers L. Rev. 947, 948 (2000). This approach essentially requires courts to promulgate stereotypes on the basis of race, gender, age, disability, ethnicity, and sexual orientation, among others, and has led to much of the scholarly criticism of the fighting words exception. See generally Note, supra, 106 Harv. L. Rev. 1129.

I will refrain from enumerating a laundry list of a stereotypes related to violent responses from which flow myriad discriminatory results, but I illustrate one example of a common refrain in society and courts: women are less likely than men to react to offensive situations with physical violence. Id., 1134. Allowing such a stereotype into the analysis of whether a reason-

able person in the addressee's circumstances is likely to respond to words with violence creates a situation in which "almost nothing one could say to a woman would be proscribed by the fighting words doctrine . . . ." W. Reilly, supra, 52 Rutgers L. Rev. 948. The overarching result is that groups of people that, for example, are stereotyped as docile due to their gender or ethnicity, or who have physical limitations due to their age or disability that prevent them from responding violently—the precise groups that face persistent discrimination—must endure a higher level of offensive speech before being afforded legal remedies that comport with our constitution. From the speaker's perspective, such a result allows him or her to more readily and viciously verbally assault certain oppressed groups without fear of criminal prosecution.

Although I have strong reservations about the viability and application of the fighting words doctrine because it leads to consideration of stereotypical propensities for violence when assessing an addressee's likely response to the speaker's words, I recognize that the fighting words exception remains binding United States Supreme Court precedent. As such, I agree with the majority's conclusion that the defendant's use of the phrases "fucking niggers" and to "remember Ferguson" during his encounter with Michael McCargo were likely to provoke a violent response from a reasonable person under the circumstances and, therefore, constituted fighting words not entitled to protection under the first amendment. Although there are no per se fighting words, and statements must be assessed in the context in which they are made, the highly offensive, degrading, and humiliating racial slur that the defendant used is one of the most volatile terms in the English language, and, therefore, it does not stretch logic to conclude that its use in this context would likely cause a reasonable person to respond with violence.

For the foregoing reasons, I respectfully concur.

[1] I completely agree with the majority that the racial epithet is particularly demeaning and hostile when used toward an African-American person, thereby likely to provoke a violent reaction. I would not, however, preclude a situation in which the same language directed at a non-African American could result in a similar reaction. By way of example, if the same racial slurs were directed with the same intent to an African-American child in the presence of her or his non-African-American parent, that parent may have a similar visceral reaction of violence.

[2] Even if the fighting words doctrine were obsolete, the defendant's conduct could have constituted a violation under other provisions of our criminal statutes, such as General Statutes § 53a-181 (a) (1). In this case, the state charged the defendant with breach of the peace under § 53a-181 (a) (5), the provision that proscribes speech. The defendant, however, engaged in both speech and conduct that could have supported a charge under § 53a-181 (a) (1), which provides that "[a] person is guilty of breach of the peace in the second degree when, with intent to cause inconvenience, annoyance or alarm, or recklessly creating a risk thereof, such person: (1) Engages in fighting or in violent, tumultuous or threatening behavior in a public place . . . ." Alternatively, the state could also have charged the defendant with disorderly conduct under General Statutes § 53a-182 (a) (1) or (2). Although "the correct application of the exception to first amendment protection is not based on the charge or charges leveled against the defendant but, rather,

on the state's theory of the case," by focusing on speech only, the state relied on the fighting words, rather than the true threat, exception to first amendment protection. *State* v. *Parnoff*, supra, 329 Conn. 407 (*Kahn*, *J.*, concurring in the judgment). The point remains that it is the state that determines on which charge and on which exception to first amendment protection it chooses to rely. The state should consider the wisdom of continuing to pursue a doctrine that has been often criticized and rarely upheld.

[3] I observe that the United States Supreme Court has suggested that whether the addressee is a police officer should be considered because "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." (Emphasis added; internal quotation marks omitted.) *Houston* v. *Hill*, 482 U.S. 451, 462, 107 S. Ct. 2502, 96 L. Ed. 2d 398 (1987), quoting *Lewis* v. *New Orleans*, 415 U.S. 130, 135, 94 S. Ct. 970, 39 L. Ed. 2d 214 (1974) (Powell, J., concurring in the result); see also *State* v. *Baccala*, supra, 326 Conn. 263–64 (*Eveleigh*, *J.*, concurring in part and dissenting in part). "Nevertheless, this court has expressly adopted a narrower application of the fighting words standard for speech addressed to police officer[s]," at least in some contexts. *State* v. *Baccala*, supra, 264 (*Eveleigh*, *J.*, concurring in part and dissenting in part); see also *State* v. *DeLoreto*, 265 Conn. 145, 163, 827 A.2d 671 (2003) ("a narrower class of statements constitutes fighting words when spoken to police officers, rather than to ordinary citizens, because of the communicative value of such statements"). To the extent that these cases do not rely on stereotypes related to an addressee's race, gender, age, disability, ethnicity, sexual orientation, or other immutable characteristics, they do not raise the concerns typically associated with the application of the doctrine.

ECKER, J., concurring. I join the majority opinion because we are bound by United States Supreme Court precedent to apply the fighting words doctrine as currently formulated, and, in my view, the majority reaches the correct result applying that doctrine to the facts of the present case. I write separately lest my silence otherwise be misunderstood as an endorsement of this deeply flawed doctrine.[1] I also wish to draw attention to the looming question that comes into increasingly sharp focus with every decision issued by this court on the topic. That question is whether there may be a more sensible first amendment framework that would better serve to justify the outcome reached today in a manner that fully honors our government's commitment to freedom of speech without, in the process, sacrificing our ability to regulate a narrow category of malicious hate speech—which, for present purposes, may be defined as speech communicated publicly to an addressee, in a face-to-face encounter, using words or images that demean the addressee on the basis of his or her race, color, national origin, ethnicity, religion, gender, sexual orientation, disability, or like trait, under circumstances indicating that the speaker intends thereby to cause the addressee severe psychic pain. I do not know when the United States Supreme Court will acknowledge that the current doctrine is untenable or whether it will consider replacing it with a reformulated doctrine focused on the government's interest in regulating hate speech. Nor do I know whether such a hate speech doctrine ultimately would pass muster under the first amendment. Sooner or later, however, I believe that it will become necessary to either shift doctrinal paradigms or admit failure because it has become evident that the existing fighting words doctrine does not provide a sound or viable means to draw constitutional lines in this area.

I

I agree wholeheartedly with my colleagues that the words and sentiments expressed by the defendant, David B. Liebenguth, were vile, repugnant and morally reprehensible. He selected his words for their cruelty and used them as a weapon to inflict psychic wounds as painful, or more so, than physical ones. The defendant crossed a particular line that should never be crossed by anyone in America and then crossed that line again by engaging in after-the-fact conduct indicating a complete lack of contrition. See footnote 4 of the majority opinion. The views expressed in this concurring opinion should not be construed in any way to excuse, defend, or otherwise condone the defendant's words or accompanying conduct.

This brings me directly to the point. I believe that

we need not scratch too deeply beneath the surface to see that the defendant is being punished criminally for the content of his speech. It is the reprehensible content of the speech that propels our desire to prohibit it. Indeed, one very particular meaning intended by the defendant's language is behind this prosecution. The criminality of the defendant's speech does not inhere in his use of the word "nigger" itself because that word can mean very different things depending on the identity, race, affiliation, and cultural milieu of the speaker and the addressee. See R. Kennedy, "The David C. Baum Lecture: 'Nigger!' as a Problem in the Law," 2001 U. Ill. L. Rev. 935, 937.[2] The criminality of the defendant's speech derives from his use of the word as a term of oppression, contempt, and debasement rather than affection or brotherhood.

Therein lies the difficulty under the first amendment, because the quintessential teaching of the constitutional prohibition against any law abridging the freedom of speech is that the government cannot proscribe speech on the basis of content. "[A]bove all else," Justice Thurgood Marshall famously observed, "the [f]irst [a]mendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dept.* v. *Mosley*, 408 U.S. 92, 95, 92 S. Ct. 2286, 33 L. Ed. 2d 212 (1972); accord *Brown* v. *Entertainment Merchants Assn.*, 564 U.S. 786, 790–91, 131 S. Ct. 2729, 180 L. Ed. 2d 708 (2011); *Ashcroft* v. *American Civil Liberties Union*, 535 U.S. 564, 573, 122 S. Ct. 1700, 152 L. Ed. 2d 771 (2002); see *Reed* v. *Gilbert*, 576 U.S. 155, 163, 135 S. Ct. 2218, 192 L. Ed. 2d 236 (2015) ("[c]ontent-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests"); *R. A. V.* v. *St. Paul*, 505 U.S. 377, 382, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992) ("[t]he [f]irst [a]mendment generally prevents [the] government from proscribing speech . . . or even expressive conduct . . . because of disapproval of the ideas expressed" (citations omitted)); see also footnote 8 of this opinion. Speech that offends, provokes, or disrupts cannot be censored by the government merely because it roils calm waters or contravenes our collective sense of civilized discourse. Although the content of such speech at times may be extremely difficult to tolerate, and its value may be impossible to discern, we must never forget that "a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech,

though not absolute . . . 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. . . . There is no room under our [c]onstitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups." (Citations omitted.) *Terminiello* v. *Chicago*, 337 U.S. 1, 4–5, 69 S. Ct. 894, 93 L. Ed. 1131 (1949).

The fighting words doctrine is among the very few exceptions to this rule. "[T]he [f]irst [a]mendment has 'permitted restrictions upon the content of speech in a few limited areas' " consisting of " 'historic and traditional categories long familiar to the bar' . . . including obscenity . . . defamation . . . fraud . . . incitement . . . and speech integral to criminal conduct . . . ." (Citations omitted.) *United States* v. *Stevens*, 559 U.S. 460, 468, 130 S. Ct. 1577, 176 L. Ed. 2d 435 (2010); see also *R. A. V.* v. *St. Paul*, supra, 505 U.S. 383, 386 (listing exceptions, including fighting words). The fighting words doctrine, in modified form, appears to remain good law despite widespread criticism and a distinctly underwhelming track record in its place of origin, the United States Supreme Court.[3] See *State* v. *Parnoff*, 329 Conn. 386, 411, 186 A.3d 640 (2018) (*Kahn*, *J.*, concurring in the judgment) ("[t]he continuing vitality of the fighting words exception is dubious and the successful invocation of that exception is so rare that it is practically extinct").

I understand that we must adhere to the fighting words doctrine until the United States Supreme Court says otherwise. But, although the majority opinion does an admirable job fashioning a silk purse out of this particular sow's ear, I believe that we are better off in the end expressing our concerns openly and displaying a more determined preference for avoiding further entanglement with this untenable doctrine.[4] In my view, this court's own engagement with the fighting words doctrine to date has resulted in a series of decisions embedding us more deeply in the doctrinal quicksand each time we undertake the futile task of drawing constitutional distinctions between one person's lyric and another's vulgarity.[5] I fear that the doctrine we have embraced disserves us more than we acknowledge by inducing us to believe, or act as if we believe, that we are able to discern a constitutional line distinguishing one angry person screaming a race-based epithet at a municipal parking enforcement officer from another angry person screaming a gender-based epithet at a store manager. See *State* v. *Baccala*, 326 Conn. 232, 235–36, 256, 163 A.3d 1 (calling assistant manager of grocery store "a 'fat ugly bitch' and a 'cunt' " did not constitute fighting words and, therefore, warranted constitutional protection under first amendment), cert.

denied, U.S. , 138 S. Ct. 510, 199 L. Ed. 2d 408 (2017).

II

The profound and intractable problems inherent in the fighting words doctrine become evident the moment we examine the legal standard that our court uses to determine whether a defendant's speech falls within its scope. The majority correctly describes the analysis. Fighting words is speech that is "likely to provoke a violent response under the circumstances in which [the words] were uttered . . . ." Id., 234. The doctrine purports not to be concerned with the content of the speech per se but, rather, the "likelihood of violent retaliation." Id., 240. Thus, unlike the situation described by George Carlin in his classic comedic monologue about government censorship of obscene language, "Seven Words You Can Never Say on Television,"[6] there is no predetermined list of proscribed fighting words or phrases; context is everything. As the majority aptly observes, "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." In determining whether the speech in any particular circumstance is constitutionally protected, the person performing the constitutional line drawing must consider "a host of factors," including not only the words themselves, but "the manner and circumstances in which the words were spoken" and "those personal attributes of the speaker and addressee that are reasonably apparent . . . ." *State* v. *Baccala*, supra, 326 Conn. 240–41; see id., 242–43 ("[c]ourts have . . . considered the age, gender, race, and status of the speaker" and "also have taken into account the addressee's age, gender, and race"). This intensely contextualized and fact specific inquiry strives to remain "objective" in nature. Id., 247. For this reason, the issue is not how the actual addressee in fact responds to the speech, but the likely response of the *average* person in the addressee's shoes. Id.; see *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 573, 62 S. Ct. 766, 86 L. Ed. 1031 (1942) ("the test [for determining which words are fighting words] is what men of common intelligence would understand would be words likely to cause an average addressee to fight" (internal quotation marks omitted)).

As this description illustrates, the constitutional justification for the fighting words doctrine, as it operates today, does *not* rest on the state's interest in protecting the addressee from the emotional and psychic harm caused by words "which by their very utterance inflict injury . . . ."[7] *Chaplinsky* v. *New Hampshire*, supra, 315 U.S. 572. Instead, the current fighting words doctrine purports to regulate speech on the basis of its *incitement effect*, i.e., the likelihood of inciting the addressee

to immediate violence against the speaker. The ascendancy of the incitement rationale as the sole constitutionally legitimate justification for the fighting words doctrine avoids the appearance, discomfiting to some, that the state is censoring speech due solely to the emotional impact that the content of that speech has on the addressee.[8] The allure of the incitement analysis, in other words, lies in its insistence that it is entirely unconcerned with the *content* of the speech under review and regulates solely on the basis of the "nonspeech" element of the communication. See *R. A. V.* v. *St. Paul*, supra, 505 U.S. 386.

Serious problems arise, however, when we use the fighting words exception to regulate offensive speech under the rubric of the incitement rationale. Fighting words is an unusual subcategory of incitement speech—the speaker and listener are adversaries rather than coconspirators, and the speaker ordinarily is not *advocating* violence but, rather, speaking words in a manner likely to stimulate the listener's anger to the boiling point.[9] The fighting words doctrine permits the government to prohibit speech that the government deems likely to incite a physical attack by the addressee *on the speaker himself*. Put another way, this category of speech loses its constitutional protection because it is deemed likely to "cause" another person to punch the speaker in the nose (or worse)—a distinctly counterintuitive justification for withdrawing constitutional protection from the speaker. See *Feiner* v. *New York*, 340 U.S. 315, 327 n.9, 71 S. Ct. 303, 95 L. Ed. 295 (1951) (Black, J., dissenting) ("[T]he threat of one person to assault a speaker does not justify suppression of the speech. There are obvious available alternative methods of preserving public order. One of these is to arrest the person who threatens an assault."); B. Caine, "The Trouble with 'Fighting Words': *Chaplinsky* v. *New Hampshire* Is a Threat to First Amendment Values and Should Be Overruled," 88 Marq. L. Rev. 441, 507 (2004) ("[p]unishing the speaker for the violence committed against the speaker is totally at odds with [first amendment principles]"); R. Kennedy, supra, 2001 U. Ill. L. Rev. 942 ("Rather than insisting that the target of the speech control himself, the doctrine tells the offensive speaker to shut up. This is odd and objectionable.").

I wish to focus on two of the most fundamental problems that infect the doctrine as it has been applied in Connecticut. First, as Justice Kahn observes in her concurring opinion, one of the foremost flaws inherent in the fighting words doctrine is that its application turns on the adjudicator's assessment of the addressee's physical ability and psychological or emotional proclivity to respond with violence to the speaker's insulting words. The majority's description of the required legal analysis frankly acknowledges its focus on the speaker's and the addressee's respective age, race, gender, physical condition, and similar characteristics. The doc-

trine thus confers or withdraws constitutional protection depending on the demographic characteristics of the relevant individuals; vicious and vile words spoken by "a child, a frail elderly person, or a seriously disabled person" may be protected under the first amendment because "social conventions . . . [or] special legal protections . . . could temper the likelihood of a violent response . . . ." *State* v. *Baccala*, supra, 326 Conn. 242. And most important, as the majority, quoting *State* v. *Baccala*, supra, 249, acknowledges, " 'an unfortunate but necessary' " part of the constitutional analysis is an assessment of the *addressee's* physical abilities and aggressive tendencies to determine whether the addressee is " 'likely to respond violently . . . .' "

"Unfortunate" is a vast understatement. The fighting words doctrine invites—even requires—stereotyping on the basis of age, gender, race, and whatever other demographic characteristics the adjudicator explicitly or implicitly relies on to decide whether a person is likely to respond to offensive language with immediate violence. In my view, a bright red light should flash when our first amendment doctrine leads us to conclude, for example, that an outrageous slur directed at a physically disabled elderly woman is constitutionally protected but the identical words addressed to a physically fit man walking down the sidewalk will subject the speaker to criminal prosecution. It is no wonder that the fighting words doctrine is considered by many critics to represent a "hopeless anachronism that mimics the macho code of barroom brawls." K. Sullivan, "The First Amendment Wars," New Republic, September 28, 1992, p. 40; id. (observing that fighting words doctrine "give[s] more license to insult Mother Teresa than Sean Penn just because she is not likely to throw a punch"); see A. Carr, "Anger, Gender, Race, and the Limits of Free Speech Protection," 31 Hastings Women's L.J. 211, 227 (2020) (describing *Chaplinsky* as reflecting "a gendered . . . perspective" enshrining "a 'hypermasculine' exemption from presumed 'gentlemanly' expectations of conduct among men"); S. Gard, "Fighting Words as Free Speech," 58 Wash. U. L.Q. 531, 536 (1980) (opining that fighting words doctrine represents "a quaint remnant of an earlier morality that has no place in a democratic society"); K. Greenawalt, "Insults and Epithets: Are They Protected Speech?," 42 Rutgers L. Rev. 287, 293 (1990) ("Many speakers who want to humiliate and wound would also welcome a fight. But in many of the cruelest instances in which abusive words are used, no fight is contemplated: white adults shout epithets at black children walking to an integrated school; strong men insult much smaller women."); R. Kennedy, supra, 2001 U. Ill. L. Rev. 943 (fighting words doctrine "gives more leeway to insult a nun than a prizefighter because she is less likely to retaliate"); W. Reilly, "Fighting the Fighting Words Standard: A Call for Its Destruction," 52 Rutgers L. Rev.

947, 956 (2000) (observing that fighting words doctrine permits "speech to be [regulated] . . . when directed at someone who would react violently to a verbal assault, but [prohibits regulation] . . . when directed at someone with a more pacific bent").[10]

The doctrine in no way avoids this analytical abyss by focusing its inquiry on the personal characteristics of the "average" addressee rather than the actual listener. To the contrary, styling the test in faux objective garb only makes things worse because there is no empirical basis for such an inquiry; no such average person exists, no metric for assessment exists, and, to the best of my knowledge, nothing that we would consider valid social science is available to assist the decision maker. The first amendment becomes a Rorschach blot onto which the adjudicating authority (and, before it reaches the adjudicator, the arresting officer and state prosecutor) projects his or her own stereotypes, preconceptions, biases and fantasies about race, ethnicity, sexual orientation, gender, religion, and other "identity" characteristics of the addressee to decide whether a person with those demographics probably would react with immediate violence.[11] This is especially the case when it comes to the predominant twenty-first century brand of insults, epithets, and slurs, which so often target the group identity of the addressee. The fighting words doctrine in its current form confers or withdraws first amendment protection on the basis of nothing more substantial than our own stereotypes and biases regarding those very demographic features. This is "I know it when I see it" run amok.[12]

The sharp contrast between this court's holdings in *Baccala* and the present case demonstrate the point. The majority does its best to distinguish *Baccala* on some basis other than gender and race, but the stark reality of differential treatment remains.[13] In my view, the various distinctions drawn between that case and the present case, though unquestionably reflecting the good-faith assessment of the subscribing justices, reinforce rather than remove valid concerns regarding the arbitrary, subjective, and gendered nature of the fighting words doctrine. An observer would be excused for thinking that these outcomes reflect, and may tend to perpetuate, nothing more substantial than our deeply ingrained stereotypes regarding the traditional gender traits of the "average" woman, at least the "average" white woman. See footnote 11 of this opinion.[14]

The potential for discriminatory enforcement, or at the very least the perception that a "realistic possibility that official suppression of ideas is afoot," is anathema to our most fundamental first amendment values. *R. A. V.* v. *St. Paul*, supra, 505 U.S. 390. In the hands of even the most responsible police officers, prosecutors, judges and juries, this legal standard is sure to produce incongruous and inexplicable results, even if all participants—

including the speaker and the addressee—share a relatively homogenous set of cultural norms and expectations. Under the auspices of less enlightened administrating authorities, the doctrine, in my view, "contains an obvious invitation to discriminatory enforcement . . . ." (Internal quotation marks omitted.) *Houston* v. *Hill*, 482 U.S. 451, 465 n.15, 107 S. Ct. 2502, 96 L. Ed. 2d 398 (1987). The wide degree of subjectivity necessitated by the legal standard "furnishes a convenient tool for 'harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure' "; *Papachristou* v. *Jacksonville*, 405 U.S. 156, 170, 92 S. Ct. 839, 31 L. Ed. 2d 110 (1972), quoting *Thornhill* v. *Alabama*, 310 U.S. 88, 97–98, 60 S. Ct. 736, 84 L. Ed. 1093 (1940); and "confers on [the] police a virtually unrestrained power to arrest and charge persons with a violation." *Lewis* v. *New Orleans*, 415 U.S. 130, 135, 94 S. Ct. 970, 39 L. Ed. 2d 214 (1974) (Powell, J., concurring in the result).

This brings me to the second fundamental problem with the fighting words doctrine, which is that such an intensely contextualized, fact specific, and inherently subjective analysis in the area of free speech creates major constitutional concerns under due process vagueness principles. The underlying vice addressed by the void for vagueness doctrine is basic to the rule of law: "As generally stated, the [void for vagueness] doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. . . . Although the doctrine focuses both on actual notice to citizens and arbitrary enforcement, [the court has] recognized recently that the more important aspect of the vagueness doctrine 'is not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement.' . . . Where the legislature fails to provide such minimal guidelines, a criminal statute may permit 'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.' " (Citations omitted.) *Kolender* v. *Lawson*, 461 U.S. 352, 357–58, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983); see also *Grayned* v. *Rockford*, 408 U.S. 104, 108–109, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972) ("It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for

those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, [when] a vague statute abut[s] upon sensitive areas of basic [f]irst [a]mendment freedoms, it operates to inhibit the exercise of [those] freedoms. Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked." (Footnotes omitted; internal quotation marks omitted.)).

The defendant in the present case has not challenged General Statutes § 53a-181 (a) (5) on vagueness grounds, and, accordingly, it is not necessary or appropriate at this time to decide whether the statute is saved by this court's narrowing construction, which limits its coverage to fighting words as we have defined that term in the prescribed analysis.[15] In my opinion, our recent decisions, including the decision issued today, have not made that future task any easier.

To summarize, the facts of the present case obscure the mischief inherent in the fighting words doctrine, as applied by this court. I feel confident that every judge in Connecticut would agree without reservation that the particular words spoken by the defendant occupy a singular category of offensive content as a result of our country's history. They are unique in their brutality. I therefore agree fully with the view expressed by Judge Devlin that "angrily calling an African-American man a 'fucking [nigger]' after taunting him with references to a recent police shooting of a young African-American man by a white police officer" must fall within the scope of the fighting words doctrine. *State* v. *Liebenguth*, 181 Conn. App. 37, 68, 186 A.3d 39 (2018) (*Devlin*, *J.*, concurring in part and dissenting in part). But, for the reasons set forth in this concurring opinion, I also believe that the fighting words doctrine does not provide a sensible way to determine the circumstances under which the government may prosecute the utterance of such vile and repugnant speech.

III

This court's own recent experience applying the fighting words doctrine, as well as the many similar cases adjudicated by state courts around the country, powerfully illustrates why the United States Supreme Court should consider fashioning a more defensible and administrable first amendment framework for deciding when the government may criminalize the kind of hate speech uttered by the defendant in the present case. To best serve its purpose, the reformulated doctrine should directly confront the fundamental constitutional issue underlying many of these cases, which is whether and under what circumstances the first amendment permits the government to protect its citizenry from

the kind of psychic and emotional harm that results when a speaker with malicious intent subjects another person to outrageously degrading slurs in a personal, face-to-face encounter. I cannot predict the outcome of such a doctrinal reexamination, but, in my view, it would benefit us all if the Supreme Court undertakes the challenge before too long. Our current doctrine, operating by indirection and proxy through a hypothetical, stereotype-driven assessment of the likelihood that the words will incite violence, is as unworthy as it is unworkable, and every new case decided under its purview creates additional cause for concern.

In the meantime, I agree with the majority that, under our current first amendment case law, if anything is fighting words, then the words spoken by this defendant under these factual circumstances fit the bill. I concur in the majority opinion for this reason.

[1] As will become clear, my concerns share a great deal in common with those expressed by Justice Kahn in her incisive concurring opinion.

[2] Professor Randall L. Kennedy, the author of the acclaimed 2002 book entitled "Nigger: The Strange Career of a Troublesome Word," writes with great learning, sensitivity and sophistication on the subject. He explains the "remarkably protean" nature of the word: "It can mean many things. . . . A weapon of racist oppression, 'nigger' can also be a weapon of antiracist resistance as in Dick Gregory's autobiography entitled Nigger, or H. Rap Brown's polemic Die Nigger Die! An expression of deadening contempt, use of the N-word can also be an assertion of enlivened wit as in Richard Pryor's trenchant album of stand up comedy That Nigger's Crazy. A term of belittlement, 'nigger' can also be a term of respect as in 'James Brown is sho nuff nigger.' . . . A term of hostility, nigger can also be a term of endearment as in 'this is my main nigger'—i.e., my best friend. . . . It might just be, as [the journalist Jarvis Deberry] writes, 'the most versatile and most widely applied intensifier in the English language.' " (Footnotes omitted.) R. Kennedy, supra, 2001 U. Ill. L. Rev. 937; see also A. Perdue & G. Parks, "The Nth Decree: Examining Intraracial Use of the N-Word in Employment Discrimination Cases," 64 DePaul L. Rev. 65, 66 (2014) ("[w]hile some members of the black community . . . publicly embrace [the] use of the N-word by and among blacks as a term of endearment, others . . . still view it exclusively as a tool of racial oppression"). The indomitable Charles Barkley has revealed the politically subversive undercurrent that accompanies some uses of the word: "I use the N-word. I'm going to continue to use the N-word . . . . [W]hat I do with my black friends is not up to white America . . . ." (Internal quotation marks omitted.) A. Perdue & G. Parks, supra, 65–66.

[3] Questions arise about the continued vitality of the fighting words doctrine because the United States Supreme Court has not upheld a single criminal conviction under the doctrine since *Chaplinsky* was decided almost eighty years ago. Note, "The Demise of the *Chaplinsky* Fighting Words Doctrine: An Argument for Its Interment," 106 Harv. L. Rev. 1129, 1129 (1993). There is no doubt that the doctrine's scope has been narrowed by a series of decisions including, but not by any means limited to, *Cohen* v. *California*, 403 U.S. 15, 20, 91 S. Ct. 1780, 29 L. Ed. 2d 284 (1971) (limiting fighting words to personally abusive epithets spoken in direct and personal confrontation), *Lewis* v. *New Orleans*, 415 U.S. 130, 135, 94 S. Ct. 970, 39 L. Ed. 2d 214 (1974) (Powell, J., concurring in the result) (indicating that first amendment protection is broader when addressee is police officer, who "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" (internal quotation marks omitted)), and *R. A. V.* v. *St. Paul*, supra, 505 U.S. 386, 391 (recognizing that fighting words are not devoid of expressive value, describing fighting words doctrine as regulation of " 'nonspeech' element of communication," and holding that statute prohibiting particular fighting words was unconstitutional because it discriminated on basis of viewpoint of speaker). See, e.g., W. Nevin, " 'Fighting Slurs': Contemporary Fighting Words and the Question of Criminally Punishable Racial Epithets," 14 First Amendment L. Rev. 127, 133–38 (2015) (reviewing post-*Chaplinsky* cases

limiting fighting words doctrine); T. Place, "Offensive Speech and the Pennsylvania Disorderly Conduct Statute," 12 Temp. Pol. & Civ. Rts. L. Rev. 47, 51–59 (2002) (same); R. Smolla, "Words 'Which By Their Very Utterance Inflict Injury': The Evolving Treatment of Inherently Dangerous Speech in Free Speech Law and Theory," 36 Pepp. L. Rev. 317, 350 (2009) (noting that "the entire mainstream body of modern [f]irst [a]mendment law . . . has dramatically tightened the rules of immediacy, intent, and likelihood of harm required to justify restrictions on speech on the theory the speech will lead to violence" and suggesting that "the 'inflict[s] injury' prong of *Chaplinksy*" is no longer operative and what remains is "that part of *Chaplinksy* linked to genuine 'fighting words' and the maintenance of physical (as opposed to moral) order"). I nonetheless agree with the majority and Justice Kahn that the fighting words exception to the first amendment has not been overruled and remains binding on this court.

[4] I do not break any new ground in pointing out these defects. See, e.g., B. Caine, "The Trouble With 'Fighting Words': *Chaplinsky* v. *New Hampshire* Is a Threat to First Amendment Values and Should Be Overruled," 88 Marq. L. Rev. 441, 444–45 n.6 (2004) ("While I agree with both scholars and others that *Chaplinsky* ought to be overruled, I must note that the [United States] Supreme Court has paid little attention to their plea. . . . [*Chaplinsky*] is so deeply flawed that it cannot stand, and . . . [it] is an intolerable blot on free speech jurisprudence."); S. Gard, "Fighting Words as Free Speech," 58 Wash. U. L.Q. 531, 536 (1980) ("the fighting words doctrine is nothing more than a quaint remnant of an earlier morality that has no place in a democratic society dedicated to the principle of free expression"); R. O'Neil, "Hate Speech, Fighting Words, and Beyond—Why American Law Is Unique," 76 Alb. L. Rev. 467, 471–72 (2012–2013) ("[The] dismissive . . . view of expression [in *Chaplinsky*] that was both unquestionably offensive and provocative now seems not only archaic but also wholly illogical. . . . Seventy years later, *Chaplinsky* remains a persistent source of constitutional confusion. It might have been mercifully overruled long since, but that never happened." (Footnotes omitted.)); W. Reilly, "Fighting the Fighting Words Standard: A Call for Its Destruction," 52 Rutgers L. Rev. 947, 948 (2000) ("The [fighting words doctrine] is discriminatory because its application depends on assumptions about how likely a listener is to respond violently to speech. This approach invites judges or juries to determine whether speech is protected by the [f]irst [a]mendment based on their own prejudices about the listener."); M. Mannheimer, Note, "The Fighting Words Doctrine," 93 Colum. L. Rev. 1527, 1558, 1568–71 (1993) (arguing for modification of fighting words doctrine to add scienter requirement); Note, "The Demise of the *Chaplinsky* Fighting Words Doctrine: An Argument for Its Interment," 106 Harv. L. Rev. 1129, 1141 (1993) ("Overruling *Chaplinsky* would eliminate a doctrine that accommodates the undesirable 'male' tendency to come to blows. More [important], eliminating the 'fighting words' doctrine would eradicate a tool that governmental officials may use and have used to harass minority groups and to suppress dissident speech.").

[5] See *Cohen* v. *California*, 403 U.S. 15, 25, 91 S. Ct. 1780, 29 L. Ed. 2d 284 (1971) (recognizing that, under fighting words doctrine, "it is . . . often true that one man's vulgarity is another's lyric").

[6] G. Carlin, Class Clown (Little David Records 1972).

[7] *Chaplinsky* defined fighting words as "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Chaplinsky* v. *New Hampshire*, supra, 315 U.S. 572. The two parts of this definition have come to be known as the "inflicts injury" prong and the "breach of peace" or "incitement" prong. It is debatable whether the "inflicts injury" prong was ever anything more than dictum. See Note, "The Demise of the *Chaplinsky* Fighting Words Doctrine: An Argument for Its Interment," 106 Harv. L. Rev. 1129, 1129 (1993) (noting that "the prong of *Chaplinsky* that exempted words 'which by their very utterance inflict injury'—dictum in that opinion—has never been used by the [c]ourt to uphold a speaker's conviction"). In any event, it is generally acknowledged that the "inflicts injury" prong no longer serves to justify the fighting words exception. See, e.g., *Purtell* v. *Mason*, 527 F.3d 615, 624 (7th Cir.) ("[a]lthough the 'inflict-injury' alternative in *Chaplinsky*'s definition of fighting words has never been expressly overruled, the [United States] Supreme Court has never held that the government may, consistent with the [f]irst [a]mendment, regulate or punish speech that causes emotional injury but does not have a tendency to provoke an immediate breach of the peace" (emphasis omitted)), cert. denied, 555 U.S. 945, 129 S. Ct. 411, 172 L. Ed. 2d 288 (2008); *Boyle* v. *Evanchick*, United States District Court, Docket No. 19-3270 (GAM) (E.D.

Pa. March 19, 2020) (noting "[t]he [United States] Supreme Court's retreat from the broad standard announced in *Chaplinsky*" and abandonment of the "inflicts injury" prong); *UWM Post, Inc.* v. *Board of Regents*, 774 F. Supp. 1163, 1170 (E.D. Wis. 1991) ("[s]ince *Chaplinsky*, the [United States] Supreme Court has . . . limited the fighting words definition so that it now . . . includes [only the 'incitement' prong]"); *People in the interest of R.C.*, 411 P.3d 1105, 1108 (Colo. App. 2016) ("soon after *Chaplinsky*, the [United States] Supreme Court either dropped the 'inflict[s] injury' category of fighting words altogether or recited the full definition of fighting words without further reference to any distinction between merely hurtful speech and speech that tends to provoke an immediate breach of the peace"), cert. denied, Colorado Supreme Court, Docket No. 16SC987 (November 20, 2017); *State* v. *Drahota*, 280 Neb. 627, 634, 788 N.W.2d 796 (2010) ("the [United States] Supreme Court has largely abandoned *Chaplinsky*'s 'inflict[s] injury' standard"); E. Chemerinsky, Constitutional Law (5th Ed. 2017) § 9 (C) (2) (a), p. 1387 ("the [c]ourt has narrowed the scope of the fighting words doctrine by ruling that it applies only to speech directed at another person that is likely to produce a violent response"); M. Rutzick, "Offensive Language and the Evolution of First Amendment Protection," 9 Harv. C.R.-C.L. L. Rev. 1, 22–27 (1974) (tracing United States Supreme Court's rejection of "inflicts injury" prong in decades since *Chaplinsky*); M. Mannheimer, Note, "The Fighting Words Doctrine," 93 Colum. L. Rev. 1527, 1538–49 (1993) (tracing United States Supreme Court's rejection of "inflicts injury" prong in decades since *Chaplinsky*); Note, supra, 106 Harv. L. Rev. 1137 ("this prong almost certainly has been de facto overruled").

[8] First amendment jurisprudence traditionally recognizes that the government may not censor speech merely because the content or message is insulting or offensive due to its emotional impact on the audience. See, e.g., *Texas* v. *Johnson*, 491 U.S. 397, 414, 109 S. Ct. 2533, 105 L. Ed. 2d 342 (1989) ("[i]f 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"); *Cohen* v. *California*, 403 U.S. 15, 25, 91 S. Ct. 1780, 29 L. Ed. 2d 284 (1971) ("Surely the [s]tate has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us. . . . [I]t is . . . often true that one man's vulgarity is another's lyric."); cf. R. Kennedy, supra, 2001 U. Ill. L. Rev. 943 ("[t]he [fighting words] doctrine is in tension with the dominant (and good) rule in criminal law that prevents 'mere words standing alone . . . no matter how insulting, offensive, and abusive' from constituting the predicate for a provocation excuse"), quoting *United States* v. *Alexander*, 471 F.2d 923, 941 n.48 (D.C. Cir.), cert. denied sub nom. *Murdock* v. *United States*, 409 U.S. 1044, 93 S. Ct. 541, 34 L. Ed. 2d 494 (1972).

[9] The incitement analysis has its origins in cases in which a speaker faces criminal prosecution or civil liability for advocating unlawful conduct. See, e.g., *Brandenburg* v. *Ohio*, 395 U.S. 444, 444–45, 89 S. Ct. 1827, 23 L. Ed. 2d 430 (1969) (speech allegedly advocating hate group to engage in racial violence); *Schenck* v. *United States*, 249 U.S. 47, 48–50, 39 S. Ct. 247, 63 L. Ed. 470 (1919) (speech advocating reader to resist military conscription); cf. *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886, 927, 102 S. Ct. 3409, 73 L. Ed. 2d 1215 (1982) (applying *Brandenburg* test to speech allegedly inciting group to cause property damage). Under the *Brandenburg* "incitement" analysis, speech loses its constitutional protection only if it is (1) "directed to inciting or producing imminent lawless action," *and* (2) "likely to incite or produce such action." *Brandenburg* v. *Ohio*, supra, 447. The fighting words doctrine, unlike the *Brandenburg* incitement analysis, contains no intent requirement. See C. Calvert, "First Amendment Envelope Pushers: Revisiting the Incitement-to-Violence Test with Messrs. Brandenburg, Trump, & Spencer," 51 Conn. L. Rev. 117, 131–32 (2019) ("[i]n contrast to *Brandenburg*, the [c]ourt's test for another unprotected category of speech related to violence—fighting words—lacks an intent element"); M. Mannheimer, Note, "The Fighting Words Doctrine," 93 Colum. L. Rev. 1527, 1557 (1993) (observing that fighting words doctrine does not contain "a true incitement requirement because [it] fail[s] to require a critical component of the *Brandenburg* incitement standard—the intent of the speaker to cause violence").

[10] Professor Kathleen Sullivan is correct to label the doctrine gendered and anachronistic, although its historical roots trace back to the nineteenth century gentlemanly ritual of the duel rather than the timeless working-class custom of barroom brawling. Ironically, as Professor Jeffrey Rosen has observed, "[t]he [social] foundation of the [fighting words] doctrine had

collapsed long before the [United States] Supreme Court enshrined it as marginal constitutional law in 1942 [in *Chaplinksy*].'' J. Rosen, ''Fighting Words,'' Legal Affairs, May/June, 2002, p. 18. ''Legal bans on fighting words,'' explains Rosen, ''grew out of the [nineteenth century] efforts to discourage the practice of dueling, and they evolved from a [class-based] culture of honor and hierarchy'' that we would no longer recognize in contemporary America. Id., p. 16. The concept of fighting words emanates from a ''highly ritualized code of honor [that] led American gentlemen in the [nineteenth] century to fight duels, to prove their social status and worthiness for leadership. . . . [D]ueling depended on a strong consensus about the social pecking order. If you were insulted by a social equal, you redeemed your honor by challenging him to a duel. If you wanted to insult a social inferior, you displayed your contempt by bludgeoning him with a cane. In a culture based on honor, there was broad agreement about what kinds of insults could be avenged only by demanding satisfaction in a duel.'' Id. States attempted—apparently with little success—to put an end to this cultural artifact by enacting laws criminalizing the utterance of words considered so insulting as to necessitate a violent response. Id.; see also K. Greenberg, Honor and Slavery (Princeton University Press 1996) c. 1, pp. 14–15 (discussing history of antidueling laws); J. Freeman, Affairs of Honor (Yale University Press 2001) c. 4, pp. 159–198 (discussing social meaning and national importance of dueling in America during early nineteenth century). Professor Freeman's discussion in particular demonstrates that participation in these ''affairs of honor'' was not considered optional. See J. Freeman, supra, pp. 159–164 (discussing Alexander Hamilton's tormented desire to avoid proceeding with duel demanded by Aaron Burr and Hamilton's reluctant conclusion that duel was impossible to avoid). ''The laws of honor,'' writes Professor Freeman, ''indicated when insults could not be ignored . . . .'' Id., p. 171. Our country's dominant social code no longer compels us to defend our honor with violence; to the contrary, it is considered honorable to respond to insults by walking away, as the parking enforcement officer, Michael McCargo, did in the present case.

[11] There is a substantial body of social science literature on implicit bias, which is generally defined as subconscious ''stereotypes and prejudices that can negatively and nonconsciously affect behavior . . . .'' L. Richardson, ''Arrest Efficiency and the Fourth Amendment,'' 95 Minn. L. Rev. 2035, 2039 (2011). One such implicit bias ''consists of the cultural stereotype of blacks, especially young men, as violent, hostile, aggressive, and dangerous.'' Id.; see also A. Rutbeck-Goldman & L. Richardson, ''Race and Objective Reasonableness in Use of Force Cases: An Introduction to Some Relevant Social Science,'' 8 Ala. C.R. & C.L. L. Rev. 145, 149 (2017) (''[s]ocial science research over the last few decades suggests that we unconsciously associate [b]lack men with danger, criminality, and violence''). Implicit biases ''linking [b]lacks with aggression have been shown to cause people to judge the behavior of a [b]lack person as more aggressive than the identical behavior of a [w]hite person,'' leading to higher rates of police violence and incarceration. K. Spencer et al., ''Implicit Bias and Policing,'' 10 Soc. & Personality Psychol. Compass 50, 54 (2016); see also L. Richardson, supra, 2039 (''As a result of implicit biases, an officer might evaluate behaviors engaged in by individuals who appear black as suspicious even as identical behavior by those who appear white would go unnoticed. In other words, even when officers are not intentionally engaged in conscious racial profiling, implicit biases can lead to a lower threshold for finding identical behavior suspicious when engaged in by blacks than by whites.''). Implicit biases are not limited to race; they also perpetuate subconscious gender stereotypes. Many individuals view women as ''meek or submissive''; J. Cuevas & T. Jacobi, ''The Hidden Psychology of Constitutional Criminal Procedure,'' 37 Cardozo L. Rev. 2161, 2181 (2016); and, thus, not prone to engage in violent behavior. This is not true, however, for women of color. Black women are often viewed as ''hot-tempered, combative, and uncooperative,'' leading to higher rates of police violence and incarceration. F. Freeman, Note, ''Do I Look Like I Have an Attitude? How Stereotypes of Black Women on Television Adversely Impact Black Female Defendants Through the Implicit Bias of Jurors,'' 11 Drexel L. Rev. 651, 655 (2019); see also N. Amuchie, '' 'The Forgotten Victims' How Racialized Gender Stereotypes Lead to Police Violence Against Black Women and Girls: Incorporating an Analysis of Police Violence into Feminist Jurisprudence and Community Activism,'' 14 Seattle J. Soc. Just. 617, 646 (2016) (''[b]lack women and girls are viewed as [nonfeminine] or [unladylike], which leads to high levels of violence against them and excessive policing''). America, of course, has no monopoly on group

stereotypes of this nature. See, e.g., P. Lerner et al., "Introduction: German Jews, Gender, and History," in Jewish Masculinities (B. Baader et al. eds., 2012) p. 1 ("[t]he idea that Jewish men differ from non-Jewish men by being delicate, meek, or effeminate in body and character runs deep in European history").

[12] See *Jacobellis* v. *Ohio*, 378 U.S. 184, 197, 84 S. Ct. 1676, 12 L. Ed. 2d 793 (1964) (Stewart, J., concurring) (confessing his inability to define pornography in words but explaining that "I know it when I see it"). Justice Potter Stewart's candor is admirable and refreshing, but it is also troubling to those who believe that "the exercise of judicial power is not legitimate if it is based . . . on subjective will rather than objective analysis, on emotion [or instinct] rather than reasoned reflection." P. Gewirtz, Essay, "On 'I Know It When I See It,' " 105 Yale L.J. 1023, 1025 (1996). Some commentators, including Professor Gewirtz, consider such criticism unfair on the ground that it "mischaracterizes and understates the role that emotion and nonrational elements properly play in forming judicial [decision-making and opinion writing]." Id. I am not unsympathetic to Professor Gewirtz' general point, but my heart and mind are in agreement that "I know it when I see it" jurisprudence has no place in first amendment law.

[13] To cite one illustrative example of what I consider the unconvincing arguments offered by the majority to explain why the offensive speech was protected in *Baccala* but not here, the majority compares the nature of the addressee's job as an assistant store manager in *Baccala* to that of Michael McCargo, the parking enforcement officer in the present case, and opines that the store employee's supervisory status made her more likely to "[model] appropriate, responsive behavior, aimed at de-escalating the situation . . . ." (Internal quotation marks omitted.), quoting *State* v. *Baccala*, supra, 326 Conn. 253. Unlike the majority, I would place far greater weight on the fact that the addressee in this case was a government employee, not a private individual, as in *Baccala*. This factor, though not dispositive, traditionally and commonsensically weighs strongly in favor of according the speaker greater first amendment protection. See, e.g., *Houston* v. *Hill*, 482 U.S. 451, 462, 107 S. Ct. 2502, 96 L. Ed. 2d 398 (1987) ("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" (internal quotation marks omitted)), quoting *Lewis* v. *New Orleans*, 415 U.S. 130, 135, 94 S. Ct. 970, 39 L. Ed. 2d 214 (1974) (Powell, J., concurring in the result); *United States* v. *Poocha*, 259 F.3d 1077, 1081 (9th Cir. 2001) ("the area of speech unprotected as fighting words is at its narrowest, if indeed it exists at all, with respect to criminal prosecution for speech directed at public officials"); *Abudiab* v. *San Francisco*, 833 F. Supp. 2d 1168, 1175 (N.D. Cal. 2011) (parking control officer, "as a public official whose duties often incite the vitriol of the public, and who consequently is authorized to use force against members of the public (deployment of pepper spray in self-defense) . . . should be held to a higher standard of conduct in terms of his reaction to mere criticisms, profane and otherwise, of the manner in which he conducts his official duties"), aff'd sub nom. *Abudiab* v. *Georgopoulos*, 586 Fed. Appx. 685 (9th Cir. 2013); *In re Nickolas S.*, 226 Ariz. 182, 188, 245 P.3d 446 (2011) ("a student's profane and insulting outburst" was not fighting words because "Arizona teachers exemplify a higher level of professionalism"); *State* v. *Baccala*, supra, 326 Conn. 244 ("a majority of courts, including ours, hold police officers to a higher standard than ordinary citizens when determining the likelihood of a violent response by the addressee"). To be sure, McCargo was not a police officer, but he was employed as an agent of the government to walk the streets imposing monetary fines on members of the public for municipal parking violations. Parking enforcement officers, as the bearers of bad news, are in a very unpopular line of work and can expect to be subjected to varying levels of verbal abuse. See, e.g., T. Barrett, The Dangerous Life of a Parking Cop, The Tyee (April 2, 2004), available at https://thetyee.ca/Life/2004/04/02/The_Dangerous_Life_of_a_Parking_Cop/ (last visited August 26, 2020) (reviewing film about "the life of a parking enforcement officer," who explained that "physical assaults are rare, but verbal abuse is something that happens almost every day"); J. McKinley, "San Franciscans Hurl Their Rage at Parking Patrol," N.Y. Times, January 6, 2007, p. A12 (abuse on parking control officers is "common, often frightening and, occasionally, humiliating").

[14] The particular facts of the present case, and our consensus regarding the correct result here, ought not obscure the reality that demographic stereotypes and implicit biases relating to race will continue to plague this

doctrine. Conscious or unconscious racial stereotypes help to explain why some speech is deemed likely to incite violence, whereas other speech is not. See, e.g., A. Carr, supra, 31 Hastings Women's L.J. 229–30 ("For nonwhite Americans, racist stereotypes and diverging governmental and cultural norms about expressing public anger compound the complexities of [speech regulation]. Moreover, the state's responses to different individuals and groups' public displays of anger—as in protest actions—vary on the basis of race. For example, the recent cases of mass protests in Ferguson [Missouri, in 2014] and the Women's Marches (2017 onward) displayed enormous disparities: police responses to the [majority black] protesters in Ferguson were militarized and violent compared to the anodyne permissiveness of authorities toward the visibly white Women's March organizers and attendees. . . . Those [state individual] contexts include, among others, racist patterns of policing and incarceration, as well as profoundly asymmetric rates of arrest and prosecution. These considerations form a daunting backdrop for nonwhite (and non-male) listeners . . . in ways not contemplated by the [c]ourt in *Chaplinsky* and later cases. Black and brown Americans have myriad deeply rooted claims for condemning state authorities, for angrily castigating them in terms far harsher than Chaplinsky's censured utterance, but they also face far greater chances of harm if they choose to do so. Censure limits free speech rights; speaking out against racist systems often deprives speakers of color their very lives." (Footnotes omitted.)).

[15] I doubt that anyone would dispute that the actual statutory language promulgated by our legislature, which criminalizes the use of "abusive or obscene language" in a public place "with intent to cause inconvenience, annoyance or alarm"; General Statutes § 53a-181 (a) (5); plainly cannot pass muster under the void for vagueness doctrine without the aid of a workable narrowing construction. See *Gooding* v. *Wilson*, 405 U.S. 518, 523, 92 S. Ct. 1103, 31 L. Ed. 2d 408 (1972) (striking down Georgia's breach of peace statute in absence of such limiting construction while observing that "[its] decisions since *Chaplinsky* have continued to recognize state power constitutionally to punish 'fighting' words under carefully drawn statutes not also susceptible of application to protected expression"); see also *Plummer* v. *Columbus*, 414 U.S. 2, 2–3, 94 S. Ct. 17, 38 L. Ed. 2d 3 (1973) (striking down municipal ordinance providing that "[n]o person shall abuse another by using menacing, insulting, slanderous, or profane language" (internal quotation marks omitted)).

How the American News Media Address the n-Word

by Frank Harris III

How the American News Media Address the n-Word

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Abstract

This study surveyed American newspapers, television and radio stations on how they address the word "nigger" or "nigga" in today's news stories. It found the overwhelming majority has encountered the words in some part of the news process. While most do not have a formal policy for addressing the words, they nearly all apply euphemistic words, phrases and editorial approaches to keep the explicit words from being seen, read or heard by the public.

Keywords: United States, news media, newspapers, television, radio, racial slur, nigger, nigga, n-word, blacks, African-Americans, whites, Hispanics

Introduction

When video of University of Oklahoma fraternity members chanting their strong feelings against blacks went viral in March 2015, it became the latest in a series of high-profile news stories with the word "nigger" at its core. The incident involving Sigma Alpha Epsilon members included the suggestion of lynching, along with the explicit, venomous use of the word "nigger."
America's news media, when presenting the video and the corresponding news coverage, addressed the pejorative word in a number of ways – sometimes in the same newscast.

CNN, for instance, aired the video with the word "nigger" deleted. In the text graphics presented with the video, the word was presented with asterisks as ("n*****"). However, host Don Lemon, after using the term "n-word" in his segment to describe what the frat members chanted, quickly abandoned that term saying: "They didn't say 'n-word.' They said 'nigger.'" He continued to use the actual word they said throughout the broadcast.

America's First Amendment gives anyone and everyone the right to use this word. No one gets thrown in jail for its use. However, there are social constraints today that did not exist in America's past. These constraints make the word a major faux pas that can bring the offending party up to public ridicule and shame, as well as derail a career and lead to a

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host of other negative results up to and including economic sanctions and status as a social outcast.

The word's usage is an issue not just for high-profile stories such as this or Paula Deen, Riley Cooper, Laura Schlessinger and a host of others, but for the many instances when journalists encounter this word during the course of their everyday coverage when used by people of all races, ethnicities and social status.

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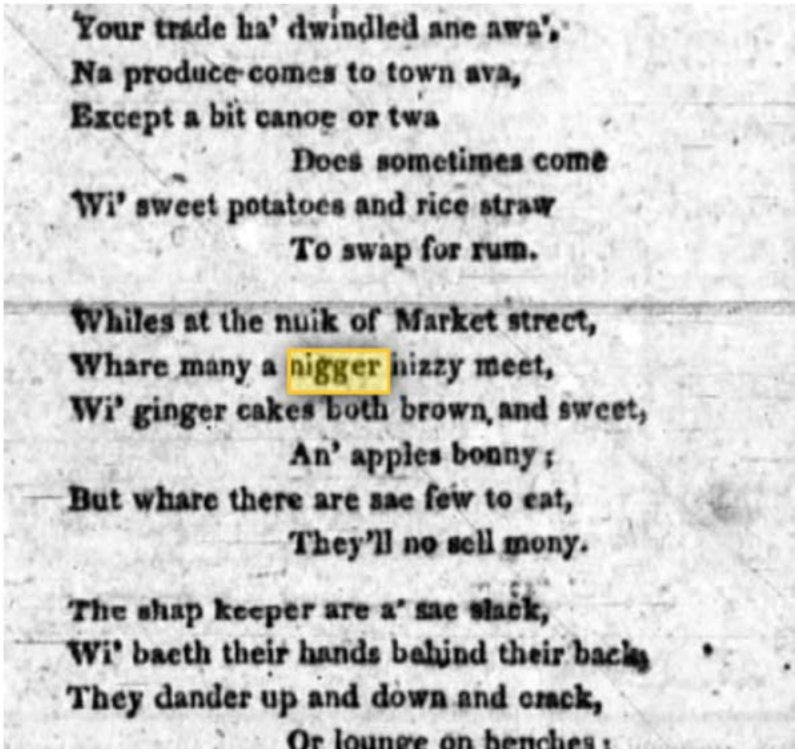
This leads to the other element of the word. Should those who receive media scrutiny regarding this word's usage be determined by the race of the person saying it? That is, should there be a double standard between blacks and nonblacks who use the word "nigger" or "nigga"?

Whether it is a national or local beat, a general story or a political story, a sports/entertainment or crime story, journalists have or will encounter the word "nigger" or "nigga" at some point in their news coverage. How do they address this word that on the one hand has been described in terms both hateful and endearing? Do they use the actual word that is said, or do they use the euphemistic "n-word." Do they use asterisks or underlines or some other creative way of describing the word? Is there a policy that news organizations have to address the word? How should they address it?

Excerpt from poem "The Poor Time of Wilmington"



Your trade ha' dwindled ane awa',
Na produce comes to town ava,
Except a bit canoe or twa
Does sometimes come
Wi' sweet potatoes and rice straw
To swap for rum.

Whiles at the nuik of Market street,
Whare many a nigger nizzy meet,
Wi' ginger cakes both brown and sweet,
An' apples bonny;
But whare there are sae few to eat,
They'll no sell mony.

The shap keeper are a' sae slack,
Wi' baeth their hands behind their back,
They dander up and down and crack,
Or lounge on benches;

Source: Cape-Fear (Wilmingtonm, N,C.) Record, July 31, 1819

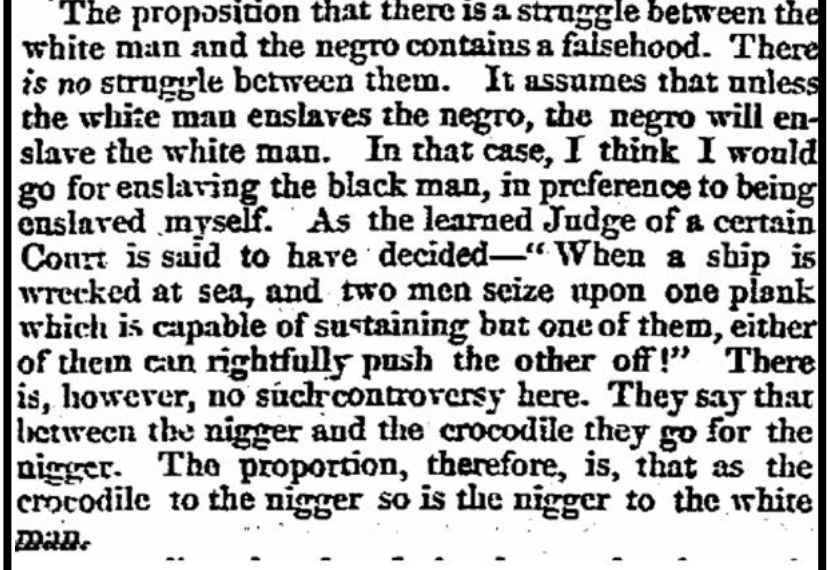
Historical overview of the n-word in America's news media.

When Publick Occurrences Both Forreign and Domestick published its one and only edition in 1690 making it America's first newspaper, there was not a word printed about America's blacks, most of whom were slaves. They were then referred to by a variety of names ranging from "slave," "African," "black," "Negro" and "nigger." While no one can say for sure when the word "nigger" was first uttered in America, the earliest newspaper

reference uncovered in this study was in the July 31, 1819 edition of Cape-Fear Recorder of Wilmington, N.C. The reference came in the form of a poem titled "The Poor Times of Wilmington." That is not to say that the word was not being used before this, as evident by the paper's introduction to the poem that indicated it was written by an Andrew Clarke in 1794, who was deceased at the time of its publication. But even 200 years before this, in 1582 according to the Oxford English Dictionary, the word was used. Citing a Spanish colonial source and written as "niger," the word was described as "post-classical Latin" for a black person. This was 37 years before the first black Africans were brought to America as slaves. The Oxford English Dictionary also pointed out "the word was initially a neutral term, and only began to acquire a derogatory connotation in the mid-18th (century) onward."

This still does not fully explain why the word was absent from American newspapers until the 1800s, including America's oldest continuously published newspaper, the Hartford Courant, whose earliest reference was July 28, 1834 in what was then called the Connecticut Courant. That reference was a reprint from the New York Daily Advertiser and was part of a regular satirical feature written in a folksy style reminiscent of Mark Twain.

Excerpt from Abraham Lincoln's 1860 Presidential Campaign Speech in Hartford, Conn., where he used the word 'nigger'



The proposition that there is a struggle between the white man and the negro contains a falsehood. There *is no* struggle between them. It assumes that unless the white man enslaves the negro, the negro will enslave the white man. In that case, I think I would go for enslaving the black man, in preference to being enslaved myself. As the learned Judge of a certain Court is said to have decided—"When a ship is wrecked at sea, and two men seize upon one plank which is capable of sustaining but one of them, either of them can rightfully push the other off!" There is, however, no such controversy here. They say that between the nigger and the crocodile they go for the nigger. The proportion, therefore, is, that as the crocodile to the nigger so is the nigger to the white man.

Source: Hartford Daily Courant, March 6, 1860

The trend of newspapers publishing poems, songs, satirical columns, short stories and novels containing the word "nigger" continued throughout the 1800s and the early 1900s. There would also be comic strips and cartoons featuring the word in newspapers. Early on, news editors and publishers tended to place quotes around the word to cite others' use of the word. As the slavery debate kicked in during the 1840s on to the Civil War, editors provided their own voices to the word in headlines and in the stories themselves.

It should be noted that the word "nigger" was a common and openly accepted term throughout much of America's existence. It was a word spoken by whites of all classes, including presidents and presidential candidates. Though he was speaking against slavery, presidential candidate Abraham Lincoln said the word "nigger" on several occasions during a campaign stop in Hartford, Conn. His words were captured in the March 6, 1860 Hartford Daily Courant. Said Lincoln: "They say that between the nigger and the crocodile they go for the nigger. The proportion therefore is that as the crocodile to the nigger so is the nigger to the white man."

The words, printed as is, did not cause a stir as they would if such a high-profile public figure were to say the word today. It was also not uncommon for blacks to use the word toward each other as numerous articles reveal. The word when used by blacks even 200

years ago was regarded as "neutral or affectionate"[1] (Oxford English Dictionary, 2013) while at the same time was "used by people who are not black as a hostile term of abuse or contempt"[2] (Oxford English Dictionary, 2013). However, the word has been used in all kinds of ways and not all blacks who used the word then did so with affection or neutrality. Some said it with similar contempt as whites or in a "depreciatory" way (Oxford English Dictionary, 2013).[3]

But the words spoken by blacks did not lead to the same type of horror as it did with whites who followed such pejoratives with action. Many articles when not poking fun with jokes and poems and songs, captured the pure hate and violence associated with the word, as in a March 29, 1848 story from the Sumter (S.C.) Banner about a "nigger hanging" in which a reporter describes the scene.

"Great indeed was the excitement manifested by all classes, more particularly the non-slaveholders, between the trial and day of execution, to see these negroes hung, and the expected 'nigger hanging' was much talked about as a circus would have been, in the days of Pineville memory. Nothing could be said nor done, but what the 'nigger hanging,' in some shape or another was brought upon the tapis and every body was going, and even seemed to anticipate much pleasure in the sight."

The word nigger was never the most frequent reference to Americans of black African descent for any decade since being brought to America from Africa. The words "Negro" and "Black" hold that distinction. Still, the word has proven to be resilient and fraught with power rooted in hate.

A look at newspapers' trend (in presenting the word "nigger" over the past 320 years gives some indication of its re-

Excerpt from the 'nigger hanging," South Carolina, 1848

Great indeed was the excitement manifested by all classes, more particularly the non-slaveholders, between the trial and day of execution, to see these negroes hung, and the expected 'nigger hangidg' was much talked about as a circus would have been, in the days of Pineville memory. Nothing could be said nor done, but what the 'nigger hanging,' in some shape or another, was brought upon the tapis, and every body was going, and even seemed to anticipate much pleasure in the sight.

'How *ar* you to day Bob?'

'I'm well, how is it yourself, I give you thanks?'

'O, sorter so. so. You gwine to the nigger hangin' Bob?'

'O yes, I would'nt miss it for a quarter.'

'Nor I nuther, I'd druther see it than to see the circus!'

Even the old women seemed delighted at the idea of having an opportunity, to see these poor devils suffer.

'Yes I intend to go,' says one, 'I know I can look at 'em hang as onconsarned as I could at an old sheep killin' dog, or a suck nig son of a hound.' The speaker growing more angry, the more she talked about it, until she seemed mad enough to kill every dog on the plantation, for fear they might turn out to sucking her eggs.

Source: The Sumter (S.C.) March 29, 1848.

1 1848 G. Lippard Paul Ardenheim ii. i. 225 For sixteen—seventeen year, dis nigga watch his time.

2 1818 H. B. Fearon Sketches Amer. 46 The bad conduct and inferior nature of niggars (negroes).

3 1952 J. Lait & L. Mortimer U.S.A. Confidential i. viii. 61 They are outcasts, unwanted even by other Negroes who came before them. These citified blacks resent the new influx and call them 'niggers'.

lation to the mood and events of the time. This can be seen, for instance, in the spike in usage in the period before and during the Civil War, as well as in the period of Reconstruction in the 1870s followed by the official government sanctioning of racism in the 1890s followed again with the rise in lynchings at the turn of the century during the "Red Summers" and again the turmoil of the 1960s during the Civil Rights Movement.

Newspapers of the past provided a major outlet for the use of the word "nigger" before the word lost its luster in the 1950s.

As for radio and television, neither lent themselves to the type of archival research as newspapers. However, when radio first aired in 1920, overt racism was still the norm. Accordingly the airwaves were filled with bigotry in the form of music containing the word "nigger," as well as radio shows and undoubtedly the news as spoken by radio broadcasters and/or their sources during interviews. When television came along in the 1950s, the word "nigger" was arguably not as strong a presence as it had been with newspapers and radio.

Kenn Venit, a former television news reporter, producer (personal communication, March 31, 2015), in the 1960s through the early 1980s said he has no recollection of ever hearing the word "nigger"

Most Frequent Name Reference for Americans of African Descent by Decade 1730-2008

Decade	Most Frequent Racial Reference
1730-1739*	Black
1740-1749*	Negro
1750-1759*	Negro
1760-1769	Negro
1770-1779	Negro
1780-1789	Negro
1790-1799	Negro
1800-1809	Negro
1810-1819	Negro
1820-1829	Slave
1830-1839	Negro
1840-1849	Slave
1850-1859	Slave
1860-1869	Negro
1870-1879	Colored
1880-1889	Negro
1890-1899	Colored
1900-1909	Negro
1910-1919	Negro
1920-1929	Negro
1930-1939	Negro
1940-1949	Negro
1950-1959	Negro
1960-1969	Negro
1970-1979	Black
1980-1989	Black
1995-1999	Black ‡
2000-2008	Black ‡

Source: * Pennsylvania Gazette, first three decades.
All else: Connecticut Courant, Hartford Daily Courant, Hartford Courant.
‡ African American was a close second.

broadcast during that time.

"In the newsrooms I worked in going back to the Sixties and Seventies," said Venit, "'hell' and 'damn' were prohibited. The language in journalism was extremely conservative.

For example, when the Black Panther rally happened on the New Haven green, I actually made a request – which years later I realized was inappropriate – but I asked some of the speakers like Jerry Rubin 'Could you limit the use of the F-word?' because our film, you couldn't use it and we weren't allowed to bleep.

If you could read lips, we weren't allowed to put that language on the air even bleeped. It's the equivalent of the newspaper when they put n----- etc. Again, in our television so many words were not acceptable. Then you couldn't say 'pissed off.' It was 'ticked off.'

I think we were much more careful about language and operating in the public interest, convenience and necessity etc. and in the later years the liberalization of the language had led to given certain circumstances you can say the n-word and I might be quoting someone else or perhaps using it in a more educational or contextual way but in the early days that wouldn't have been allowed.

We would not have broadcast that word ('nigger'). I would have to say under any circumstances we would not be broadcasting that word. I don't remember covering anything where the word was actually used. So it may have been that people that dealt with the media in those days did not have an expectation that the word would be used. I think today there would be great consideration of that word whether it would be broadcast or print, but I started where it was absolutely prohibited."

Previous Studies

There are numerous news stories about the n-word and a few on the news media's use of the word, such as Nadrea Kareem Nittle's "The Media and the N-Word" posted on the website of the Maynard Institution of Journalism Education in July18, 2012. However, there have been no studies noted to date featuring a survey of the news media on how they address the words "nigger" or "nigga." The closest would be a survey by journalist Richard Prince, also in 2012 and also for the Maynard Institute, in his capacity as a columnist on diversity issues in the media. His survey featured the responses of nine news organizations that were asked their "policies about using epithets for race, ethnicity and sexual orientation."

Methodology

This study involved three methods of gathering information:

Newspaper Archives

First, there was research of America's first newspaper, Publick Occurrences Both Foreign and Domestick (1690). There was also a database search that involved the archives of the Hartford Courant, America's oldest continuously published newspaper beginning in 1764 – 2009. There was also a search of the 3,354 newspapers of Newspapers.com, an online subscription-based service featuring newspapers from 1688 -2009. These databas-

es yielded news stories featuring the word "nigger," but more importantly, provided information that led to a plotting of the trend of newspapers' use of the word "nigger" in news stories over the past 320+ years.

Interviews

There were recorded interviews with over 100 people across America about their experience with the word "nigger" or "nigga." These interviews were conducted primarily in person from February 2014 to March 31, 2015. The people interviewed were of all races, ages, and genders and economic backgrounds. Some were famous people; most were everyday Americans.

Survey

The heart of this study centered on survey responses of 184 American newspapers, television news and radio news journalists from Jan. 14, 2015 to March 11, 2015. All were selected from the Mondo Times, a news media guide that provided the names of news organizations for each of the 50 states, along with the name of the contact person. For newspapers, that person was typically the managing editor; for television, it was the news director; for radio it was the news director or program director. With the names provided, a visit to the website produced, in most cases, the email addresses and phone numbers. In the vast majority of instances, the names were accurate. From there, email letters were sent to the contact person describing the research and asking the person to click the Snap Survey link in the letter to complete the online survey.

Understanding the sensitivity of the word and the topic meant finding a way to introduce the survey in a way that would not offend those seeing it, while at the same time ensuring that the email grabbed the attention of the recipients

Email Letter Sent to News Media

Good morning, (Name):

The word "nigger" and "nigga" are words that most news organizations have encountered or will encounter in some element of their news coverage.

I am rolling out a **BRIEF** survey of (news media) across America on how they address this word in their news stories.

I am asking for your station's participation.

Please click this link https://www.snapsurveys.com/wh/s.asp?k=141935387973 and complete the survey.

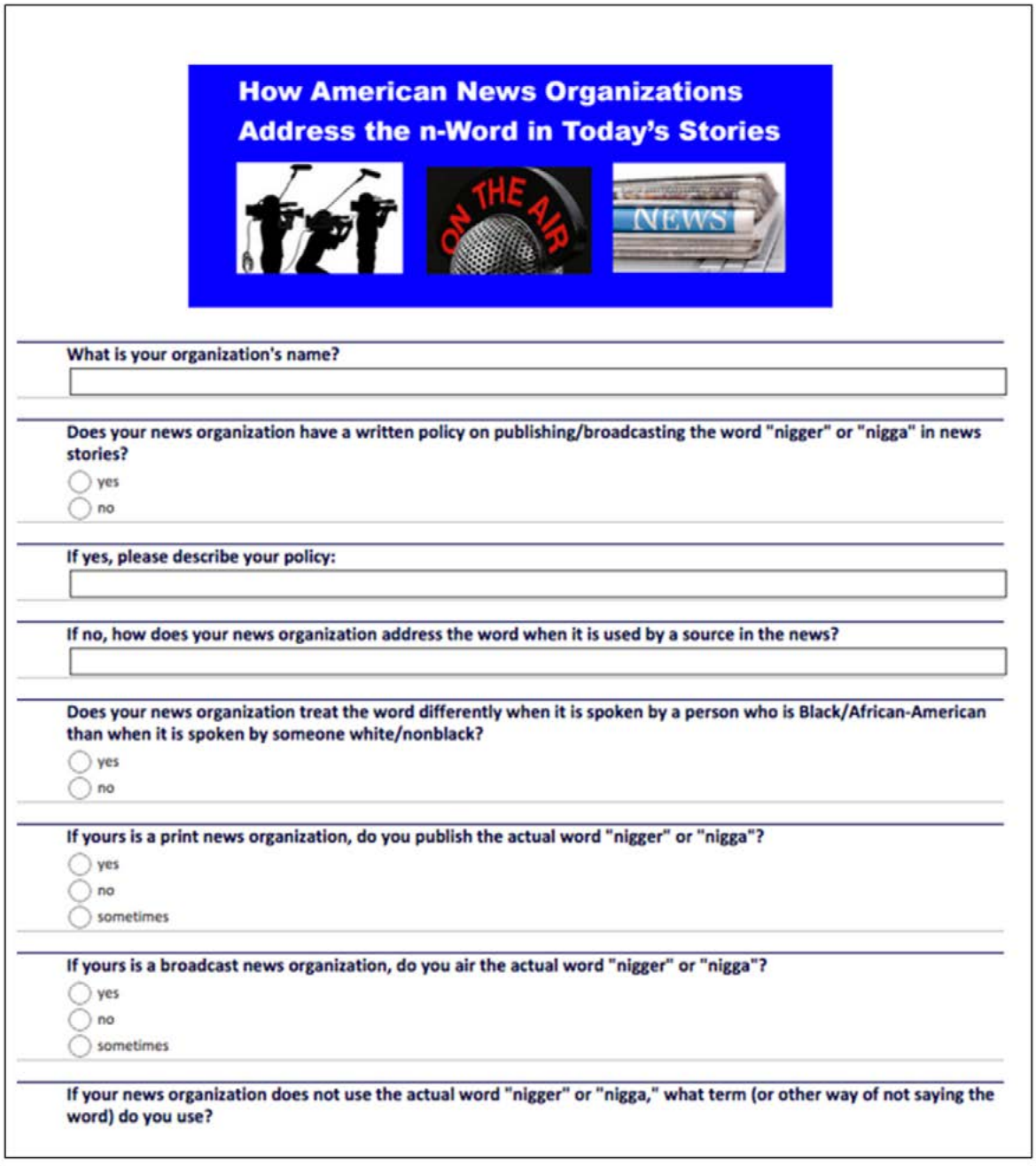
I promise you it is **Brief.** Just eight questions. Seven when counting just identifying your news organization. It will be a big help to my research and I will be more than happy to share with you the results.

Thanking you in advance.

Regards,
(My name and contact info)

from the countless other emails they undoubtedly receive each day. If it is not seen and noticed right away, it gets pushed farther into the queue where it can be lost if not forgotten. Recognizing the subject box was the first thing recipients see, emails were sent individually with the recipient's first name in the subject box followed by the question of how the recipient's news organization – also identified by name -- addresses the n-word? For example: Jim – How does WXWW address the n-word? When recipients open the email, they are again addressed by name, with the letter describing the research and asking them to click the link — which led them to the following survey:

The Survey



Three Mediums

Newspapers
Surveys were sent via email with a link embedded to the editors of 450 American newspapers in all 50 states and the District of Columbia. Included were the top 100 circulation dailies, as well as small town dailies, weeklies, Spanish-language and African-American papers. Fifteen of the email letters bounced back and were undelivered. The total receiving the survey was 435, of which 84 responded for a 19 percent response rate.

Television
Surveys were sent via email with a link embedded to the news directors and program directors of 668 television stations in major markets, as well as smaller markets in all 50 states. Sixty-five emails were undelivered. The total receiving the survey was 603, of which 53 responded for a 9 percent response rate.

Radio
Surveys were sent via email with a link embedded to the news directors and program directors of 494 radio stations in the 50 states. Thirty-were undelivered. The total receiving the survey was 462, of which 47 responded for a 10 percent response rate.

Survey Responses

As a group, 1,500 newspaper editors, and television and radio news editors/program directors received the survey, with 184 responding for a response rate of 12 percent. The list of news media respondents are listed in their respective categories on the three pages that follow.

Newspaper Respondents

Albany (N.Y.) Times Union	Denver Post	LEO (Louisville) Weekly	Rockford (Ill.) Register Star
Albuquerque Weekly Alibi	Detroit Free Press	Lewiston (Maine) Sun-Journal	Salt Lake Tribune*
Annapolis (Md.) Capital Gazette	Devils Lake (N.D.) Journal	Long Beach Press-Telegram (LANG)	San Francisco Chronicle
Arkansas (Little Rock) Democrat-Gazette	Durham (N.C.) INDY week (Independent Weekly	Los Angeles Daily News (Los Angeles News Group)	Scottsbluff (Neb.) Star-Herald Publishing
Arkansas Times	Ellsworth (Maine) American	Lowell (Mass.) Sun	South Carolina (Columbia) State
Aurora (Colo.) Sentinel/Aurora Media Group	Evansville (Ind.) Courier & Press	Macomb (Clinton Township, Mich.) Daily	South Florida (Ft. Lauderdale) Sun Sentinel
Bangor (Maine) Daily News	Everett)Wash.) Daily Herald	Mat-Su (Alaska) Valley Frontiersman	St. George (Utah) Spectrum & Daily News
Bay Area News Group –San Jose Mercury News, Contra Costa Times, Oakland Tribune	Fayetteville (N.C.) Observer	Medford (Ore.) Mail Tribune	St. Louis Post-Dispatch
Billings (Mont.) Gazette	Florida Times-Union (Jacksonville, Fla.)	Milwaukee Community Journal	Statesman Journal (Salem, Ore.) Media
Biloxi-Gulfport (Miss) Sun Herald	Fort Wayne Journal Gazette	Milwaukee Journal Sentinel	USA Today
Brattleboro (Vermont) Reformer	Frederick (Md.) News-Post	Monroe (La.) News- Star	Valencia County (N.M.) News-Bulletin
Brightside (Kennesaw, Ga.)*	Gambit Weekly (New Orleans)	Mundo Hispanico Atlanta	Valley Breeze (Lincoln, R.I.)
Caledonian –Record Publishing Co. (St. Johnsbury, Vermont)	Gardnerville, (Nev.) Record-Courier	N'DIGO Magapaper (Chicago)	Viva Colorado
Canton Repository/Gatehouse Media Ohio	Hagerstown (Md.) Herald-Mail	NJN Publishing/Union County Suburban News (N.J.)	Washington Post
Charleston (West Va.) Gazette	Hoy Los Angeles	Northwest Arkansas Democrat-Gazette	Waterbury (Conn.) Republican-American
Charleston (West Virginia) Daily Mail	Jackson (Miss.) Clarion-Ledger	Ogden (Utah) Standard-Examiner	Westerly (R.I.) Sun
Charlotte Observer	Jamestown (N.D.) Sun	Peoria (Ill.) Journal Star	Wisconsin (Madison) State Journal
Clarion Herald (New Orleans)	Kansas City Pitch	Philadelphia Daily News	Wyoming (Cheyenne) Tribune Eagle
Coeur d'Alene (Idaho) Press	Kingsport (Tenn.) Times-News	Philadelphia Inquirer	
Connecticut Post (Hearst Conn. Media - Stamford Advocate, Greenwich Times, Danbury News-times and several weeklies)	Knoxville News Sentinel	Providence Journal	
Creative Loafing Charlotte (N.C)	Las Cruces (N.M.) Sun-News	Provo (Utah) Daily Herald Media	
Dallas Morning News	Lawrence (Kansas) Journal World	Riverside Reader/Riverside Media Group (Port Allen, La.)	

Television News Station Respondents

KAKE 10, Wichita - Kan.	KSBY, San Luis Obispo, Calif.	WABI 5 - Bangor, Maine	WLTZ - Columbus, Ga.
KCRG 9 - Cedar Rapids, Iowa	KSNT 27, KTKA, KTMJ -Topeka, Kan.	WAFF - Hunstville, Ala.	WPDE 15 - Florence, S.C.
KENV 10 - Elko, Nev.	KTEN 10 - Denison, Texas	WAFF - Hunstville, Ala.	WQOW 18 -Eau Claire, Wisc.
KEPR 19 - Pasco and KIMA 29 - Yakima, Wash.	KTTC 10 – Rochester, Minn.	WANE 15 - Fort Wayne, Ind.	WTOL 13 and WUPW 36 - Toledo, Ohio
KLKN 8, Lincoln, Neb.	KTVA - Anchorage, Alaska	WBAL 11 - Baltimore, Md.	WTVO/WQRF 39 - Rockford, Ill.
KMEG 14 - Sioux City, Iowa	KTVA -Anchorage, Alaska	WBOY 12 - Clarksburg, W. Va.	WVVA 6 - Bluefield, W. Va.
KMPH Fox 26 Fresno, Calif. and KPTM Fox 42 - Omaha, Neb.	KTVE - Monroe, La.	WBTV 3 - Charlotte, N.C.	WYOU 22 - Scranton and WBRE 28 - Wilkes-Barre, Pa.
KMSB and KOLD - Tucson, Ariz.	KTVN 2, Reno, Nevada	WCBI 4 -Columbus, Miss.	Anonymous
KOB 4 - Albuquerque and KOBF - Farmington, N.M.	KVHP Fox 29 - Lake Charles, La.	WCIA 3 - Champaign, Ill.	Anonymous
KODE 12 and KSNF 16 - Joplin, Mo.	KVVU 5 (FOX 5 VEGAS) - Henderson, Nev.	WECT 6 and WSFX 26 - Wilmington, N.C.	Anonymous
KOLO 8 - Reno, Nevada	KWCH 12, KBSD 6 - Dodge City, KBSH - Hays, KBSL Goodland, Kan.	WETM 18 - Elmira, N.Y.	Anonymous
KRIS 6 and KZTV 10 - Corpus Christi, Texas	News Channel WTVF 5 - Nashville, Tenn.	WFXV 33, WUTR 20, Eyewitness News - WPNY 11, Utica, N.Y.	
KRTV 3 - Great Falls and KXLH 25 Helena, Mont.	North Metro - Blaine, Minn.	WIFR 23 - Rockford, Ill.	
KSAT 12 - San Antonio, Texas	Time Warner Cable News, Rochester, N.Y.	WJBF 6 - Augusta, Ga.	

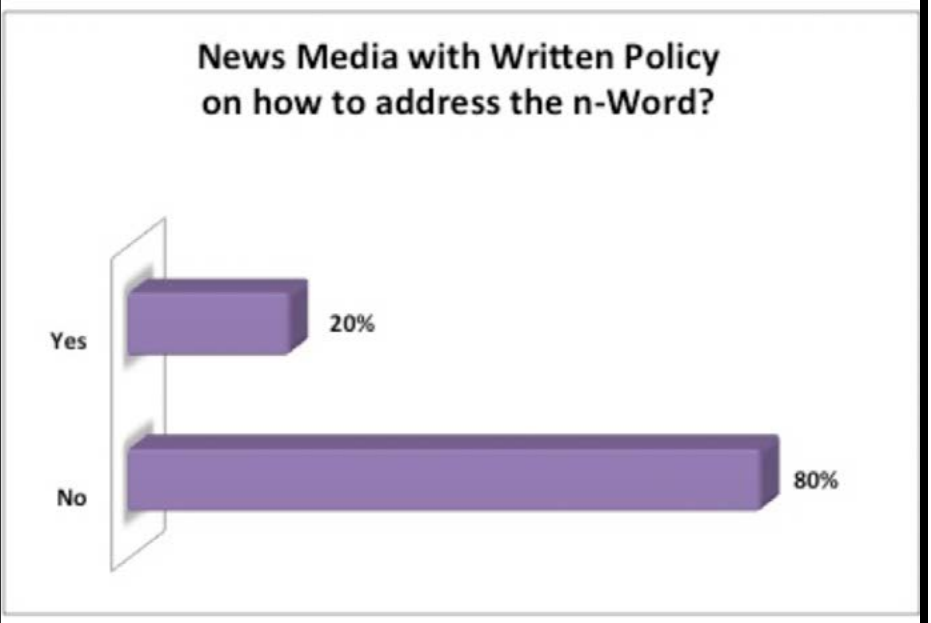
Radio News Station Respondents

Hawaii Public Radio - Hilo, Hawaii	KOKC AM 1520 - Oklahoma City	WBAA FM 101 Public Radio -West Lafayette, Ind.	WNIS AM 790 - Norfolk, Va.
KARN-FM 102.9 - Little Rock, Ark.	KOZY AM 1320 (Lamke Broadcasting) - Grand Rapids, Minn.	WBBM AM 780 - Chicago	WOCA AM 1370 - Ocala, Fla.
KAZM Radio 780 - Sedona, Ariz.	KPCW FM 91.9 NPR - Salt Lake City	WBT AM 1110 radio - Charlotte, N.C.	WSJM AM 1400 Midwest Family Broadcasting Group - Saint Joseph, Mich.
KDAQ FM 89.9 Red River Radio - Shreveport, La.	KSFC FM 91.1 Spokane Public Radio - Spokane, Wash.	WCHL AM 1360 CBS - Chapel Hill, N.C.	WSPD AM 1370 - Toledo, Ohio
KDWA AM 1460 - Hastings, Minn.	KUNM FM - Albuquerque, N.M.	WDEL AM 1150 - Wilmington, Del.	WUNC - Chapel Hill, N.C.
KFBK 1530 AM - Sacramento, Calif.	KWQW FM 98.3 the Torch - Des Moines, Iowa (Urbandale)	WDET FM NPR - Detroit	WVLK AM 590 - Lexington, Ky.
KGMI AM 790 - Bellingham, Wash.	KZIM AM 960 - Cape Girardeau, Mo.	WESA FM 90.5 NPR - Pittsburgh	WWNO FM - New Orleans
KKDV FM 92.1 – Pleasanton, Calif.	Michigan Radio (WUOM, WFUM, WVGR) - Ann Arbor, Mich.	WGN Radio AM 720 - Chicago	Anonymous
KKWK FM and KMRN AM - St. Joseph, Mo.	Midwest Communications - Terre Haute, Ind. Cluster	WHQR FM 91.3 Public Radio - Wilmington, N.C.	Anonymous
KKXT AM 1360 - Corpus Christi, Texas	News Radio KFBK – Sacramento, Calif.	WINC 92.5 FM - Winchester, Va.	
KLBJ AM 590 - Austin, Texas	Sportsradio 610 - Houston	WINS 1010 AM - New York	
KLIV AM 1590 - San Jose, Calif.	WAKR-AM 1590 WONE-FM WQMX-FM Rubber City Radio Group - Akron, Ohio	WISN AM 1130 - Milwaukee	
KNBA 90.3 FM Anchorage, Alaska	WAOK-AM 1380 - Atlanta	WLKF AM 1430 - Lakeland, Fla.	

Results

Written policy on the n-Word

Overall, just 37 (20%) of the 182 total respondents to the question indicated their news organization had a written policy; 145 (80%) said they had no written policy. Of the 37 that have a written policy, 23 (62%) of these were newspapers, seven (18%) were television stations, and seven (18%) were radio stations. In describing their policy, 14 of the respondents said their policy was to treat the words "nigger" or "nigga" as they would any other profane, obscene or vulgar word. Ten said they treated the word as they would any other derogatory racial or ethnic slur. Other respondents simply said they do not publish or air the word in their news stories, or if it is used, , there must be a compelling reason that is approved by the highest editor or news director on duty. Several others said their policy was to follow the Associated Press[4] or National Public Radio's guidelines.[5] It is important to note that most of those who had a written policy said their



Source: Responses of 182 editors and news directors/program directors of American newspapers, television and radio stations on whether they have a written policy on how to address the n-word.

4 The Associated Press' guidelines for the 2013 edition do not directly reference the word "nigger" or "nigga." It states under "nationalities and guidelines": "Use derogatory terms online in direct quotes when essential to the story and flag the contents in an editor's note." Also under "obscenities, profanities, vulgarities," it states: "Do not use them in stories unless they are part of direct quotations and there is a compelling reason for them. Try to find a way to give the reader a sense of what was said without using the specific word or phrase. If a profanity, obscenity, or vulgarity must be used, flag the story. Confine the offending language, in quotation marks, to a separate paragraph that can be deleted easily by editors who do not want to use it."

5 While some news organizations indicate that they treat the word "nigger" or "nigga" the same way as they do any other profanity, National Public Radio noted in its guidelines on the use of potentially offensive language that according to the Federal Communications Commission policy against profanity that "profanity does not include religious or racial epithets, such as the word 'nigger.'" However, the NPR Guidelines also noted that while the FCC does not prohibit racial epithets, "editorial considerations must separately bear on whether to use terms that may be offensive to segments of the public. Accordingly, NPR's position is that use of racial or religious epithets should be avoided unless the use is essential to the piece, the piece has significant news or other value, and the appropriate internal NPR consultation has taken place."

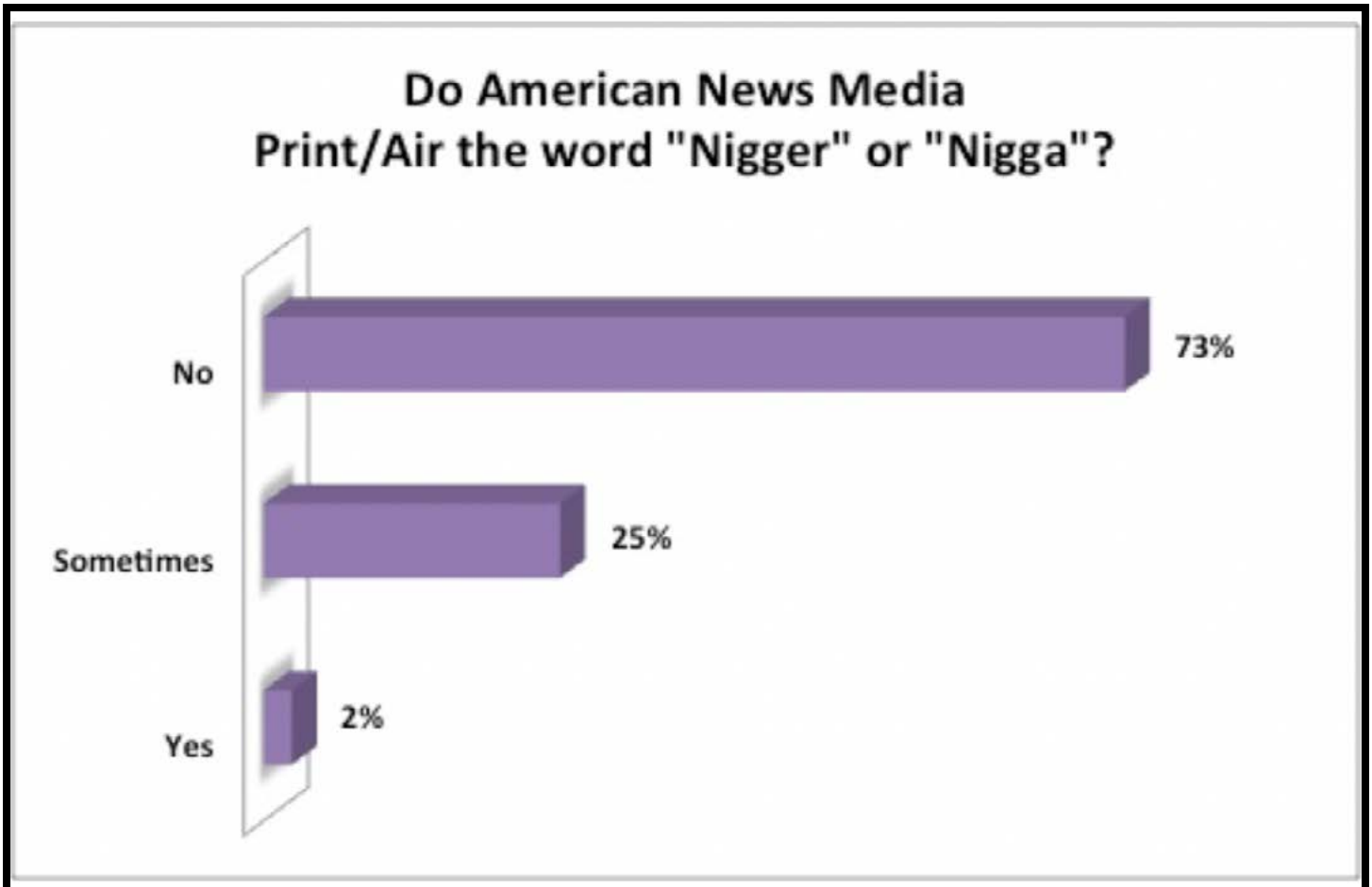
policy is not to use the word, though many of them qualified this by saying that its use or nonuse depends on the context. Some examples provided included if a prominent figure said it or if there are overriding circumstances where the word is critical to the story. They also said they use a sanitized version of the word.

Treat the word differently based on the race of the person saying it

Across the board, nearly all of the 170 respondents (95%) to this question said they don't treat the word differently when it is spoken by a black/African-American than when it is spoken by someone white/nonblack. Of the eight respondents (5%) who said they do treat the word differently, six of these were newspapers, while two were from radio.

Printing/Airing the actual word "nigger" or "nigga"

The overwhelming majority (80%) of the American media surveyed indicated they did not print or air the actual word "nigger" or "nigga" in their news stories. (See Figure 15, p. 42) Of the 20 percent who did indicate they aired or published the actual words, most of them said they "sometimes" did so.



Source: Responses of 168 editors and news directors/program directors of American newspapers, television and radio stations on whether they print or air the words "nigger" or "nigga."

The words and phrases news organizations use in place of "nigger" or "nigga"

For newspapers, television news and radio news stations combined, the "n-word" was the word most often used to replace the actual word "nigger' or "nigga." Of the 139 journalists providing word choices within the three media, the n-word accounted for more than half (52%) of all words used. "Racial slur" or "racial epithet" followed a distant second at 25 percent; the first letter followed by a series of dashes[6] (what one editor referred to as the "Wheel of Fortune") at 18 percent; bleeping or editing it out at 13 percent. Other choices and phrases abounded and it should be noted that not all editors and directors used one word or phrase exclusive of all others. A number said they might vary their word or phrase of choice based on the context and circumstance. Among the three media[7] that used the n-word as the word replacement, radio (66%) and television (65%) had the greatest percentage of its media using the term "n-word."

While a look at the group overall is revealing, a closer look within each media provides more detail in how they address the word.

Analysis by Media

Newspapers

Newspapers' written policy on the n-word

While all three media had few of their number with written policies on the n-word, newspapers (28%) had the highest percentage of its group who said they had written policies. The vast majority had policies that echoed that of the Associated Press', with three explicitly stating that they followed the AP's guideline. Only one paper surveyed, a 100,000+ circulation Northeastern daily, indicated it had a policy geared specifically to address the words in question. Said the paper's managing editor: "Nigger or nigga: DO NOT USE unless there is a compelling reason to do so, and either the editor or an assistant managing editor has signed off on it."

The managing editor of a 50,000+ Midwestern daily said his paper's policy is to publish the word "Only when necessary and presented as n-----."

The editor of a 500,000+ Western daily said his paper's policy "falls under the portion of not using derogatory names."

The editor of an 80,000+ circulation Southeastern daily said, as did many editors, that his paper treated the word like any other offensive word:

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6 The use of generic terms "racial slur" or "racial epithet" and the use of initial letter followed by hyphens indicate the particular news organization is following the Associated Press' Stylebook under "obscenities, profanities, vulgarities": "... replace the letters of the offensive word with hyphens, using only an initial letter. In some stories or scripts, it may be better to replace the offensive word with a generic descriptive in parentheses…"

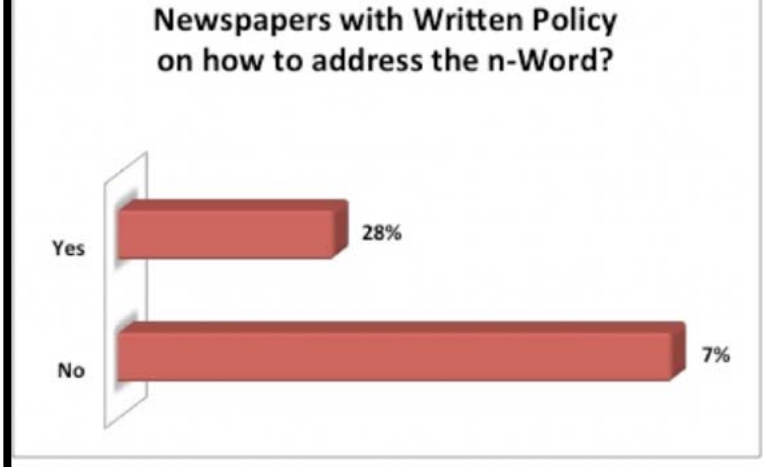
7 The use of the words "media" or "three media" refers to newspapers, television and radio. For this study, it also should be inferred that the same policy that these media have in how they address the n-word also applies to their news stories when posted on their Internet websites.

If it is necessary to indicate what the word is in a quotation, we use 'n-----.' However, in one special report last year, we used the word in its entirety in stories about a historical racial incident because the narrative style of the package made the context more appropriate.

While only 1 in 4 indicated they had a written policy, all newspapers responding said their staff had some understanding

The staff 'adheres to the belief that the 'N-word' is not appropriate.'

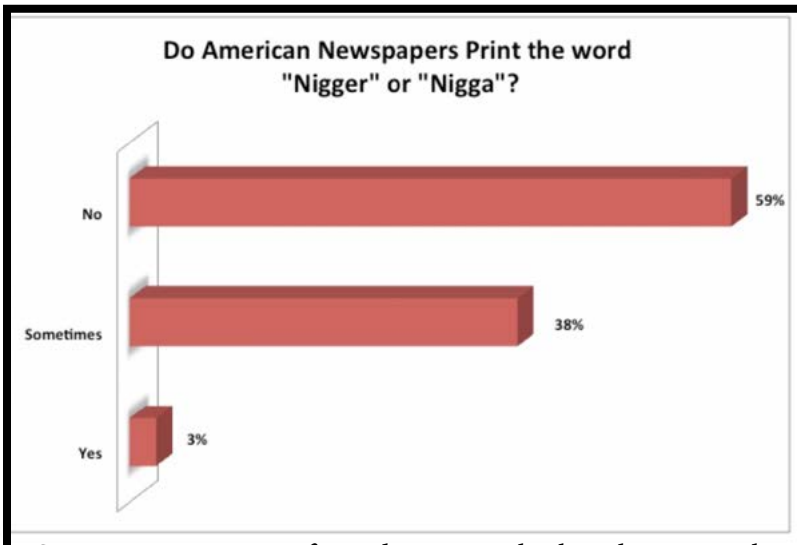
of how they address the word. For instance, the editor of a black Midwestern twice-a-week 40,000+ newspaper said her paper has an unwritten policy in which the staff "adheres to the belief that the 'N-word' is not appropriate;" that it is offensive and racist in its connotations."



Source: Responses of 82 editors of American newspapers on whether they have a written policy on how to address the n-word.

Likewise, the editor-in-chief of a 180,000+ Midwestern daily said his paper does not have a "word-by-word policy, but a broad policy that says we generally do not publish foul language, including obscenity, profanity and racial/ethnic slurs. He noted exceptions are made if the language is critical to the story, but this is done only after consultations with the highest editors.

The editor of a Southeastern major circulation daily said his paper "doesn't have a policy that singles out the term 'nigger' or 'nigga'" but addresses the words as they do other vulgar or profane words. The decision to use the word, he said, is made on a case-by-case basis with the managing editor deciding whether the word should be fully spelled out or use the first letter followed by a series of hyphens.



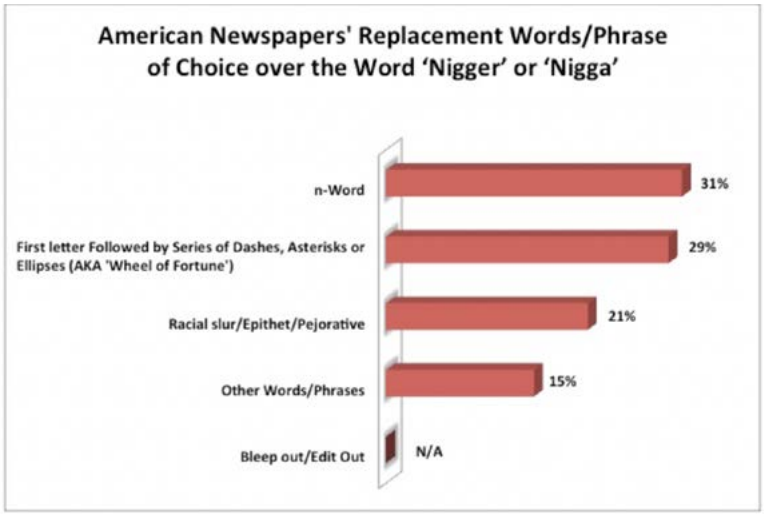
Sourcer: Responses of 76 editors on whether they print the word "nigger" or "nigga" in their newspaper.

Newspapers printing the actual word "nigger" or "nigga"

Among the media that used the actual word in their news stories, 4 of 10 newspaper respondents (41%) said they print the actual word "nigger" or "nigga," with most who publish the word noting they did so "sometimes." Just under six of 10 (59%) indicated they did not publish the actual words.

The words and phrases Newspapers use in place of "nigger" or "nigga"

Of the 72 newspapers editors who responded to the question of what word or phrase they use in place of the words "nigger" or "nigga," it was a toss-up between the "n-word" (35%) and the use of dashes, asterisks or ellipses in place of the missing letters (33%) as the way newspapers address the word without actually saying it. The phrase "racial slur" or "racial epithet" (24%) was the third choice of newspapers.



Source: Responses of 72 editors who indicated they did not or sometimes published the word "nigger" or "nigga" in their newspaper. Some editors used more than one word or phrase of substitution.

There were also a number of other choices such as the word "expletive," and such phrases as "an offensive term for a black person," or "a derogatory or socially offensive word to describe a minority person."

The replacement description choice for some also depended on the circumstance.

"If it's in a quote," said managing editor of a 7,000+ Northeastern paper, "(use) 'n-----' otherwise you refer to it as 'a racial pejorative.'"

The managing editor of a 17,000+ Southeastern daily said her paper refers to it as a "racial slur or epithet." "We avoid the term 'n-word,'" she said. "In direct quotes, we use the first letter and dashes."

The managing editor of a 7,000+ Western paper, noting the absence of blacks in its newsroom and circulation area said: "We are mostly white folks here. However, if someone's skin color is part of the storyline, we ask them how they identify. If someone uses that word in a quote, we don't use the quote. We paraphrase the info, if we need it."

Some Spanish-language newspapers in the survey had an entirely different word choice. The editor of a 140,000+ Spanish Language weekly in the West said his paper uses "Afroamericano" or Afromexicano" depending upon what country the person of black African descent hails from. He also suggested that it uses the word "negro."

"We understand the meaning in United States of the word 'nigger' or 'nigga,'" he said, "however, in Latinamerican countries we use negro as a regular word, with no connotation like in (the) United States."

The editor of a 50,000+ Spanish Language weekly in the West somewhat echoed this understanding relating to the word "negro, " which in Spanish means the color black, but has a negative connotation today in the United States.[8]

8 Indeed, years ago, some students sent to research old newspapers on how they addressed race, came back exclaiming how they kept running across the word "Negro." These students were viewing the word as they would the other n-word. It had to be explained that "Negro" was once the preferred and respectable word of reference for Americans of black African descent until the late 1960s.

He said his paper faces this issue every week when picking news wire from The Associated Press Spanish service based out of Mexico.

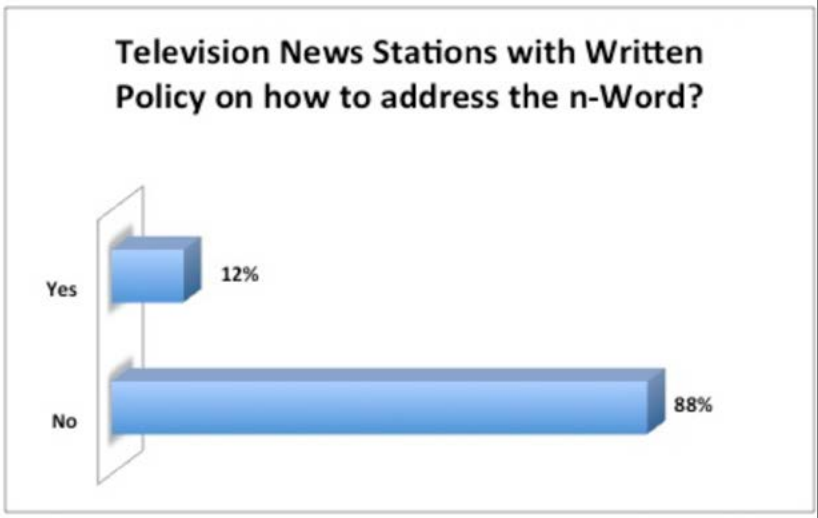
"For 'negro,' constantly seen in the (A.P. Spanish wire service) we change it to 'afroestadounidense' or "afroamericano.' But the word 'negro' isn't necessarily used to refer to 'nigger.' Instead it is the common word to refer to African-Americans or blacks."

The managing editor of a 70,000+ Spanish Language weekly in the Southeast said if her paper had to write a quote on a story, it would translate it as "Negro."

Television

Television news' written policy on the n-word.

Just 12 percent of television news stations surveyed said they had a written policy on addressing the n-word. There was no distinction between those who had a written policy and those that didn't as to whether they would air the explicit word – most overwhelming said they would not. Also, many stations indicated they address the words as they would a profane or obscene word.



Sourcer: Responses of 59 news directors of American television news stations on whether they have a written policy on how to address the n-word.

Said the news director of a Southeastern TV news station that has a written policy: "We are professional journalists who do not tolerate vulgarity on-air."

A Midwestern news director whose station also has a written policy, said his station "will not broadcast offensive language unless absolutely necessary to the telling of the story. When it arises," he said, "(we) will bleep the audio for that word."

A Southwestern news director whose station does not have a written policy said her station does not use the word or any form of the word in its newscasts, websites or its social media posts.

'Our policy would be to not air it if it's on tape and to leave the live shot immediately it if happens live.'

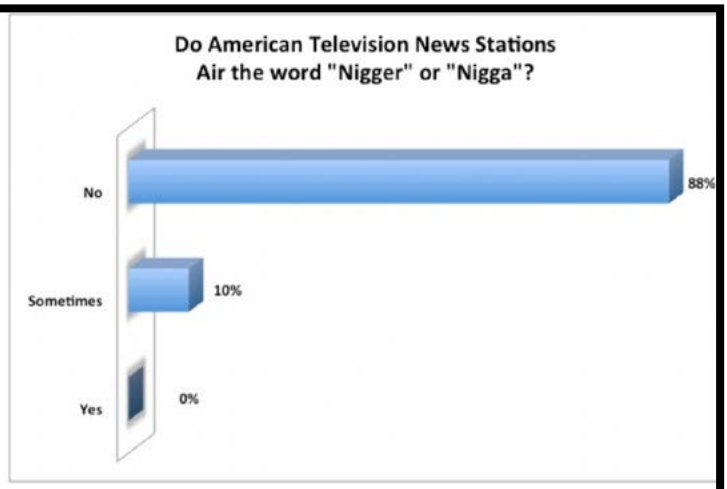
A Western news director whose station also does not have a written policy said his station does not allow the word airtime.

"Obviously we don't delay live broadcasts," he said, "but our policy would be to not air it if it's on tape and to leave the live shot immediately if it happens live."

Some, however, said their decision to use or not use the explicit word depends on the context. The general manager of three Northeastern television news stations said his stations would sometimes use the word if, for instance, quoting a prominent figure or if the word is "a major factor in the progression of the story."

Television news stations airing the actual word “nigger” or “nigga”

Among television news stations, 1 of 10 (10%) said they air the actual words, most of these saying they did so sometimes.



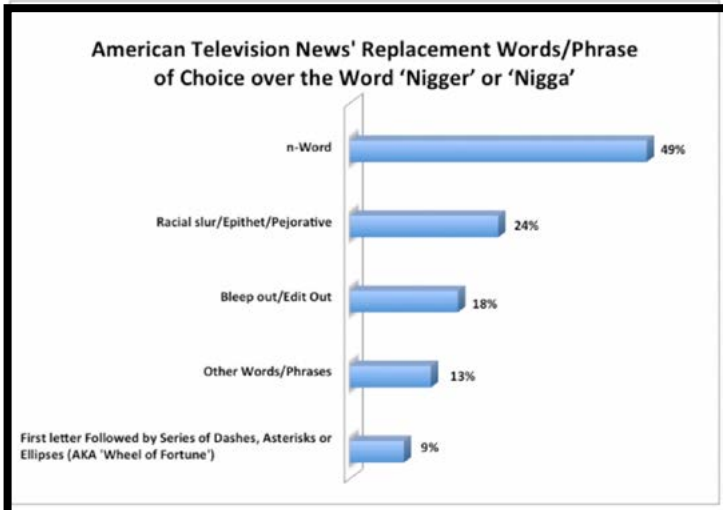
Sourcer: Responses of 51 television news directors on whether they air the word "nigger" or "nigga" on their broadcasts.

The words and phrases Television News uses in place of “nigger” or “nigga”

For television news stations, “n-word” is by far the word of choice, outdistancing “racial slur” or “racial epithet” and other references such as bleeping or editing it out, as well as using the first letter followed by dashes or ellipses.

The news director at two Southwestern television stations described her stations’ policy of not saying the word “nigger” or “nigga” and the way it addresses the word in its coverage.

“If it is in a full screen,” she said, “we either completely redact or publish first letter and blur the rest. If someone on air in an interview says the word, we bleep out.”



Source: Responses of 45 news directors and who indicated they did not or sometimes aired the word "nigger" or "nigga" in on their television news broadcasts. Some television news directors used more than one word or phrase of substitution.

The news director at a Midwestern television station said his anchors are not to say it and “we bleep it” if an interview(ee) says it.

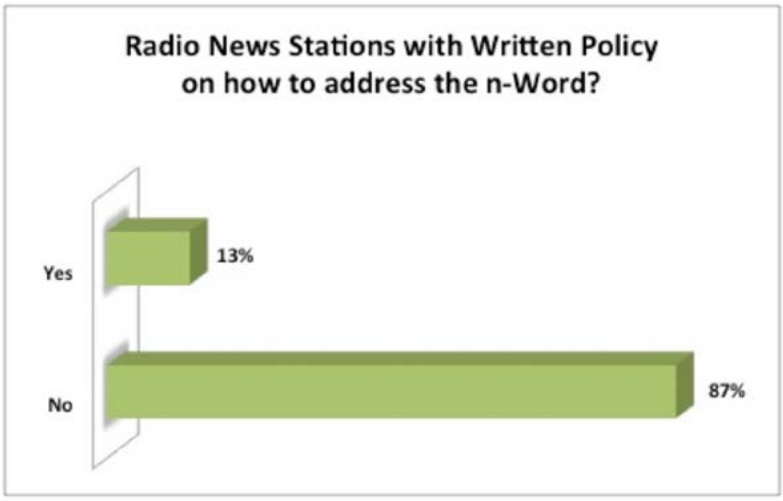
The news director of two Northeastern stations said: “We will write the copy stating a racially insensitive word. We will bleep sound bites that include the word. We will make every effort not to show the word as video when shooting graffiti.”

The news director of two Midwestern television stations who spoke about substituting for the actual word on a case-by-case basis had this to say:

This happens very rarely, and typically, the word can be bleeped without distorting what is being said because of the context of its use. In situations where we are covering a controversy over the use of the word, ‘n-word’ works fine. I think it is important to note that we don’t use racially or ethnically charged language of any type. For example, we recently interviewed (an) Hispanic anchor who used the term ‘wetback’ in the title of his book. He was angry we refused to use the term, but just because he was Hispanic and felt the word was appropriate was not justification enough for us to feel it was appropriate for us to use it on a television broadcast.”

Radio news' written policy on the n-word

Just seven (13%) of the radio news stations covered indicated they had a written policy that addresses the n-word. The vast majority of those with and without a written policy indicated their station does not air the explicit word. It should also be noted that the few who did have a policy had one that was not geared specifically to the n-word, but was under the auspices of strong language that was either derogatory, profane or vulgar.



Source: Responses of 55 news and program directors of American radio news stations on whether they have a written policy on how to address the n-word.

The news director of a Midwestern radio station that has a written policy said his station's policy was that "strong language should be considered in the news context and should be reviewed by a news manager."

A Northeastern radio station news director that has a written policy said his station does not use either word unless there is an "overriding set of circumstances" critical to the story.

The news director at a Southwestern radio station with a written policy said "the word is not allowed to be used on air or off air in this news room."

One Midwestern news director stressed that both words cannot be used on the air in any form by either the radio news staff or the newsmaker.

Another Midwestern news director that did not have a written policy said that since it was an NPR affiliate, the station often gets NPR advisories before a story airs to let it know if there are potentially objectionable words in the piece. He added:

If we were to air a piece with the N-word in it, we'd let people know ahead of time and we'd also make sure it was integral to the story (i.e. the story would be worse for not including the word).

One Western station's news director that does not have a written policy said its announcers do not use the word in a quote, but "we may consider including in an actuality depending on the context" though he cannot recall having ever done so.

A Southeastern news director said her station does not include the word if a source says it during an exclusive interview with the station.

"If a prominent source says it," she said, "we would bleep it out."

Said a Midwestern news director whose station did not have a written policy:

It is understood by editors to very carefully consider the context of these words and to be able to justify why we would consider using such a word in our stories. There are times when allowing a source to use the word may do more to show the character of that individual than any description we could provide. There are also times when the word itself is being discussed, and stating the word is appropriate. The use of the word in our news coverage, however, is extremely rare.

Radio news stations printing the actual word "nigger" or "nigga."

Of the 42 radio news stations, 1 of 3, (32%) said they aired the actual words.

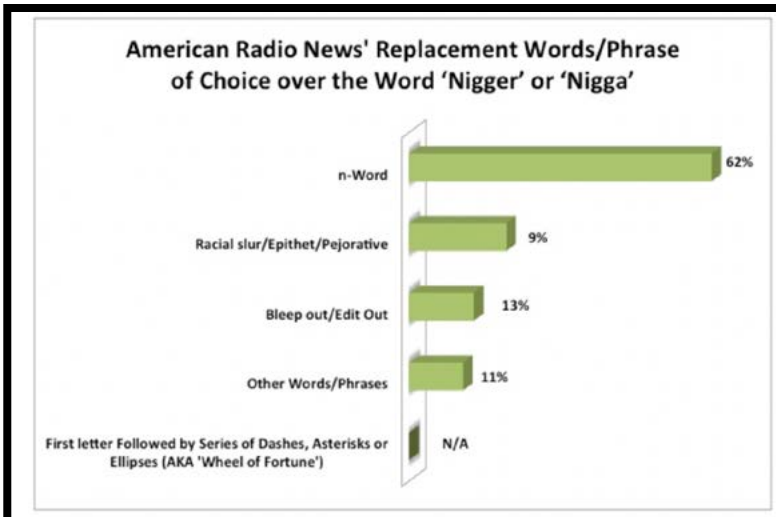
The words and phrases radio news uses in place of "nigger" or "nigga"

For news radio stations, the "n-word" was by far the word of preference over any other word when addressing the word "nigger" or "nigga" in their news stories.

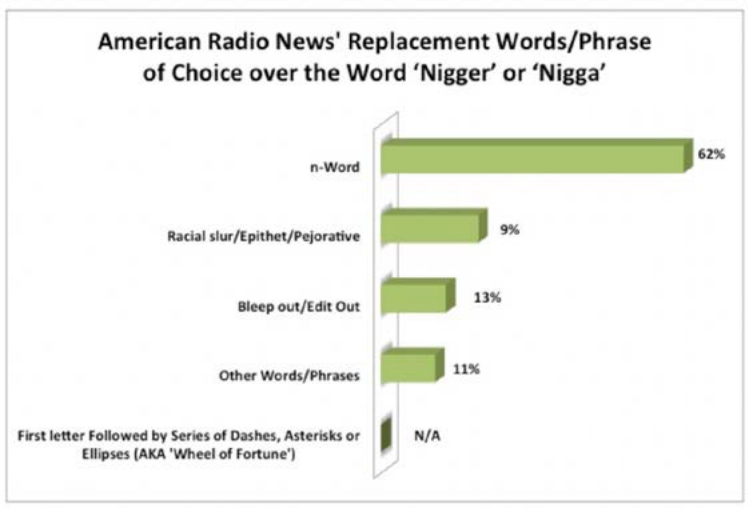
"If absolutely necessary, we refer to it as "the N-word," said the news director at a Northeastern radio station.

For the program director at a Midwestern radio station, the decision might rest on whether the word was used by one of the sources interviewed.

"If it is a direct quote, in news context, we would use the hyphenated 'N-word' substitute," she said. "If it is not a direct quote, we would rephrase the sentence to avoid using either."



Source: Responses of 45 news directors and program directors who indicated they did not or sometimes aired the word "nigger" or "nigga" on their radio news broadcasts. Some News and program directors used more than one word or phrase of substitution.



Source: Responses of 45 news directors and program directors who indicated they did not or sometimes aired the word "nigger" or "nigga" on their radio news broadcasts. Some News and program directors used more than one word or phrase of substitution.

'We edit the word out — or beep over it. The listener will not hear it. There is no other word to replace that word.'

The news director at a Southwestern radio station said he believes in a complete ban of the actual word – not only on air, but off the air in the newsroom: "We edit the word out—or 'beep' over it. The listener will not hear it. There is no other word to replace that word."

The news director at a Southeastern radio station that sometimes uses the word said his station addresses it on a case-by-case basis.

"Often," he said, "we 'bleep' it out like a curse word."

Discussion

While this study featured the perspectives of 184 individuals representing three different medias, there are inherent limitations in projecting their views (12% of those surveyed) to the entire country of journalists. However, given the sensitivity of the topic and the broad geographic responses from all across the country, including Alaska and Hawaii, along with the diversity of circulation and market size it is believed that these responses provide some value in assessing how America's news media address the n-word today.

It is important to note that of the 184 respondents to this survey, only 14 (five newspapers, five television, four radio) said they had never encountered this issue of how to address the word "nigger" or "nigga" in their news coverage. However, for the vast majority of news organizations, this issue is something they have encountered and continue to encounter to varying degrees.

It is remarkable how far the American news media has come in seeking to avoid the publication and broadcast of the explicit word.

Given the past history of how this word once freely populated America's newspapers beginning in the 1830s and on into the 20th century with radio following suit (television was left out of much of the usage of this word), it is remarkable how far the American news media has come in seeking to avoid the publication and broadcast of the explicit words. It can be said the news media is united in their opposition to printing or airing the word, and even those who do opt to print or broadcast the actual word are mindful of how they do it. It is a notable change from America's past when the news media reflected the social views of the day, and in some instances helped to spark those views. But has the pendulum swung to an extreme?

There are times when editors and news and program directors have ventured to an extreme when taking the position that the explicit word should be censored under all circumstances.

While this author has no love for the explicit reference of the word, there are times when editors and news and program directors have ventured to an extreme when taking the position that the explicit word should be censored under all circumstances. Even discussing the word has become a challenge with the word being unspeakable in some quarters. One person responding to this survey questionnaire emailed back to say he was offended by the survey letter's explicit reference of the word. But in conducting this research, it was certainly necessary to explicitly refer to the word being examined.

There are instances where the word has to be used for historical accuracy as well as to ensure everyone is clear on what was said. For instance, Charlayne Hunter-Gault (personal communication, Feb. 5, 2013), who before becoming a respected journalist, gained distinction as one of the first blacks to integrate the University of Georgia in 1961 said she has issues when people sometimes hide behind the euphemistic term "n-word." Said Hunter-Gault:

When I was at the University of Georgia, people weren't calling me the n-word. They were calling me 'nigger.' And when I read and talk to students today, I can't say they called me the n-word. They called me 'nigger.' And when you put it in context, it is perfectly ac-

ceptable to use the term. But it has to be in context.

Margaret Sullivan, (personal communication, Feb. 28, 2014), media columnist for the Washington Post and former public editor of the New York Times who is white, described her discussion with a black journalist who wrote a piece for the Times' viewpoint section describing two experiences with the word "nigger" as a young girl and as a young woman. Said Sullivan:

It was very personal, and it's a great piece and I edited it myself and we had many interesting discussions about it and she really wanted to use the word – spell it out – and I opted to use a shortened version of it (n----r). I understand the reasons for it but I also thought it could take away the impact of the story. So that's a decision we ended up making.

There are many viewpoints on this and during the course of interviewing a variety of Americans about their experience with the word "nigger" or "nigga," I was at first taken aback when many whites, young and old, would avoid repeating the word in what sometimes took on comical proportions. For instance when they or someone else said the explicit word, they used "n-word" or some other word in describing it. For example, "He said n-word come here."

There has been a clear distnction in how the word is treated when a black says it as compared to a nonblack.

It has been said that the word should be treated like any other profane word. It is agreed it is a word that should not be overused and in some cases should be softened with the euphemistic term n-word, or quieted with the missing letters in print or silenced with the edited space of air in broadcast. But there are times when it should be seen and times when it should be heard.

One of the interesting findings was that of the news media saying they report the word's use in the same way, regardless of the race of who is saying it. Throughout much of society, there has been a clear distinction in how the word is treated when a black says it as compared to a nonblack. There are numerous anecdotal stories, for instance, of black athletes and entertainers saying the word freely and it not becoming news. Yet, when a white person says it, it becomes news – as when the Philadelphia Eagles wide receiver Riley Cooper said it but other black player are not called on it when they say it on the field or the locker room. The same can be said in the entertainment field.

What the news media has done in not printing and airing the word is in many ways bucking the way it was done in the past when they mirrored society as well as reinforced its views.

As the question did not focus on sports or entertainment per se, it would be interesting to hear what reporters covering those areas would say. Certainly while it is notable that America's news media has sought to prevent giving the explicit word the light of air and print space, addressing everyone the same when it is used – regardless of race -- would go a long way toward eliminating the need for replacement words and phrases.

Conclusion

Today, the word "nigger" and "nigga" has taken a dizzying turn. On the one hand there are those who abhor the word; while on the other hand there are people of all races, led dubiously by many blacks, who embrace the word. It is a word said by all groups, yet still retaining the hate that was on display among those University of Oklahoma students who

chanted it in correlation with lynching.

Durrell James, a 46-year old black in Atlanta, spoke about his use of the word "nigga": You know, in my generation we call each other niggas. You know what I'm saying. We say 'My nigga." And that's not hate. That's really saying you are accepted. That you are original···Even when a guy calls me a nigger and he means it and the energy behind it is bad, I mean, it just don't bug me at all. But if it (the word nigger or nigga) became acceptable (as a new official reference for blacks), I mean, it would be the world catching up with what it really already is.

What the news media is doing in not printing and airing the word is in many ways bucking the way it was done in the past when they mirrored society as well as reinforced its views. It is this author's hope that the news media will continue to steer clear of giving the explicit words legitimacy and normalcy.

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The n-WORD in America

ABOUT

Some time ago, I embarked on a journey to get to the bottom of the n-word, meaning the roots, the seeds, the essence of the word "nigger" and the many derivatives of the root word "nig" – including but not limited to "nigga," "niggah," "nigguh," "niggress."

What is at the bottom of this word and its usage in America? I wanted to uncover how this word lived and breathed in our past, and how it continues to live and breathe in our present.

The words "nigger" and "nigga" have a long, ubiquitous link to our American past, and a resilient, persistent link to our present.

Its usage has exploded in a way unseen since it went viral before the Civil War when the country was grappling with the question of slavery in a self-proclaimed land of the free. While whites and other nonblacks certainly continue to advance the word today, its explosive usage has come with great help from the people toward whom it was brutally targeted.

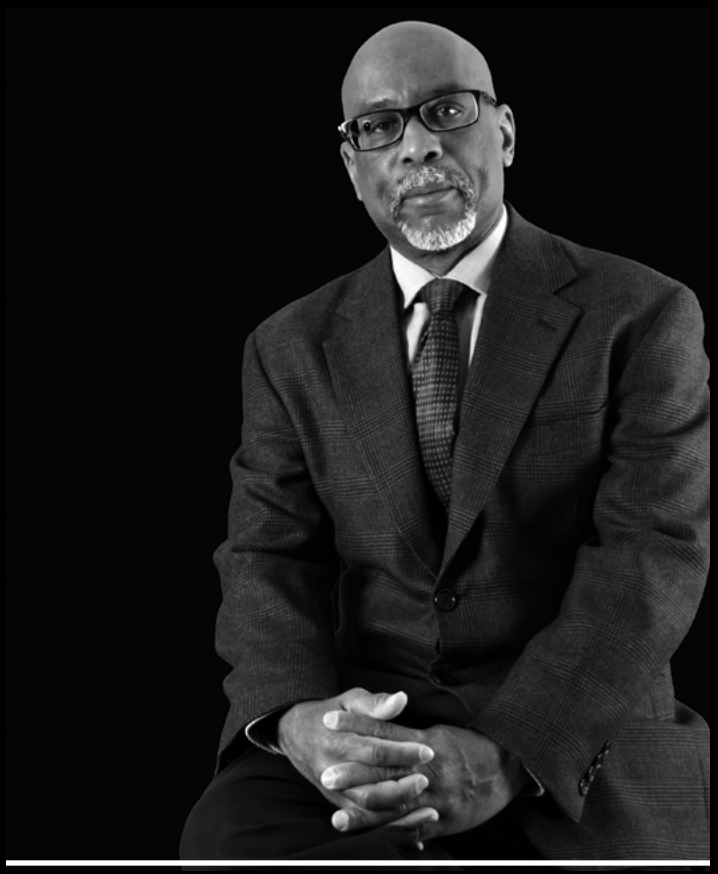
The word can still wound and kill. But some say using the word can heal. Some say reclaiming the word will strip it forever of its power. So we hear it in songs and words from blacks, while nonblacks skate on the peripherally, knowing it will be received and perceived differently if they say it.

Others say the word should be banned, censored, muted under all circumstances — even in a website such as this.

It is a powerful word, tricky, potentially dangerous word — a word worthy of a journey.

The first leg of my journey took me inside the pages of hundreds of America's old newspapers. Through quantitatively and qualitatively analyzing digital archives, I landed a ringside seat to history in motion. I heard, saw and felt the raw, "real-time" words, thoughts and feelings of common, everyday people in particular moments and places in time; as well as those whose names fill America's history books and inscribe America's buildings and monuments. Because the newspapers I researched came from all regions of the country, they provided a common thread, a tapestry if you will, of the word's birth and evolution.

Having borne witness to the American news media's role in forging the word's growth in the past, I thought it important to compare it to the present. Accordingly, the second leg involved surveying news editors and directors of America's newspapers, television and radio stations to determine how they address the word in today's news stories.



Prof. Frank Harris III, Southern Connecticut State University, New Haven, Conn.

The final leg of my journey took me on the road and in the air with camera and pen talking to people about the word. The bulk of my interviews involved approaching strangers and asking them about their n-word experience. They were strangers of all races, ethnicities, genders and backgrounds, and this was the most fascinating, exciting and potentially dangerous part of my journey as I went into places where I otherwise would not have gone. It taught me a lot about people and human nature, both good and bad. Hearing their stories – young and old of varied genders, races, and religions, as well as educational and economic backgrounds — was at times shocking, revealing and reaffirming. As they described their experiences, it forced me to summon forth my own, which nudged me into recalling things easily remembered and jarred me into remembering things I had somehow forgotten, including one buried as deep as the near-death experience that caused me to place it in the realm of the forgotten.