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Taking the Fight Out of Fighting Words on the Doctrine's Eightieth Anniversary: What "N" Word Litigation Today Reveals About Assumptions, Flaws and Goals of a First Amendment Principle in Disarray

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ABSTRACT

Analyzing a trio of recent rulings involving usage of the "N" word by white people directed at Black individuals, this Article explores problems with the United States Supreme Court's fighting words doctrine on its eightieth anniversary. In the process of examining these cases and the troubles they illuminate, including the doctrine's dubious reliance on racial and gender-based stereotypes, this Article calls for the Supreme Court to do more than merely refine its amorphous contours that lower courts now are fleshing out for themselves. Specifically, this Article contends that the Court must reconsider the foundational goals that animate this aging, often-criticized facet of First Amendment jurisprudence initially articulated in Chaplinsky v. New Hampshire. *If those goals no longer pivot on preventing fights that might arise due to utterance of personally abusive epithets, then the doctrine should be reconceptualized. Specifically, it might be refashioned to thwart possible First Amendment-based speech defenses to crimes such as disorderly conduct or torts such as intentional infliction of emotional distress or, perhaps more ambitiously, to help safeguard the realm of civil discourse from hate speech as the nation wrestles anxiously with racial justice. This Article avers that Connecticut Supreme Court Justice Steven Ecker's concurrence in one of the "N" word cases*

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appraised here, Connecticut v. Liebenguth, *lays the groundwork for this latter reconceptualization that simultaneously would promote civil discourse and shield targets of personally vicious epithets from emotional injury. In short, such a doctrinal reformulation would restore focus on* Chaplinsky's *concern with "insulting" words that "by their very utterance inflict injury" while deemphasizing its other fret regarding "fighting" words that "tend to incite an immediate breach of the peace."*

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I. INTRODUCTION

A quarter-century ago, the Supreme Court of North Carolina observed the following about the use and causal effect of the "N" word:[1]

> No fact is more generally known than that a white man who calls a [B]lack man a "n----r" within his hearing will hurt and anger the [B]lack man and often provoke him to confront the white man and retaliate. The trial court was free to judicially note this fact.[2]

The court advanced that assertion while concluding that the "N" word, when voiced "loudly and repeatedly" at a bar by a white man – a district attorney, no less – to a Black patron, "squarely falls within the category of unprotected speech" called fighting words created in 1942 by the United States Supreme Court in *Chaplinsky v. New Hampshire*.[3]

North Carolina's highest court, in fact, dubbed the district attorney's repeated utterance of the "N" word in *In re Spivey* a "classic case of the use of 'fighting words' tending to incite an immediate breach of the peace which are not protected by either the Constitution of the United States or the Constitution of North Carolina."[4] Indeed, the "N" word was characterized in 2020 by one scholar as "the ultimate fighting word,"[5] and it is regarded by "many recent courts as the most offensive word in the English language."[6]

Is it always a fighting word today, however, if directed in unfriendly fashion by a white adult to a Black one? And does *Spivey's* thesis remain true that it is a fact of which courts may take judicial notice that Black men often will respond violently when the "N" word is directed at them by white men? In 2020 and 2021, appellate courts ruled in three cases – *United States v. Bartow*,[7] *Connecticut v. Liebenguth*,[8] and *City of Columbus v. Fabich*[9] – in which white men were criminally prosecuted

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[1] When this Article quotes courts and articles that completely spell out the "N" word, it substitutes "n----r." Additionally, this Article substitutes "C" word for "cunt" when addressing the fighting words case of *State v. Baccala*, 163 A.3d 1 (Conn. 2017).

[2] *In re* Spivey, 480 S.E.2d 693, 699 (N.C. 1997).

[3] *Id.* at 695, 698; Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942).

[4] *Spivey*, 480 S.E.2d at 699.

[5] David L. Hudson, Jr., *The Fighting Words Doctrine: Alive and Well in the Lower Courts*, 19 U.N.H. L. REV. 1, 20 (2020).

[6] Darryll M. Halcomb Lewis, *The Creation of a Hostile Work Environment by a Workplace Supervisor's Single Use of the Epithet "N----r,"* 53 AM. BUS. L.J. 383, 406 (2016).

[7] 997 F.3d 203 (4th Cir. 2021).

[8] 250 A.3d 1 (Conn. 2020), *cert. denied*, 141 S. Ct. 1394 (2021).

[9] 166 N.E.3d 101 (Ohio Ct. App. 2020).

after addressing the "N" word toward Black adults.[10] In all three decisions, the courts examined whether usage of the "N" word was protected by the First Amendment to the U.S. Constitution or whether it fell outside the ambit of that provision as fighting words.[11]

Given the North Carolina Supreme Court's declaration quoted earlier that no fact is more generally known than that a Black man often will be provoked to retaliate when a white person denigrates him with the "N" word,[12] one might take it as a forgone conclusion that at least one of the Black individuals (three men and one woman, as explored later)[13] to whom the "N" word was addressed in *Bartow*, *Liebenguth* and *Fabich* physically

[10] A fourth criminal case during this same time period involving the "N" word centered on a twelve-year-old white student's utterance of it while on campus and during school hours to a Black student. Boyle v. Evanchick, No. 19-3270, 2020 U.S. Dist. LEXIS 49958 (E.D. Pa. Mar. 19, 2020). The white student was prosecuted for disorderly conduct. *Id.* at *3. After the judge declared the student not guilty, the student's mother sued for malicious prosecution, claiming her son was charged for disorderly conduct based solely on speech protected by the First Amendment to the United States Constitution. *Id.* at *21–22. United States District Judge Gerald Austin McHugh dismissed the claim, determining the student's use of the "N" word "in a confrontational face-to-face encounter constitutes fighting words and is therefore unprotected speech." *Id.* at *20. Because *Boyle* involved a school setting and the utterance of the "N" word directed by one minor toward another minor, it is not analyzed further in this Article. This Article, instead, focuses on the use of the "N" word by white adults directed at Black adults.

[11] The First Amendment to the U.S. Constitution provides, in relevant part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. CONST. amend. I. The Free Speech and Free Press Clauses were incorporated nearly 100 years ago through the Fourteenth Amendment Due Process Clause as fundamental liberties applicable for governing the actions of state and local government entities and officials. Gitlow v. New York, 268 U.S. 652, 666 (1925). Additionally, despite its absolutist "no law" terminology, the First Amendment has been held by the U.S. Supreme Court to not protect several varieties of speech, thereby allowing for their restriction and punishment. *See* United States v. Alvarez, 567 U.S. 709, 717 (2012) (listing unprotected brands of expression as including incitement to violence, obscenity, defamation, speech integral to criminal conduct, fighting words, child pornography, fraud, true threats and "speech presenting some grave and imminent threat the government has the power to prevent"); Ashcroft v. Free Speech Coal., 535 U.S. 234, 245–46 (2002) ("The freedom of speech has its limits; it does not embrace certain categories of speech, including defamation, incitement, obscenity, and pornography produced with real children."); *see also* Rebecca L. Brown, *The Harm Principle and Free Speech*, 89 S. CAL. L. REV. 953, 967–68 (2016) ("The unprotected classes of speech are often identified as incitement to illegal activity, fighting words, obscenity, defamation, fraud, and speech integral to criminal conduct, although the exact contours of this list vary among incantations and have changed over time.").

[12] *Supra* note 2 and accompanying text (quoting *In re* Spivey, 480 S.E.2d 693, 699 (N.C. 1997)).

[13] *See infra* Part III, Sections B, C, and D (exploring the facts in the cases of *Bartow*, *Liebenguth* and *Fabich* in greater detail).

attacked the speaker. Yet, as this Article explains, none of the targets responded with any violence whatsoever.[14] Additionally, in one of the three cases – *Bartow* – the court concluded that the use of the "N" word, despite being directed at two Black adults in the speaker's immediate physical vicinity, was not an unprotected fighting word under the circumstances, and thus was protected by the First Amendment.[15] In sum, the "N" word in *Bartow* not only failed to provoke violence, but its usage was constitutionally protected.[16]

Yet, the courts in all three cases united around the stance that the "N" word is particularly vile, egregious, racist and offensive.[17] In brief, an exceedingly odious term that was judged to constitute an unprotected fighting word in two out of the three "N" word cases examined here – *Liebenguth* and *Fabich* – did not, in fact, produce a fight or other violent reaction in any of them.[18] The targets of the speech in all three cases exercised dignity and restraint rather than stooping to the level of their verbal tormenters, thereby defying the fisticuff expectations of the Supreme Court of North Carolina in *Spivey*.[19]

However, the power to remain physically calm while under verbal attack, as Professor Michele Goodwin points out, "does not mitigate the assaultive nature of the word, nor the images it evokes."[20] Indeed, the Supreme Court of North Carolina in *Spivey*, in the quotation at this Article's start, actually identifies two distinct effects wrought by the "N" word: first, an emotional impact – that it "will hurt and anger the [B]lack man"[21] – and second, a physical effect – that it will often provoke

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[14] *See infra* Part III, Sections B, C, and D (examining the cases of *Bartow*, *Liebenguth* and *Fabich* in greater detail).

[15] The U.S. Court of Appeals for the Fourth Circuit in *Bartow* "assume[d] the slur was directed at" a Black woman named Cathy Johnson-Felder and an unnamed Black man. United States v. Bartow, 997 F.3d 203, 210 (4th Cir. 2021). The Fourth Circuit nonetheless concluded that the use of the "N" word directed toward them by a white male named Jules A. Bartow did not constitute a fighting word largely because "the Government . . . failed to offer any contextual evidence that Bartow's 'mode of speech' was likely to provoke violence by Johnson-Felder or the African American man or anyone else." *Id.* at 211; *see infra* Part III, Section B (analyzing *Bartow* in greater detail).

[16] United States v. Bartow, 997 F.3d 203, 205 (4th Cir. 2021).

[17] *See infra* Part III, Section A (addressing how the courts in the three cases interpreted the meaning and impact of the "N" word).

[18] *See infra* Part III, Sections B, C, and D (examining the cases of *Bartow*, *Liebenguth* and *Fabich* in greater detail).

[19] *See supra* note 2 and accompanying text (quoting *In re* Spivey, 480 S.E.2d 693, 699 (N.C. 1997)); *see also infra* Part III, Sections B, C, and D (describing how the targets of the speech reacted in *Bartow*, *Liebenguth*, and *Fabich*).

[20] Michele Goodwin, *The Economy of Citizenship*, 76 TEMP. L. REV. 129, 135 (2003).

[21] *Spivey*, 480 S.E.2d at 699.

retaliation.[22] Additionally, the fact that no one responded violently in the three cases does not, by itself, stop the speech from being characterized as fighting words.[23] That is because the fighting words doctrine does not require an actual fight to erupt for the speech that triggered a case to be classified as unprotected; it is, instead, the *likelihood* of sparking such a response that is pivotal.[24]

What thus emerges from analyzing the trio of recent "N" word cases here – especially when considered along with a 2017 ruling by the Supreme Court of Connecticut that a woman's angry use of the "C" word,[25] when directed in a face-to-face confrontation toward another woman, was not a fighting word –[26] is a jumbled jurisprudence. Specifically, fighting words is a doctrine: (1) premised on stereotypes and assumptions about how a mythical average person of a particular race or gender and who holds a specific occupation is likely to respond to certain words; (2) dependent on a nebulous constellation of contextual factors – variables other than simply the use of a particular word – that requires a highly fact-specific, case-by-case inquiry into the precise circumstances surrounding a word's usage; and (3) that precludes First Amendment protection for the "N" word in some circumstances even though that word's utterance did not, in fact, trigger a fight or seemingly come close to doing so. Regarding the "N" word, the First Amendment issue spawned by these problems boils down to this: What other factors and circumstances besides its utterance must be present to transform it into a fighting word in the absence of any fight and any evidence that a target was about to fight?

Rectifying these problems and resolving that issue requires not only identifying a clear and consistent set of variables that should factor into a court's fighting words analysis, but also examining what the ultimate goal or goals of the doctrine should be in the first place.[27] Namely, should the doctrine's primary purpose be to:

> **(1**) forestall possible violence by allowing law enforcement officials to preemptively step in and to arrest speakers who are verbally assaulting others;[28]

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[22] *Id.*

[23] *See* State v. Hoshijo, 76 P.3d 550, 565 (Haw. 2003).

[24] *Id.* ("Plainly, there is no requirement that violence must occur, merely that there be a likelihood of violence.").

[25] *See supra* note 1 (addressing this Article's use of the term "C" word).

[26] State v. Baccala, 163 A.3d 1, 21 (Conn. 2017), *cert. denied*, 138 S. Ct. 510 (2017).

[27] *See infra* Part V (calling on the U.S. Supreme Court to address these issues).

[28] *See* State v. Liebenguth, 250 A.3d 1, 19 (Conn. 2020), *cert. denied*, 141 S. Ct. 1394 (2021) (asserting that "the rationale underlying the fighting words doctrine is the

> **(2)** preclude defendants from successfully mounting a First Amendment-based speech defense when their words do, in fact, spawn disorder, a breach of the peace or violent reactions from others;
>
> **(3)** deter speakers from using personally abusive epithets that may cause others to suffer both physiological harm and emotional distress;[29]
>
> **(4)** address the hegemonic forces through which some groups are partly subordinated via language used by members of privileged,[30] dominant groups, thereby thwarting the constitutional value of equality;[31] or
>
> **(5)** uplift the realm of civil discourse and dialogue by precluding from First Amendment protection personally abusive epithets that pander to emotions and stereotypes and thereby subvert considerate, reasoned, and rational discussion?[32]

Examination of the "N" word cases presented here brings this quintet of possibilities into high relief.

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state's interest in preventing the immediate violent reaction likely to result when highly offensive language is used to insult and humiliate the addressee"); *see also* Michael J. Mannheimer, *The Fighting Words Doctrine*, 93 COLUM. L. REV. 1527, 1549 (1993) (asserting that "the fighting words doctrine aims to prevent those hostile to the speaker from attacking him or her because of the speech").

[29] *See* Mari J. Matsuda, *Legal Storytelling: Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 ("The negative effects of hate messages are real and immediate for the victims. Victims of vicious hate propaganda experience physiological symptoms and emotional distress ranging from fear in the gut to rapid pulse rate and difficulty in breathing, nightmares, post-traumatic stress disorder, hypertension, psychosis and suicide.").

[30] Hegemony is the "[d]omination by the ruling class and unconscious acceptance of that state of affairs by the subordinate group." RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION 147 (2d ed. 2012). It involves the "dissemination of the dominant group's perspective as universal and natural, to the point where the dominant beliefs and practices become an intractable component of common sense." Douglas Litowitz, *Gramsci, Hegemony, and the Law*, 2000 BYU L. REV. 515, 519.

[31] *See* ERWIN CHEMERINSKY, THE FIRST AMENDMENT (2d ed. 2021) ("Those who favor restrictions on hate speech emphasize how racist hate speech undermines the constitutional value of equality.").

[32] *See* Nancy B. Rapoport, *Training Law Students to Maintain Civility in Their Law Practices as a Way to Improve Public Discourse*, 98 N.C. L. REV. 1143, 1146 (2020) (asserting that "[a] civil discussion starts with listening to someone else's reasons for taking a position and weighing that person's reasons fairly," and adding that a civil discussion "focuses on the issues – examining the topic from more than one vantage point – and not the personalities of the people discussing the issues. A civil discussion can depersonalize deeply felt emotions so as to cool the tempers around the room and give real discourse a chance to work").

Part II of this Article briefly reviews the history and current state of the fighting words doctrine.[33] Part III then examines the three cases at the heart of this Article – *United States v. Bartow*, *Connecticut v. Liebenguth* and *City of Columbus v. Fabich* – in which appellate courts recently wrestled with whether "N" word usage by white adults directed at Black adults constituted a fighting word.[34] Part III also distills key variables in the fighting words determination by comparing the analyses in this trio of cases. Next, Part IV uses the analyses and results in these three cases to turn the focus back to possible underlying rationales for maintaining the fighting words doctrine's existence.[35] In the process, Part IV pays special attention to Connecticut Supreme Court Justice Steven Ecker's concurrence in *State v. Liebenguth* and his attempt to repackage the doctrine into a carefully cabined hate speech exception to the First Amendment guarantee of free expression.

Finally, the Article concludes in Part V by calling on the U.S. Supreme Court to soon hear a fighting words case that hinges on the utterance of the "N" word by a white adult directed at a Black adult.[36] This Article asserts in Part V that in taking on such a dispute, the Court should clarify several aspects of the fighting words doctrine. Specifically, it should resolve: (1) whether the intent of a defendant-speaker when using the "N" word matters in determining First Amendment protection; (2) which characteristics – immutable or otherwise – of both the defendant-speaker and the victim-target courts may permissibly consider when ferreting out the likelihood of the "N" word triggering a violent response; (3) which factors beyond the racist and repugnant meaning of "N" word courts may evaluate when deciding whether its usage in a given case is an unprotected fighting word; and, perhaps most importantly, (4) what the ultimate goal of the fighting words doctrine should be and, in particular, whether less judicial attention should be paid to the objective of preventing a likely violent response and more emphasis be given to the aim of averting emotional and psychic injuries sustained by victims of abusive language. This fourth points begs the Court to address the larger issues of First Amendment shelter for hate speech and whether the fighting words doctrine should be reformulated to create a limited exception to constitutional protection for personally abusive language when publicly used in a narrow set of circumstances. Such a doctrinal reworking would not only strive to shield individuals from emotional harm but would aim – at a macro level – to uplift the realm and quality of public discourse affecting race relations and culturally contested issues such as LGBTQ+ rights.

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[33] *Infra* notes 37–116 and accompanying text.

[34] *Infra* notes 117–444 and accompanying text.

[35] *Infra* notes 445–81 and accompanying text.

[36] *Infra* notes 482–98 and accompanying text.

Ultimately, resolving all four of these matters in an "N" word case would produce the larger salutary benefit of providing judicial guidance for fighting words cases involving other hot-button, disparaging words directed at a person's religion, gender and sexual orientation. In brief, lessons gleaned from the U.S. Supreme Court's resolution of a fighting words case centering on the "N" word would stretch far beyond that particular epithet.

II. THE FIGHTING WORDS DOCTRINE: A PRIMER

In *Chaplinsky v. New Hampshire*,[37] the Supreme Court seminally carved out several content-based categories of speech from the realm of First Amendment protection.[38] One variety consisted of "the insulting or 'fighting' words – those which by their very utterance inflict injury or tend to incite an immediate breach of the peace."[39] Such remarks, Justice Frank Murphy reasoned for the Court, merit no constitutional cover because they "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."[40] In brief, this type of speech is of low or no First Amendment value.[41]

A closer examination of *Chaplinsky's* effort to define this particular unprotected brand of expression indicates that the Court, in fact, may have been – with its seemingly strategic use of the disjunctive word "or" twice within a mere twelve words – articulating two distinct forms of unprotected expression.[42] Namely, it may have been distinguishing between insulting words that by their very utterance inflict injury, on the one hand, and fighting words that tend to incite an immediate breach of the peace, on the other. In short, two apparently independent prongs lurk

[37] 315 U.S. 568, 571–72 (1942).

[38] *See* Burton 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, 443 (2004) (observing that in *Chaplinsky* the Court decided "to carve out, in wholesale fashion, vast categories of exceptions to the First Amendment's otherwise unqualified protection of speech").

[39] *Chaplinsky*, 315 U.S. at 572.

[40] *Id.* The Court in *Chaplinsky* identified other categories of such low-value, unprotected speech as including "the lewd and obscene, the profane, [and] the libelous." *Id.*

[41] *See* Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 194 (1983) (noting that "[t]he 'low' value theory first appeared in the famous dictum of *Chaplinsky v. New Hampshire*").

[42] *See Chaplinsky*, 315 U.S. at 572 (identifying the unprotected speech as "the insulting *or* 'fighting' words – those which by their very utterance inflict injury *or* tend to incite an immediate breach of the peace") (emphasis added).

in *Chaplinsky* – insulting words that inflict injury simply by being spoken and fighting words that swiftly provoke violence.

The Court, however, has since narrowed the definition of fighting words to only "personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction" and that constitute "a direct personal insult."[43] As Dean Rodney Smolla encapsulates it, today a "strong body of law expressly limit[s] the fighting words doctrine to face-to-face confrontations likely to provoke immediate violence."[44] Fighting words thus now are defined "in a way that does not include speech that by its nature inflicts injury,"[45] but rather only encompasses personally abusive words that target a specific person and that are likely to cause that person to retaliate violently and immediately against the speaker.[46] In brief, fighting words are personal insults that serve as "an invitation to exchange fisticuffs."[47] The current test for fighting words therefore can be viewed as encompassing two components: (1) a direct personal insult addressed to an individual (2) that is inherently likely to provoke violence.[48]

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[43] *Id.*

[44] Rodney A. 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).

[45] Dan T. Coenen, *Freedom of Speech and the Criminal Law*, 97 B.U. L. REV. 1533, 1548 (2017); *see also* FRANKLYN S. HAIMAN, "SPEECH ACTS" AND THE FIRST AMENDMENT 22 (1993) (asserting that the Supreme Court has "cut off" the first branch of the fighting words doctrine that targeted words that "by their very utterance inflict injury," thereby "leaving only provocations to physical reactions as punishable").

[46] *See* Mary-Rose Papandrea, *The Free Speech Rights of University Students*, 101 MINN. L. REV. 1801, 1819 (2017) (remarking that "for speech to constitute fighting words, it has to be directed to a specific individual"). As one First Amendment scholar encapsulates it:

> there are ultimately four elements in removing constitutional protection from speech under a fighting words theory: (1) the content of the speech must consist of personally abusive speech directed at a specific individual; (2) the target of the speech must be in such close proximity as to create the possibility of physical violence; (3) the target must be likely to retaliate; and (4) the violent reaction to the speech must be immediate.

William C. Nevin, *"Fighting Slurs": Contemporary Fighting Words and the Question of Criminally Punishable Racial Epithets*, 14 FIRST AMEND. L. REV. 127, 137–38 (2015).

[47] Texas v. Johnson, 491 U.S. 397, 409 (1989); *see* Kevin Francis O'Neill, *A First Amendment Compass: Navigating the Speech Clause With a Five-Step Analytical Framework*, 29 SW. U. L. REV. 223, 257 (2000) (asserting that the unprotected category of fighting words is "limited now to unambiguous invitations to brawl specifically directed by one person to another").

[48] O'Brien v. Borowski, 961 N.E.2d 547, 555 (Mass. 2012).

Additionally, the Supreme Court has specified that fighting words are exempted from First Amendment protection not because of the reprehensibility of the underlying substantive idea expressed – for instance, the overtly racist notion that Black people are intellectually inferior to white people – but because the mode of expressing that same idea – using the "N" word to brutally convey a message of supposed intellectual inferiority – is "particularly intolerable . . . and socially unnecessary."[49] The Court in 2019, in a non-fighting words case regarding the U.S. Patent and Trademark Office's power to deny registration for immoral and scandalous trademarks, reinforced the notion that this distinction between an offensive idea, on the one hand, and an offensive mode of expressing it, on the other, remains an integral part of First Amendment jurisprudence.[50]

The fighting words standard focuses on a how a hypothetical average person would likely respond to speech.[51] Courts, however, hold that some people, due to their occupation, must tolerate more abusive language than an average person and consequently must exercise greater self-restraint before language targeting them becomes fighting words.[52] This principle is particularly true when insulting speech targets police officers.[53] As

[49] R.A.V. v. City of St. Paul, 505 U.S. 377, 393 (1992).

[50] *See* Iancu v. Brunetti, 139 S. Ct. 2294 , 2310 (2019) (Sotomayor, J., concurring in part, dissenting in part) (pointing out the distinction between "offensiveness in the mode of communication rather than the idea," and contending that the so-called scandalous clause portion of the federal Lanham Act affecting the registration of scandalous trademarks by the U.S. Patent and Trademark Office "covers marks that are offensive because of the mode of expression, apart from any particular message or idea"); *see also* Clay Calvert, *Iancu v. Brunetti's Impact on First Amendment Law: Viewpoint Discrimination, Modes of Offensive Expression, Proportionality and Profanity*, 43 COLUM. J.L. & ARTS 37, 60 (2019) (lauding Justice Sonia Sotomayor in *Brunetti* for her effort to "doctrinally untangle and separate two distinct modes of judicial analysis: one for examining instances of offense based upon the substantive viewpoint conveyed (offensive viewpoints) and one for reviewing instances of offense arising from the manner of expressing a viewpoint (offensive modes of expression)").

[51] *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 574 (1942) ("Argument is unnecessary to demonstrate that the appellations 'damned racketeer' and 'damned Fascist' are epithets likely to provoke the *average person* to retaliation, and thereby cause a breach of the peace.") (emphasis added)*; see also* Ira P. Robbins, *Digitus Impudicus: The Middle Finger and the Law*, 41 U.C. DAVIS L. REV. 1403, 1425 (2008) ("The Court limited fighting words to instances in which speech is addressed to a particular individual, but held that whether speech constitutes fighting words is measured by the likely reaction of an *average addressee*, rather than by an individual recipient's response.") (emphasis added).

[52] *See, e.g.*, State v. Baccala, 163 A.3d 1, 9 (Conn. 2017).

[53] *See id.* (noting that "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 also* Clay Calvert, *Personalizing First Amendment Jurisprudence: Shifting Audiences & Imagined Communities to Determine Message*

Justice Brennan wrote for the Supreme Court in *City of Houston v. Hill*,[54] the fighting words doctrine "might require a narrower application in cases involving words addressed to a police officer."[55] That is so, Brennan added, because "[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."[56]

That maxim is alive and well today. To wit, one federal district court recently observed "that 'profanity and verbal abuse' of police officers, standing alone, is not sufficient to justify an arrest."[57] Therefore, hoisting the middle-finger gesture at an officer – a form of symbolic expression or expressive conduct communicating anger and rage or,[58] more bluntly, an inaudible "fuck you"[59] – generally is not, by itself, unprotected fighting

Protection in Obscenity, Fighting Words, and Defamation, 20 U. FLA. J.L. & PUB. POL'Y 439, 453–67 (2009) (addressing how police officers generally must tolerate more verbal abuse under the fighting words doctrine, but pointing out that there are limits to how much speech even police must put up with before the speech becomes fighting words).

[54] 482 U.S. 451 (1987).

[55] *Id.* at 462.

[56] *Id.* at 462–63.

[57] *See, e.g.*, Ellison v. Martin, 2020 U.S. Dist. LEXIS 223539, *22 (S.D. Ohio Nov. 30, 2020) (quoting Williams v. City of Flint, 814 Fed. Appx. 973, 981 (6th Cir. 2020)).

[58] *See* Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 294 (1984) (noting that "a message may be delivered by conduct that is intended to be communicative and that, in context, would reasonably be understood by the viewer to be communicative," and identifying such a message as "[s]ymbolic expression"); *see also* Ira P. Robbins, *What Is the Meaning of "Like"?: The First Amendment Implications of Social-Media Expression*, 2013 FED. CTS. L. REV. 127, 133 (2013) (noting that "the Court has acknowledged that symbolic acts can also constitute speech under the First Amendment"); *see* Virginia v. Black, 538 U.S. 343, 360 n.2 (2003) ("While it is of course true that burning a cross is conduct, it is equally true that the First Amendment protects symbolic conduct as well as pure speech."); *see also* John Fee, *The Freedom of Speech-Conduct*, 109 KY. L.J. 81, 84–85 (2020/21) ("The Supreme Court has used various criteria for identifying cognizable expressive conduct . . . . These include: whether the actor's conduct sends a clear and particularized message, whether the actor's conduct would be understandable without words, or whether the actor employs a recognized form of artistic or cultural expression."); *see* Robbins, *supra* note 58, at 1407–08 (noting that "the middle finger gesture serves as a nonverbal expression of anger, rage, frustration, disdain, protest, defiance, comfort, or even excitement at finding a perfect pair of shoes") (internal citations omitted).

[59] *See* Meg Penrose, *Sharing Stupid $h*t With Friends and Followers: The First Amendment Rights of College Athletes to Use Social Media*, 17 SMU SCI. & TECH. L. REV. 449, 455–56 (2014) ("All three athletes were penalized for exercising their 'right' to self-expression through a universal signal: the middle-finger. The understood and intended message was clear: 'fuck you.'") (internal citation omitted).

words.[60] There are, however, some limits to how much expressive abuse police officers must withstand under the fighting words doctrine.[61] For example, telling an officer "Fuck you, I'm not going anywhere," when accompanied by "aggressive behavior," recently was found to fall outside the safeguards of the First Amendment.[62]

Building from such occupation-focused precedent, the Supreme Court of Connecticut in *Connecticut v. Baccala* in 2017 determined that the fighting words doctrine "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."[63] The analysis must be made on "a case-by-case basis [of] 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."[64] The court in *Baccala* focused on the likely response under the circumstances of "an average store manager."[65] In this instance, it was a female manager who was angrily called the "C" word by a female customer.[66] In holding that the expletive directed at assistant store manager Tara Freeman was not an unprotected fighting word, the court observed that a manager in Freeman's position "would be expected to model appropriate, responsive behavior, aimed at de-escalating the situation."[67] It added that "the natural reaction of an average person in Freeman's position who is confronted with a customer's

[60] *See* Clark v. Coleman, 448 F. Supp. 3d 559, 569, 577 (W.D. Va. 2020) (involving the "discrete" issue of whether "an officer, consistent with the First and Fourth Amendments, [may] seize a vehicle and its passengers simply because a passenger in the vehicle displayed his middle finger at the officer?," and, in answering that question in the negative, reasoning that the officer in question "cannot make a colorable claim that presenting the middle finger gives rise to a reasonable concern for public safety. Courts across the country have refused to find that offensive language or gestures rise to the level of fighting words that would cause a reasonable officer concern about public safety").

[61] Wood v. Eubanks, 459 F. Supp. 3d 965, 975, 977 (S.D. Ohio 2020) (noting that "[i]n a face to face encounter with a police officer, the use of certain language can constitute disorderly conduct," and adding that, in the case before it, the "Plaintiff's language consisted of personally abusive epithets sufficient under Ohio law to constitute fighting words. Plaintiff yelled at, cursed at and taunted Defendants [who were multiple law enforcement officials] in a public place").

[62] Commonwealth v. Dixon, 237 A.3d 1063 (Pa. Super. Ct. June 18, 2020).

[63] 163 A.3d 1, 9 (Conn. 2017).

[64] *Id.* at 10 (emphasis added).

[65] *Id.* at 12.

[66] The defendant-customer, Nina C. Baccala, "loudly" called the store manager "a 'fat ugly bitch' and a 'c--t,' and said 'fuck you, you're not a manager,' all while gesticulating with her cane." *Id.* at 4.

[67] *Id.* at 14.

profane outburst, unaccompanied by any threats, would not be to strike her."[68]

Taking into account specific characteristics – be it race, gender, occupation or physical ability – of the actual individual to whom speech is addressed, however, can be highly problematic if the touchstone for fighting words is simply the *likelihood* that the individual will fight back.[69] That is because, due to physical limitations, social training or being outnumbered by a hostile audience, some people are less likely to fight back than others and thus unfortunately must put up with immense verbal torment.[70] Another flaw with judicial consideration of immutable characteristics of the target of a verbal assault is that it "essentially requires courts to promulgate stereotypes on the basis of race, gender, age, disability, ethnicity, and sexual orientation, among others."[71] That stereotype-embracement problem is addressed later in more detail.[72]

In addition to the target's occupation and race, courts consider other factors when deciding if profanity amounts to fighting words, including "the presence of bystanders, the accompaniment of other aggressive behavior, and whether the words are repeatedly uttered."[73] First Amendment scholar David L. Hudson, Jr. recently examined variables lower courts evaluated when determining that speech constituted unprotected fighting words.[74] Five important factors he identified were: (1) aggressive conduct accompanying speech;[75] (2) the speech's volume, with the guidepost being that "[t]he louder the speech, the more likely that a court may use that fact to support a disorderly conduct conviction based on the fighting words doctrine;"[76] (3) repetition of words, with the maxim being that "the sheer number and intensity of the profanities may cause a reviewing court to find that the intemperate speech crosses the line into

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[68] *Id.* at 16.

[69] *See, e.g.*, Note, *The Demise of the Chaplinsky Fighting Words Doctrine: An Argument for Its Interment*, 106 HARV. L. REV. 1129, 1134 (1996).

[70] *See id.* ("Women . . . often are neither socialized to fight nor physically prepared to do so when they are addressed with abusive epithets . . . . Similarly, because minorities are often victimized by abusive insults under circumstances in which they are outnumbered by their harassers, their only prudent response may be to escape or submit.") (internal citation omitted).

[71] State v. Liebenguth, 250 A.3d 1, 26 (Conn. 2020) (Kahn, J., concurring).

[72] *See infra* Part III, Section C (addressing Justice Kahn's concerns, as well as those of Justice Ecker, with using stereotypes in the fighting words doctrine).

[73] City of Landrum v. Sarratt, 572 S.E.2d 476, 478 (S.C. Ct. App. 2002).

[74] *See* Hudson, Jr., *supra* note 5, at 6 ("The final part of the essay then explains the specific factors or facts that cause lower courts to find that certain expression constitutes unprotected fighting words rather than protected speech.").

[75] *Id.* at 17–18.

[76] *Id.* at 18.

unprotected fighting words;"[77] (4) whether the target was a police officer;[78] and (5) whether there was a racial slur and, of particular importance for this Article, whether it was the "N" word.[79] In brief, a fighting words analysis accounts for "both content and [the] delivery" of the words.[80]

However, even in a heated context such as that of a political debate, a hostile statement can still be deemed fighting words.[81] For instance, a federal district court in 2020 held that Oregon state senator Brian Boquist's declaration to the president of that legislative body – a declaration made during a walkout from senate proceedings for which Boquist faced potential arrest – that "if you send the [S]tate [P]olice to get me, Hell's coming to visit you personally" constituted fighting words.[82] Although Boquist claimed he was merely voicing a religious sentiment, U.S. District Judge Michael McShane rejected that argument, writing rather wryly that Boquist "seems to overlook the fact that he sounds more like a character out of a Clint Eastwood movie than he does Mother Theresa."[83]

Furthermore, and beyond the use of racial slurs, speech that threatens a person with immediate violence may also constitute fighting words.[84] For instance, the Court of Criminal Appeals of Alabama held in 2021 that a Waffle House restaurant patron telling a waitress "Fuck you. I'm fixing to come across that counter and beat your ass" were unprotected fighting words.[85]

Criminal statutes that target disorderly conduct and breaches of the peace must comply with the Supreme Court's fighting words doctrine when a defendant's speech allegedly causes disorder or disturbs the peace.[86] For instance, the Kansas Court of Appeals recently observed the

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[77] *Id.*

[78] *Id.* at 19.

[79] *Id.* at 19–20.

[80] Nat'l Lab. Rels. Bd. v. Pier Sixty, LLC, 855 F.3d 115, 124, n.26 (2d Cir. 2017).

[81] *See* Boquist v. Courtney, 432 F. Supp. 3d 1221, 1228 (D. Or. 2020).

[82] *Id.*

[83] *Id.* at 1128–29.

[84] *See* Clemons v. City of Saraland, 2021 Ala. Crim. App. LEXIS 13, *14 (Ala. Crim. App. Mar. 12, 2021).

[85] *Id.* at *6.

[86] For example, the U.S. Court of Appeals for the Tenth Circuit observed the following in 2020 when considering the application of Norman, Oklahoma's disturbing-the-peace ordinance:

> Most relevant to the disturbing-the-peace ordinance at issue here, the Supreme Court has recognized that if courts narrowly construe similarly worded regulations to limit their application to unprotected speech, such as "fighting words" – words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace," *Chaplinsky v. New Hampshire*, 315 U.S. 568,

following regarding that state's disorderly conduct statute:[87] "Because the First Amendment . . . protects freedom of speech and prohibits states from punishing the use of language or words except in limited circumstances, the disorderly conduct statute has been deemed constitutional only so far as the prohibited speech constitutes fighting words."[88] Similarly, Georgia's disorderly conduct law, when applied to expressive conduct, "only reaches expressive conduct that amounts to 'fighting words' or a 'true threat.'"[89] Other states' disorderly conduct statutes also have been construed to bar only fighting words.[90] Additionally, criminal laws that target cursing in others' presence are constitutional when narrowly interpreted to apply only to curse words uttered in a fighting words context.[91]

Furthermore, the Supreme Court made it clear in *R.A.V. v. City of St. Paul* in 1992 that while the government may bar fighting words without

572 (1942) – those statutes will avoid constitutional vagueness problems.

Harmon v. City of Norman, 981 F.3d 1141, 1152 (10th Cir. 2020); *see* Thomas M. Place, *Offensive Speech and the Pennsylvania Disorderly Conduct Statute*, 12 TEMP. POL. & CIV. RTS. L. REV. 47, 48 (2002) (observing that "prosecutions based upon offensive speech have been upheld where the breach of peace or disorderly conduct statute has been narrowly limited to apply only to speech that meets the Supreme Court's post-*Chaplinsky* definition of 'fighting words'").

[87] KAN. STAT. ANN. § 21-6203 (2021).

[88] State v. Hamilton, 452 P.3d 883 (Kan. Ct. App. 2019).True threats, as referenced in the textual quotation linked to this footnote, constitute another category – one in addition to fighting words – of speech that is not protected by the First Amendment; *see* Virginia v. Black, 538 U.S. 343, 359 (2003) (observing that "the First Amendment . . . permits a State to ban a 'true threat,'" and adding that "'[t]rue threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals"); *see also* Lyrissa Barnett Lidsky & Linda Riedemann Norbut, *#I U: Considering the Context of Online Threats*, 106 CALIF. L. REV. 1886, 1889–90 (2018) (observing that while the Supreme Court has carved out true threats from First Amendment protection, it "has failed . . . to answer fundamental questions . . . including whether courts should view threats from the vantage of the speaker, a reasonable recipient, a reasonable disinterested reader, or all of the above and what mens rea the First Amendment requires in threats cases").

[89] Freeman v. State, 805 S.E.2d 845, 850 (Ga. 2017).

[90] *See, e.g.*, Johnson v. Campbell, 332 F.3d 199, 212 (3d Cir. 2003) (finding that a court must read into Delaware's disorderly conduct statute "a restriction to punish only such speech that consists of 'fighting words,' as those words are understood in First Amendment jurisprudence"); Taylor v. Cudd, No. 7:18-cv-00765-TMC-JDA, 2020 U.S. Dist. LEXIS 41963, at *9 (D. S.C. Jan. 23, 2020) (noting that South Carolina's disorderly conduct statute has been interpreted "as applying only to fighting words"); Wood v. Eubanks, 459 F. Supp. 3d 965, 975 (S.D. Ohio 2020) (noting that Ohio's disorderly conduct statute "has been interpreted to prohibit fighting words and to be consistent with the First Amendment").

[91] Battle v. Commonwealth, 647 S.E.2d 499, 502 (Va. Ct. App. 2007).

violating the First Amendment, it "may not regulate [their] use based on hostility – or favoritism – towards the underlying message expressed."[92] In other words, the government cannot selectively regulate fighting words about some topics or subjects because it disagrees with the substantive ideas being conveyed while leaving unfettered fighting words pertaining to other topics and ideas.[93] As Justice Antonin Scalia explained, the First Amendment does not permit the government "to impose special prohibitions on those speakers who express views on disfavored subjects."[94] In making this point, Scalia emphasized that what makes fighting words unprotected is the noxious mode of expressing an idea, not the substance of the idea itself.[95]

Despite the doctrine's apparently now cabined scope, it remains today the target of a steady drumbeat of academic criticism.[96] Among other attacks, the fighting words doctrine is upbraided for its: "lack of clarity";[97] oversimplification of the emotion of anger that might cause one to react to hostile speech;[98] and "misplaced focus . . . on the inability of

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[92] 505 U.S. 377, 386 (1992).

[93] *Id.* at 391–93.

[94] *Id.* at 391. As one First Amendment scholar encapsulates the majority's decision:

> while unprotected speech categories always can be regulated in their entirety, subcategories of such categories generally may not be singled out and regulated on content-specific bases. Thus, while states and localities may regulate all fighting words without constitutional difficulty, states and localities generally may not regulate only those fighting words based on race, gender, or other specified topics.

Heidi Kitrosser, *Containing Unprotected Speech*, 57 FLA. L. REV. 843, 856 (2005).

[95] *R.A.V.*, 505 U.S. at 393 (remarking that "the reason why fighting words are categorically excluded from the protection of the First Amendment is not that their content communicates any particular idea, but that their content embodies a particularly intolerable (and socially unnecessary) mode of expressing whatever idea the speaker wishes to convey").

[96] *See infra* notes 97–99 and accompanying text.

[97] Mark P. Strasser, *Those Are Fighting Words, Aren't They? On Adding Injury to Insult*, 71 CASE W. RSRV. L. REV. 249, 291 (2020); *see also* Linda Friedlieb, *The Epitome of an Insult: A Constitutional Approach to Dedicated Fighting Words*, 72 CHI. L. REV. 385, 386 (2005) ("While the Supreme Court declared that fighting words is a 'well-defined' class of speech, whether any individual's speech constitutes unprotected fighting words rather than expression protected by the First Amendment is anything but clear.").

[98] *See* Andy Carr, *Anger, Gender, Race, and the Limits of Free Speech Protection*, 31 HASTINGS WOMEN'S L.J. 211, 225 (2020) (contending that the fighting words doctrine "oversimplifies the emotion at the individual level, drowning out variation in anger's experience and expression through its slippery 'reasonable person' standard, failing to account for how social forces affect certain individuals – notably

the recipient of fighting words to restrain themselves from violence and not on the actual substance of the words spoken."[99] Those last two criticisms, tapping into whether people who are angered by personally abusive speech can nonetheless stop themselves from physically fighting back, returns one to the quotation from the Supreme Court of North Carolina at this Article's start.[100] Despite that court's assertion of it as a well-known "fact" that usage of the "N" word by a white person targeting a Black individual will often lead to physical retaliation,[101] none of the Black adults in the three cases from 2020 and 2021 described in Part III retaliated against their white agitators.[102] Notwithstanding that fight-free fact, courts in two of the cases still declared the speech was unprotected fighting words.[103]

Perhaps the outcome in those two cases is attributable to the "N" word's pernicious quality as hate speech when spoken by white people to Black people.[104] As Professor Randall Kennedy explains:

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women, non-whites, and other members of historically marginalized communities – and thus limit their expressions of emotion").

[99] Etienne C. Toussaint, *Blackness as Fighting Words*, 106 VA. L. REV. ONLINE 124, 130 (2020).

[100] *Supra* note 2 and accompanying text.

[101] *See In re* Spivey, 480 S.E.2d 693, 699 (N.C. 1997) ("No fact is more generally known than that a white man who calls a black man a 'n----r' within his hearing will hurt and anger the black man and often provoke him to confront the white man and retaliate.").

[102] *See infra* Part III.

[103] *See* State v. Liebenguth, 250 A.3d 1, 22 (Conn. 2020) (concluding "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"); City of Columbus v. Fabich, 166 N.E.3d 101, 112 (Ohio Ct. App. 2020) ("We find that, where, as here, the n-word is insultingly applied to a black person (particularly in conjunction with remarks like, 'go back to the plantation'), it amounts to an utterance of fighting words.").

It must be emphasized that "hate speech" generally is protected by the First Amendment and thus is not a legal category of unprotected expression. *See* Frederick Schauer, *In the Shadow of the First Amendment*, *in* CHARLOTTESVILLE 2017: THE LEGACY OF RACE AND INEQUITY 63, 64 (Louis P. Nelson & Claudrena N. Harold eds., 2018) ("Supreme Court decisions dating . . . to the 1960s have made clear that not only does the Constitution not recognize the category of hate speech, but it also plainly prohibits targeting speakers because their message is racially hateful, hurtful, or outrageous."). Justice Samuel Alito recently reiterated this point, writing that "[s]peech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express 'the thought that we hate.'" Matal v. Tam, 137 S. Ct. 1744, 1764 (2017) (quoting United States v. Schwimmer, 279 U.S. 644, 655 (1929)). The bottom line is that "[i]n America, hate speech is not a legal category." Leslie Kendrick, *The Answers and the Questions in First Amendment Law*, *in* CHARLOTTESVILLE 2017: THE LEGACY OF RACE AND INEQUITY 70, 70 (Louis P. Nelson & Claudrena N. Harold eds., 2018); *see* RODNEY A. SMOLLA,

> in the mouths of whites, except perhaps in very special circumstances, "n----r" is still widely used and perceived as a watchword for white supremacy. It is precisely because "n----r" is thought to indicate the presence of racist beliefs or sentiments that many people take such strong objection to it.[105]

More recently, Professor Kindaka Sanders observes that utterance of the "N" word, "when directed with ill-intent by a person of European descent who harbors racial animus against [B]lack people (particularly [B]lack people from a culture with a long history of racial oppression)," is freighted with "the force of generations of racial tyranny, the scars of which are transgenerational and continuously aggravated by fresh acts of social oppression."[106] Similarly, Professor Jody Armour points out that the "N" word "in some settings performs the social action of distinguishing and distancing an inferior [B]lack 'them' from a superior white 'us' – and in this role it is one of the most violent and blood-soaked verbal acts in the English language."[107] The hegemonic, power-sustaining forces of such uses of the "N" word by whites, in turn, are transparent.[108] This buttresses Justice Brett Kavanaugh's view that a one-time use of the "N" word by a workplace supervisor can create an impermissible hostile work environment.[109]

Despite its exceedingly negative nature, however, the "N" word's mere usage, standing alone, does not make it a fighting word *per se*.[110]

CONFESSIONS OF A FREE SPEECH LAWYER: CHARLOTTESVILLE AND THE POLITICS OF HATE 291 (2020) (noting "the contemporary First Amendment principle that hate speech *is* free speech") (emphasis in original).

[105] Randall L. Kennedy, *David C. Baum Lecture, "N----r!" as a Problem in the Law*, 2001 U. ILL. L. REV. 935, 943–44 (2001).

[106] Kindaka J. Sanders, *Defending the Spirit: The Right to Self-Defense Against Psychological Assault*, 19 NEV. L.J. 227, 240 (2018).

[107] Jody Armour, *Law, Language, and Politics*, 22 U. PA. J. CONST. L. 1073, 1109 (2020).

[108] *See* Tasnim Motala, *Words Still Wound: IIED & Evolving Attitudes Toward Racist Speech*, 56 HARV. C.R.-C.L. L. REV. 115, 119 (2021) ("Unlike many non-racial insults, racial insults are steeped in a legacy of oppression, harmful stereotypes, and otherization of a group of people. Those invoking racial insults demean based on race and question an entire racial group's value and belonging in society. Racial insults are intended to put their targets 'in their place,' reducing them to a subordinate position.").

[109] Ayissi-Etoh v. Fannie Mae, 712 F.3d 572, 580–81 (D.C. Cir. 2013) (Kavanaugh, J., concurring). Kavanaugh, who was a judge on the U.S. Court of Appeals for the District of Columbia Circuit at the time he made this observation, added that "[n]o 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." *Id.* at 581.

[110] *See* United States v. Bartow, 997 F.3d 203, 209 (4th Cir. 2021) (pointing out that Virginia's abusive language statute, under which defendant Jules A. Bartow was

Indeed, and as noted earlier and as addressed later in Part III in greater depth,[111] the U.S. Court of Appeals for the Fourth Circuit in 2021 concluded in *United States v. Bartow* that even the use of the "N" word by a white man directed at both a Black woman and a Black man was not, under the circumstances there, a fighting word.[112] The bottom line seemingly is that "[w]hether any given word amounts to a 'fighting word' depends on the context of how it is used and to whom it is addressed. Thus the 'N' word in a book about racism is not a fighting word because it is not a direct personal insult."[113] Yet, perhaps another reason lurking *sub silentio* why, at least in the decisions addressed below of *Connecticut v. Liebenguth* and *City of Columbus v. Fabich*, deployment of the "N" word was held to be a fighting word despite the absence of any indication that a specific Black target was about to react violently, is pure judicial disdain for the abhorrent nature of the word itself.[114] If that, in fact, is the latent reason why some courts dub the "N" word unprotected even when there is no sign it will trigger violent retaliation against the speaker, then the very rationale or purpose of the fighting words doctrine requires reexamination. The objective might shift from stopping violence before it occurs to preventing psychic harm caused by hate speech.

With this background in mind, this Article next turns in Part III to a trio of recent rulings in which appellate courts evaluated whether use of the "N" word by white adults directed at Black ones was either safeguarded by the First Amendment or constituted unprotected fighting words. As becomes clear, the courts in all three rulings were unified in their disgust with the offensive nature of the "N" word,[115] but they fractured on whether the First Amendment shielded its use when there was

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prosecuted, "does not (and could not consistent with the First Amendment) criminalize the mere statement of this abhorrent word. The Government recognizes, 'even the most egregious racial slur is not a fighting word *per se*. The circumstances in which the word is used matter a great deal'") (quoting a government brief filed in the case); State v. Liebenguth, 250 A.3d 1, 12 (Conn. 2020) (describing it as "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"); *In re* H.K., 778 N.W.2d 764, 770 (N.D. 2010) ("The First Amendment protects an individual's mere use of the term 'n----r.").

[111] *Supra* note 15 and accompanying text.

[112] *See* 997 F.3d at 211 ("The Court has so narrowed the 'fighting words' exception that it has not upheld a criminal conviction under the doctrine since *Chaplinsky* itself. We cannot do so today.").

[113] CLAY CALVERT, DANIEL V. KOZLOWSKI & DERIGAN SILVER, MASS MEDIA LAW 128 (21st ed. 2020).

[114] State v. Liebenguth, 250 A.3d 1 (Conn. 2020).

[115] *See infra* Part III, Section A.

no suggestion that any of the Black targets took physical steps toward committing violence.[116]

III. MUCH JUDICIAL OFFENSE TAKEN, NO PHYSICAL FIGHTS FOUGHT: EXAMINING THREE "N" WORD CASES FOR CLUES ABOUT THE FIGHTING WORDS DOCTRINE'S PRINCIPLES AND METHODOLOGY

This Part has five sections. Initially, Section A illustrates a crucial agreement among the federal and state appellate courts in *United States v. Bartow*,[117] *Connecticut v. Liebenguth*,[118] and *City of Columbus v. Fabich* – namely, consensus about the racist and repugnant nature of the "N" word, particularly when directed by a white person at a Black individual.[119] Moving beyond this point of judicial solidarity, Section B then dissects the reasoning of the U.S. Court of Appeals for the Fourth Circuit in *Bartow* that led it to conclude that the use of the "N" word in that case was not a fighting word. Next, Section C examines the logic of the Supreme Court of Connecticut in *Liebenguth* in reaching the opposite conclusion that the "N" word there was, in fact, an unprotected fighting word. Section D then turns to the Ohio Court of Appeals' analysis in *Fabich* in determining that, as in *Liebenguth*, the utterance of the "N" word was not protected by the First Amendment. Finally, Section E synthesizes the analyses of these three cases by cataloging key variables and factors used to suss out whether usage of the "N" word constitutes fighting words.

A. A Point of Consensus and Accord on Meaning

Despite the factual and analytical differences in *Bartow*, *Liebenguth* and *Fabich* explored below in Sections B, C and D, the appellate courts in all three cases were unified in their understanding of the virulently racist and harmful nature of the "N" word. Significantly, that was true even in *Bartow*, in which the Fourth Circuit declared the "N" word was not a fighting word.[120] Despite that free-speech friendly conclusion, the Fourth Circuit described the "N" word, among other things, as an "ugly racial

[116] *Bartow*, 997 F.3d 203; *Liebenguth*, 250 A.3d 1; *Fabich*, 166 N.E.3d 101.

[117] 997 F.3d 203 (4th Cir. 2021).

[118] 250 A.3d 1 (Conn. 2020).

[119] 166 N.E.3d 101 (Ohio Ct. App. 2020).

[120] *See Bartow*, 997 F.3d at 211 ("The Court has so narrowed the 'fighting words' exception that it has not upheld a criminal conviction under the doctrine since *Chaplinsky* itself. We cannot do so today.").

epithet,"[121] a "highly offensive slur,"[122] a "vile epithet,"[123] a "vile slur,"[124] "a noxious racial epithet,"[125] and "shameful speech."[126] Although merely speculation on the part of this Article's author, perhaps the court affixed those half-dozen derogatory labels to the "N" word to make it abundantly apparent that its decision safeguarding the word's use in the case before it should not be construed as an endorsement of its general usage.

Beyond pinning the "N" word with those six damning labels, Judge Diana Gribbon Motz explained for a unanimous three-judge panel that the "N" word "is so loaded with a legacy of slavery and racial hatred that it is inextricably linked with prejudice and hostility toward African Americans."[127] Motz, who was nominated to the Fourth Circuit by former President Bill Clinton,[128] deemed it "hard to think of an English term that is more abhorrent."[129] In a nutshell, she penned a blistering but well-reasoned indictment of the "N" word that incorporated support from the scholarship of,[130] among others, professors and critical race theorists Charles R. Lawrence and Richard Delgado.[131]

In August 2020, approximately eight months prior to the Fourth Circuit's *Bartow* ruling, the Supreme Court of Connecticut in *Connecticut v. Liebenguth* similarly encapsulated the disparaging nature of the "N" word.[132] The Nutmeg State's highest appellate court called it

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[121] *Id.* at 205.

[122] *Id.*

[123] *Id.* at 209.

[124] *Id.* at 211.

[125] *Id.* at 210.

[126] *Id.* at 211.

[127] *Id.* at 209.

[128] *Judge Diana Gribbon Motz*, U.S. COURT OF APPEALS FOR THE FOURTH CIRCUIT, https://www.ca4.uscourts.gov/judges/judges-of-the-court/judge-diana-gribbon-motz [https://perma.cc/PY6C-3CTW] (last visited Mar. 16, 2022).

[129] *Bartow*, 997 F.3d at 208.

[130] *See id.* at 209 (reiterating the Fourth Circuit's prior "indictment" of the "N" word).

[131] *See id.* (first citing Charles R. Lawrence, III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431 (1990)); then citing Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982)); *see also Charles R. Lawrence, III*, UNIV. OF HAWAII AT MANOA, WILLIAM S. RICHARDSON SCH. OF L., https://www.law.hawaii.edu/personnel/lawrence/charles [https://perma.cc/EP87-9XUW] (last visited Aug. 21, 2021) ("Professor Lawrence is best known for his prolific work in antidiscrimination law, equal protection, and critical race theory."); *see also* Richard Delgado, UNIV. OF ALA. SCH. OF L., https://www.law.ua.edu/directory/People/view/Richard_Delgado [https://perma.cc/EB6X-BZCU] (last visited Aug. 21, 2021) ("Professor Delgado's teaching and writing focus on race, the legal profession, and social change.").

[132] 250 A.3d 1, 22 (Conn. 2020).

"undoubtedly the most hateful and inflammatory racial slur in the contemporary American lexicon . . . [and] is probably the single most offensive word in the English language."[133] In delivering the court's opinion, Justice Richard Palmer also focused on the particularly stigmatizing and harmful nature of the "N" word when used by a white person and directed at a Black individual.[134] Perhaps most eloquently, and drawing support from the North Carolina Supreme Court's ruling in *In re Spivey* noted at this Article's start,[135] Palmer wrote: "Born of violence, the word 'n----r,' when uttered with the intent to personally offend and demean, also engenders violence. Indeed, such use of the word 'n----r' aptly has been called 'a classic case' of speech likely to incite a violent response."[136] He added that despite the coarsening of American culture and vernacular over the years, the "N" word still is likely to trigger a violent response.[137] Indeed, Palmer dubbed it "uniquely injurious and provocative."[138]

Concurring with the result in *Liebenguth*, Justice Maria Araujo Kahn also emphasized the "N" word's heinous nature.[139] She called it a "highly offensive, degrading, and humiliating racial slur" and "one of the most volatile terms in the English language."[140] Likewise, Justice Steven Ecker authored a concurrence characterizing defendant David Liebenguth's use of the "N" word and related statements as "vile, repugnant and morally reprehensible."[141] Tapping into the emotional injuries wrought by the "N" word when directed at a Black target such as the one in *Liebenguth*, Ecker added that the defendant used the slur as "a weapon to inflict psychic wounds as painful, or more so, than physical ones."[142] In brief, the opinions of Justices Palmer, Kahn and Ecker were all unsparing in their disdain for and castigation of the "N" word.

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[133] *Id.* at 14.

[134] *See id.* ("With respect to the language at issue in the present case, the defendant, who is white, uttered the words 'fucking n----rs' 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.").

[135] *See supra* notes 2–6 and accompanying text (addressing *In re* Spivey, 480 S.E.2d 693 (N.C. 1997).

[136] *Liebenguth*, 250 A.3d at 17 (quoting *In re* Spivey, 480 S.E.2d 693, 699 (1997)).

[137] *See id.* at 17–18 ("To whatever extent public discourse in general may have coarsened over time . . . it has not eroded to the point that the racial epithets used in the present case are any less likely to provoke a violent reaction today than they were in previous decades.") (internal citation omitted).

[138] *Id.* at 22.

[139] *Id.* at 26 (Kahn, J., concurring).

[140] *Id.*

[141] *Id.* at 27 (Ecker, J., concurring).

[142] *Id.*

In this Article's third centerpiece case, a unanimous three-judge panel of the Ohio Court of Appeals in *City of Columbus v. Fabich* in December 2020 did not proffer its own observations on the meaning of, or harm caused by, the "N" word to the same extent as the courts in *Bartow* and *Liebenguth*.[143] Nonetheless, the court in *Fabich* dubbed the "N" word "racial invective."[144] It also quoted favorably the opinions of several other courts referencing the word's abhorrent, vile, vicious, bigoted and inflammatory meaning, as well as its historical usage among white people targeting Black people.[145] The *Fabich* court added that "nationwide precedent" generally supported the principle "that, where, as here, the ["N"] word is insultingly applied to a [B]lack person (particularly in conjunction with remarks like, 'go back to the plantation'), it amounts to an utterance of fighting words."[146] Furthermore, the Ohio appellate court leaned on the Supreme Court of North Carolina's decision in *In re Spivey*.[147] In fact, *Fabich* quoted approvingly the same language from *Spivey* referenced at this Article's start – "'[n]o fact is more generally known than that a white man who calls a [B]lack man a 'n----r' within his hearing will hurt and anger the [B]lack man, and often provoke him to confront the white man and retaliate.'"[148]

In summary, the courts in *Bartow*, *Liebenguth* and *Fabich* bonded over the reprehensible, racist nature of the "N" word. Indeed, reading the material above, one is tempted to believe that the "N" word was ready to be deemed a *per se* fighting word, especially when angrily directed by a white speaker toward a Black person. Furthermore, as a federal district court in Pennsylvania observed in 2020 in an "N" word case involving school children, several "[o]ther appellate state courts have endorsed the logic of *Spivey*" that it is a well-known fact that utterance of the "N" word by a white man toward a Black man will often provoke retaliation.[149] Quoting the scholarly work of Harvard Law School Professor Randall Kennedy, that same district court pointed out that the "N" word "has been aptly described as the 'paradigmatic slur' toward African Americans and

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[143] 166 N.E.3d 101 (Ohio Ct. App. 2020).

[144] *Id.* at 119.

[145] *Id.* at 113.

[146] *Id.* at 112.

[147] *Id.* at 113 (citing and quoting *In re* Spivey, 480 S.E.2d 693, 699 (N.C. 1997)).

[148] *Fabich*, 166 N.E.3d at 113 (quoting *Spivey*, 480 S.E.2d at 699); *see also supra* note 2 and accompanying text.

[149] Boyle v. Evanchick, 2020 U.S. Dist. LEXIS 49958, at *19 (E.D. Pa. Mar. 19, 2020). As noted earlier, a complete discussion of *Boyle* is beyond this Article's scope because that case involves minors, while the three key cases examined here each involve speech by adults directed at adults. *Supra* note 10.

the 'most socially consequential insult.'"[150] In short, there is near-universal judicial condemnation of the "N" word.

Despite all of this, Sections B, C and D render it clear that courts in 2020 and 2021 were not ready to make the lengthy legal leap that would strip the "N" word of any and all First Amendment protection whenever a white person directs it toward a Black person. Instead, a fact-intensive, circumstance-specific inquiry involving multiple variables beyond the "N" word itself prove pivotal when nudging it across the critical line separating a constitutionally safeguarded insult from an unprotected racial slur. Consequently, it is best to categorize the "N" word *not* as a fighting word *per se* when insultingly spoken by a white person toward a Black individual,[151] but rather as a word that carries the *potential* to be a fighting word.[152]

B. United States v. Bartow[153]

"*If I called her a [n****r], would she still say good morning?*"[154]

That question, posed by retired Air Force Lieutenant Colonel Jules Bartow while shopping at a Marine Corps retail store,[155] was directed toward two Black adults – an unnamed man wearing civilian clothes and Cathy Johnson-Felder, a store employee who earlier had asked Bartow if she could assist him.[156] It ultimately led to Bartow's conviction for

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[150] *Boyle*, 2020 U.S. Dist. LEXIS 49958, at *18 (quoting RANDALL KENNEDY, N----R: THE STRANGE CAREER OF A TROUBLESOME WORD at 22, 35 (2002)).

[151] The viewpoint that the use of the "N" word, standing alone in such a situation, is a fighting word finds some judicial support. *See* Deng Deng v. Henton (*In re* Henton), No. 13-10216-TPA, 2014 Bankr. LEXIS 624, at *16 (Bankr. W.D. Pa. Feb. 13, 2014) ("In the Court's view, given the unfortunate history of the word's use, when a Caucasian person refers to an African American by using the 'N' word in a belligerent manner, that could well be *an exception to the general rule that words alone cannot be a provocation*.") (emphasis added).

[152] *See* Lee v. Superior Court, 11 Cal. Rptr. 2d 763, 764 (Cal. Ct. App. 1992) (noting that the "N" word "is commonly considered to be a racial epithet and has the *potential* to be a 'fighting word'") (emphasis added).

[153] 997 F.3d 203 (4th Cir. 2021).

[154] *Id.* at 205 (emphasis added).

[155] *Id.* The venue was the Quantico Marine Corps Exchange in Quantico, Virginia. *Id.*

[156] *See id.* at 210 ("For purposes of our discussion, we will assume the slur was directed at Johnson-Felder and the African American man."). The Fourth Circuit referred to both targets of Bartow's speech as African Americans. *See, e.g.*, *id.* at 205. This Article, except when directly quoting the Fourth Circuit, refers to them as Black for the sake of consistency with the rest of the Article's reference to Black individuals.

violating Virginia's abusive-language statute.[157] In May 2021, however, the U.S. Court of Appeals for the Fourth Circuit tossed out that decision.[158] It concluded that the "N" word-inclusive query raised by Bartow, who is white, was sheltered by the First Amendment's guarantee of free speech because it did not rise to the height of fighting words.[159]

The appellate court reached its free-speech favorable determination largely because the government failed to offer any "evidence that either [the Black male or Johnson-Felder] actually responded violently to Bartow's hateful slur or that a reasonable person in their positions would have done so."[160] In brief, Bartow's utterance of a court-deemed "noxious racial epithet" was nonetheless safeguarded, with no facts indicating his words were "likely to provoke violence by Johnson-Felder or the African American man or anyone else."[161]

To better understand how the Fourth Circuit reached this result, this Section initially explores the court's understanding of the rules affecting fighting words. It then explains how the court applied them to the facts in *Bartow*.

Regarding the rules, the Fourth Circuit observed that the fighting words doctrine has been severely cabined since the Supreme Court first articulated it in *Chaplinsky v. New Hampshire*.[162] As interpreted by the Fourth Circuit, the doctrine today demands "a case-by-case" examination of "contextual evidence" about whether a defendant-speaker uttered a requisite "direct personal insult" and whether that insult was likely to provoke imminent violence.[163] Quoting the Supreme Court's opinion in *Gooding v. Wilson*,[164] the Fourth Circuit stressed that the fighting words exception to First Amendment protection only applies when a "likelihood

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[157] *See id.* at 206 ("The magistrate found Bartow guilty and fined him $500, the maximum penalty under the Virginia statute."); *see also* VA. CODE ANN. § 18.2-416 (2021) (making it a class three misdemeanor for a person "in the presence or hearing of another, [to] curse or abuse such other person, or use any violent abusive language to such person concerning himself or any of his relations, or otherwise use such language, under circumstances reasonably calculated to provoke a breach of the peace"); *see also* Hershfield v. Commonwealth, 417 S.E.2d 876, 877 (Va. Ct. App. 1992) (observing that the Virginia abusive-language statute had been narrowly construed to only limit abusive language uttered in a fighting words context).

[158] *See Bartow*, 997 F.3d at 211 ("For the foregoing reasons, we reverse the judgment of the district court and remand the case to that court to vacate Bartow's conviction and sentence.").

[159] *See id.* at 211 ("The Court has so narrowed the 'fighting words' exception that it has not upheld a criminal conviction under the doctrine since *Chaplinsky* itself. We cannot do so today.").

[160] *Id.* at 210.

[161] *Id.* at 210–11.

[162] *Id.*

[163] *Id.* at 207–08, 211.

[164] 405 U.S. 518 (1972).

[exists] that the person addressed would make an immediate violent response'" or where a reasonable person in the addressee's position would respond violently.[165] The court, turning for guidance to the Supreme Court of Connecticut's 2020 ruling in *Connecticut v. Liebenguth* discussed later in this Part,[166] specified that contextual evidence suggesting a statement would likely spark violence includes:

> (1) repetition of alleged fighting words;[167]
>
> (2) accompaniment of alleged fighting words with other profanity or a threat to commit violence against the target;[168]
>
> (3) utterance of alleged fighting words in a "pugnacious" mode;[169] and
>
> (4) "aggressive actions" by a defendant-speaker.[170]

The court added that the standard for proving fighting words is "stringent" and demands "compelling evidence."[171]

Applying these rules to *Bartow's* facts, the Fourth Circuit found that none of the four contextual factors listed above existed.[172] Bartow's deployment of the "N" word – despite it being a "highly offensive" and "ugly racial epithet,"[173] and even assuming it was directed at the two Black individuals noted earlier[174] – thus was safeguarded, with the government failing to demonstrate that it was likely to elicit a violent reaction by either its two Black targets or anyone else.[175] It is important to recall that although neither Johnson-Felder nor the unnamed Black man reacted violently, Jules Bartow's speech still would have been considered fighting words if a reasonable person in their position likely would have violently

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[165] *Bartow*, 997 F.3d at 208 (emphasis removed) (quoting *Gooding*, 405 U.S. at 528); *see also id.* at 210 ("The Government offered no evidence that either of them actually responded violently to Bartow's hateful slur or *that a reasonable person in their positions would have done so*.") (emphasis added).

[166] 250 A.3d 1 (Conn. 2020); *see infra* Part III, Section C (addressing *Liebenguth*, 250 A.3d 1).

[167] *Bartow*, 997 F.3d at 211.

[168] *Id.*

[169] *Id.*

[170] *Id.*

[171] *Id.* at 210–11

[172] *Id.* at 211.

[173] *Id.* at 205.

[174] *Supra* note 156 and accompanying text.

[175] *See Bartow*, 997 F.3d at 211 (noting that "the Government has failed to offer any contextual evidence that Bartow's 'mode of speech' was likely to provoke violence by Johnson-Felder or the African American man or anyone else").

retaliated.[176] The key issue therefore is how the Fourth Circuit determined it was unlikely a reasonable person in the position of the two Black targets would have responded violently.

Delving deeper into the Fourth Circuit's analysis and returning to several of the four factors noted earlier,[177] multiple contextual cues were especially relevant for the court in reckoning that retaliatory violence was unlikely. These included: (1) the substantive content of other comments Bartow made, not simply his "N" word-infused question (***what else was said***); (2) statements Bartow did not make while in the store (***what was not said***); (3) Bartow's mode of speaking (***how he spoke***); (4) Bartow's conduct (***the actions that accompanied his words***); and (5) the reaction of not only Johnson-Felder and the unnamed Black male to Bartow's statements, but also of others nearby (***what others did in response***).[178] In brief, the appellate court examined far more than the insulting, racist nature of the "N" word.[179] These factors are addressed below.

1. Putting Jules Bartow's Words into Context: What Else Was Said

First, the appellate court emphasized the "bizarre" and virtually inscrutable nature of the totality of Bartow's remarks after Johnson-Felder approached him to ask if he needed help.[180] Rather than wrench out of context a lone question incorporating the "N" word – "If I called her a [n****r], would she still say good morning?"[181] – the court contextualized it with everything else Bartow said, both before and after, until he was escorted out of the store and arrested.[182]

Indeed, Bartow's initial reply to Johnson-Felder's polite opening query – "[G]ood morning. May I help you?"[183] – certainly fails to track what might be considered a relatively normal response along the lines of

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[176] *See id.* at 209 (construing Virginia's abusive-language statute narrowly and in accord with the fighting words doctrine to require the government to "prove that the language was likely to provoke an immediate violent reaction by that person *or a reasonable person in that individual's position*") (emphasis added).

[177] *Supra* notes 167–70 and accompanying text.

[178] *See infra* notes 180–247 and accompanying text (addressing these five factors).

[179] *See supra* notes 120–31 (discussing the Fourth Circuit's interpretation of the "N" word's meaning).

[180] *Bartow*, 997 F.3d at 210 (calling it "difficult to discern" the overall meaning of Bartow's comments); *see also id.* at 205 ("The first employee, Cathy Johnson-Felder, an African American, testified that she approached Bartow and said, '[G]ood morning. May I help you?'").

[181] *Id.*

[182] *See id.* at 206 (noting that a store security officer ultimately told Bartow to leave and escorted him out of the store, where he was arrested).

[183] *Id.* at 205.

"no thanks" or "yes, please." Rather than following up with such a formulaic reply, Bartow answered with a baffling question that, colloquially put, came out of left field: "If I had indigestion, diarrhea, or a headache, would you still address me as good morning?"[184]

Although stunned by Bartow's reply,[185] Johnson-Felder nonetheless calmly tried again, yet was met with another peculiar query:

> [C]an I help you, sir?" He responded, "I'm not a sir – I'm not a male, I'm not a female, if I had a vagina, would you still call me sir?" Bartow gestured and pointed his finger several times at Johnson-Felder, who was a number of steps away from him. She was "taken aback.[186]

Shortly after this, and following an exchange of words and finger pointing between Bartow and a white Marine lieutenant colonel, Bartow uttered the "N" word.[187] He unleashed it after an unnamed Black man in civilian clothes explained to Bartow that clerks address male customers as "sir" because they are shopping on a military base.[188] Bartow, who then was sitting on the floor trying on shoes,[189] replied, "If I called her a [n****r], would she still say good morning?"[190] The Fourth Circuit assumed that query was directed at both Johnson-Felder and the Black man who had explained why Johnson-Felder used "sir."[191]

In summary, Bartow's one-time use of the "N" word arose within a framework of "bizarre" musings of a man who seemingly had difficulty following the normal pattern of clerk-customer interactions.[192] His words, as the Fourth Circuit encapsulated them, "were laden with references to various bodily functions, sexual diseases, genitalia, and ultimately, a noxious racial epithet."[193] Viewed collectively, this oddball combination

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[184] *Id.*

[185] *See id.* (noting that Johnson-Felder initially "froze in shock").

[186] *Id.*

[187] *Id.*

[188] *Id.*

[189] *Id.* at 206.

[190] *Id.* at 205.

[191] *See id.* at 210 ("For purposes of our discussion, we will assume the slur was directed at Johnson-Felder and the African American man.").

[192] *Id.* In front of the Fourth Circuit, Bartow attempted to justify his comments, explaining they:

> [r]eflect[ed] his discomfort with gender labels and sex stereotypes. . . . He maintains that he used the slur because 'just like it can be 'offensive and degrading' to be called '[n****r],' it 'can be degrading, humiliating, invalidating, and mentally devastating' for a transgender person to be misgendered, to be called 'sir' when they are not a male or 'ma'am' when they are not a female."

Id. at 210, n.3.

[193] *Id.* at 210.

of perplexing questions indicates that while the "N" word may have been *directed at* both Johnson-Felder and the unnamed Black man,[194] it did not – at least in the Fourth Circuit's view – constitute the requisite *direct personal insult* necessary to be a fighting word.[195] As the Fourth Circuit put it, "the Government has not proven the slur was *used as* a 'direct personal insult.'"[196] Because Jules Bartow did not use the "N" word as a direct personal insult, it follows that it was unlikely to cause violence. This raises a significant issue regarding a speaker's intent that is addressed immediately below.

In particular, the italicized "used as" language quoted above is important, especially if it means "intended as." That understanding would import a new, subjective state-of-mind requirement into a fighting words calculus currently devoid of a specific intent element.[197] As one scholar notes, "there is no element of intent in 'fighting words;' whether words are fighting words is determined not by the speaker's intent but by the likely reaction of the listener."[198] The phrase "used as," however, might be interpreted to require that defendant-speakers intend their speech to be understood as direct personal insults in order for it to be fighting words. To be clear, such a potential intent requirement seemingly focuses not on whether defendant-speakers intend their messages to provoke *violence*, but rather on whether they intend to *insult* their targets.

Bartow therefore may be suggesting a key difference between speech being *directed at (i.e., spoken to)* a specific person, on the one hand,[199] and speech being *used as (i.e., intended as) an insult* of that same person, on the other. If this distinction really is what the Fourth Circuit envisioned when it wrote that "the Government has not proven the slur was *used as* a 'direct personal insult,'"[200] then a white speaker directing the "N" word at a Black person is safeguarded by the First Amendment if the epithet was

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[194] *See id.* (labeling Bartow's questions as "odd").

[195] *Id.* at 211.

[196] *Id.* (quoting Texas v. Johnson, 491 U.S. 397, 409 (1989)) (emphasis added).

[197] *See* Elonis v. United States, 575 U.S. 723, 766 (2015) (pointing out that under the Court's fighting words standard, speech may be restricted "without proof of an intent to provoke a violent reaction") (Thomas, J., dissenting); *see also* Larry Alexander, *Redish on Freedom of Speech*, 107 NW. U. L. REV. 593, 596 (2013) (contending that "the Court's own approach to fighting words" does not "require, as a precondition to sanctioning the speaker, that the speaker intend to provoke the audience to violence").

[198] Robert Austin Ruescher, *Saving Title VII: Using Intent to Distinguish Harassment from Expression*, 23 REV. LITIG. 349, 372 (2004).

[199] *See Bartow*, 997 F.3d at 210 ("For purposes of our discussion, we will assume the slur was directed at Johnson-Felder and the African American man."). The Fourth Circuit assumed that Jules Bartow directed his words at two Black individuals, so this was not an issue in the court's analysis. *Id.*

[200] *Id.* at 211 (quoting *Johnson*, 491 U.S. at 409) (emphasis added).

not intended as a personal insult. In other words, a white person would be permitted under the fighting words doctrine to voice the "N" word to a Black person – to intentionally direct it at him – so long as it *also* was not intended to be taken as a personal insult and was unlikely to provoke an average Black person to violently retaliate.

Injecting this subjective state-of-mind requirement into a fighting words analysis therefore would require asking: Did the speaker-defendant intend his or her words to be understood by the recipient-target as a direct personal insult? Including this element would comport with a similar state-of-mind component for determining if speech falls into another category of unprotected expression – namely, incitement to violence or unlawful conduct.[201] In contrast to the fighting words carveout, the incitement exception to First Amendment shelter "defines the line between protected advocacy of ideas and unprotected urging of unlawful action."[202]

Today's incitement test was established by the Supreme Court more than fifty years ago in *Brandenburg v. Ohio*.[203] The Court there held that:

> the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.[204]

This test, by including the word "directed," entails an intent component.[205] As the late Professor Ronald Rotunda explained, the *Brandenburg* standard requires the government to prove that "the speaker subjectively intended incitement" in order for speech to be unprotected by

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[201] *See* Dr. JoAnne Sweeny, *Incitement in the Era of Trump and Charlottesville*, 47 CAP. U. L. REV. 585, 587 (2019) ("Incitement is an exception to First Amendment speech protections that applies, essentially, when a speaker causes others to engage in violence or illegal acts.").

[202] Leslie Gielow Jacobs, *"Incitement Lite" for the Nonpublic Forum*, 85 BROOK. L. REV. 149, 183 (2019).

[203] 395 U.S. 444 (1969); *see* James M. McGoldrick, Jr., "*This Wearisome Analysis": The Clear and Present Danger Test from Schenck to Brandenburg*, 66 S.D. L. REV. 56, 105 (2021) (noting that "the *Brandenburg* test is commonly referred to as the incitement test").

[204] *Brandenburg*, 395 U.S. at 447.

[205] *See* Rodney A. Smolla, *Should the Brandenburg v. Ohio Incitement Test Apply In Media Violence Tort Cases?*, 27 N. KY. L. REV. 1, 10 (2000) (noting that *Brandenburg's* intent element is "embodied in the requirement that such speech to be 'directed to inciting or producing' lawless action") (quoting *Brandenburg*, 395 U.S. at 447); *see also* Alexander Tsesis, *Terrorist Speech on Social Media*, 70 VAND. L. REV. 651, 708 (2017) (noting "*Brandenburg's* stringent *intent*, imminence, and likelihood requirements") (emphasis added).

the First Amendment.[206] Professor Christina Wells recently called the *Brandenburg* rule "a pillar of free speech law, allowing government officials to protect public safety by punishing only speech intended and likely to create an imminent danger of harm, while protecting even the most abhorrent of speakers from suppression of their speech simply because government officials fear or dislike it."[207] If the Fourth Circuit's deployment of the phrase "used as" does infuse the fighting words test with an intent component, then it would bring it more in line with *Brandenburg's* standard for unlawful incitement.

Of course, "used as" might not be interpreted to mean "intended as." Instead, it might denote "understood as." That construction, in turn, would jettison a possible subjective intent component from the fighting words equation and place the focus squarely on an objective standard. Specifically, it would ask courts to consider the following question: Would a reasonable person in the message recipient's position understand it as a direct personal insult? If that, in fact, is what the Fourth Circuit meant when it wrote "used as," then its conclusion was that reasonable Black people in the position of Johnson-Felder and the unnamed Black man would not have understood Bartow's utterance of the "N" word as a direct personal insult.

Regardless of whether the Fourth Circuit deployed "used as" to mean "intended as" or "understood as," the court's broader contextualization of a single repulsive epithet along with all of the defendant's other statements to decipher if it was "used as" a direct personal insult comports with other facets of First Amendment law where context is crucial for deciding if speech is protected.[208] To wit, in determining if sexually explicit speech is obscene and thus outside the ambit of First Amendment protection,[209] a factfinder must consider the message as a whole.[210] The Supreme Court has explained that in obscenity cases, "[a] reviewing court must, of

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[206] Ronald D. Rotunda, *The Right to Shout Fire in a Crowded Theatre: Hateful Speech and the First Amendment*, 22 CHAP. L. REV. 319, 353 (2019).

[207] Christina E. Wells, *Assumptions About "Terrorism" and the Brandenburg Incitement Test*, 85 BROOKLYN L. REV. 111 (2019).

[208] *Cf.* P. Brooks Fuller, *Words, Wounds, and Relationships: Why Social Ties Matter to Free Speech in High-Conflict Protests*, 21 JOURNALISM & COMMC'N MONOGRAPHS 168, 169 (2019) ("Context is central to making meaning, and therefore crucial to free speech doctrine.").

[209] *See* Roth v. United States, 354 U.S. 476, 485 (1957) (writing that "obscenity is not within the area of constitutionally protected speech or press").

[210] *See* Miller v. California, 413 U.S. 15, 24 (1973) (holding that the trier of fact, when determining if speech is obscene, must examine – among other things – whether "the work, *taken as a whole*, appeals to the prurient interest" and "whether the work, *taken as a whole*, lacks serious literary, artistic, political, or scientific value") (emphasis added).

necessity, look at the context of the material, as well as its content."[211] Sixty-five years ago in *Roth v. United States*,[212] the Court rejected the previously accepted proposition that obscenity could be judged on the basis of an isolated, detached, or separate excerpt from a larger work because it was unconstitutionally restrictive of the freedoms of speech and press."[213] As this Article's author pointed out elsewhere, "a single photograph, movie scene, or paragraph cannot be wrenched out of context. This context-based approach to obscenity partly explains why adult magazines such as Playboy and Hustler long have included serious political articles and social commentary in their pages."[214]

Similarly, in determining if speech constitutes an unprotected true threat of violence,[215] context is key for sorting out how a message would be interpreted by a reasonable person.[216] In its seminal 1969 decision in *Watts v. United States* carving out true threats from the realm of First Amendment protection,[217] the Supreme Court considered whether the statement at issue, when "[t]aken in context," could be interpreted as a threat.[218] More recently, Justice Samuel Alito bluntly wrote that "context matters" when distinguishing protected speech from a true threat.[219] First Amendment scholar P. Brooks Fuller elaborates that "context suggests meaning, which underlies the gravity of the potential harm in threatening speech. Courts therefore should thoroughly examine all relevant contextual interpretations of a message when deciding First Amendment challenges to true threats prosecutions."[220] Context thus is crucial for

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[211] Kois v. Wisconsin, 408 U.S. 229, 231 (1972).

[212] 354 U.S. 476 (1957).

[213] United States v. Extreme Assocs., No. 03-0203, 2009 U.S. Dist. LEXIS 2860, at *4 (W.D. Pa. Jan. 15, 2009).

[214] Clay Calvert, *Contextual Cues to Meaning in Communications Law and First Amendment Jurisprudence: True Threats and Beyond*, 21 JOURNALISM & COMMC'N MONOGRAPHS 259 (2019).

[215] *See* Virginia v. Black, 538 U.S. 343, 359 (2003) (observing that "the First Amendment . . . permits a State to ban a 'true threat'").

[216] *See* United States v. White, 670 F.3d 498, 507 (4th Cir. 2012) ("In determining whether a statement is a 'true threat,' we have employed an objective test so that we will find a statement to constitute a 'true threat' 'if 'an ordinary reasonable recipient who is familiar with the context . . . would interpret [the statement] as a threat of injury.'") (quoting United States v. Armel, 585 F.3d 182, 185 (4th Cir. 2009)).

[217] *See, e.g.*, Commonwealth v. Knox, 190 A.3d 1146, 1155 (Pa. 2018) ("The true-threat doctrine has its genesis in the *Watts* case.").

[218] Watts v. United States, 394 U.S. 705, 708 (1969).

[219] Elonis v. United States, 575 U.S. 723, 747 (2015) (Alito, J., concurring in part, dissenting in part).

[220] P. Brooks Fuller, *Evaluating Intent in True Threats Cases: The Importance of Context in Analyzing Threatening Internet Messages*, 37 HASTINGS COMM. & ENT. L.J. 37, 51 (2015).

resolving First Amendment protection not only in the realm of fighting words disputes, but also in obscenity and true threats cases.

In summary, the Fourth Circuit in *Bartow* examined the defendant-speaker's utterance of the "N" word within the larger framework of his other contemporaneous statements. Doing so helped it to conclude that the word was not used as a direct personal insult and that, in turn, it was unlikely to bring about violence.[221] What is unclear, however, is whether – as discussed above –[222] the Fourth Circuit injected a subjective intent element into its analysis when it incorporated the phrase "used as" in concluding that "the Government has not proven the slur was *used as* a 'direct personal insult.'"[223] If "used as" means "intended as," then this state-of-mind requirement would allow speaker-defendants to argue that their words, although commonly understood as direct personal insults, were not intended to be taken as such and thus are not fighting words.

2. What Jules Bartow Did Not Say: What Was Left Unsaid Matters

The Fourth Circuit's analysis makes it evident that what a defendant does not say – not simply what he does say – can be exceedingly important in a fighting words analysis, as well.[224] It found "no evidence that Bartow employed other profanity, repeated the vile slur, or issued any kind of threat, let alone one dripping with racism."[225] The apparent take-away here, as suggested by several of the four factors identified earlier,[226] is that the "N" word is more likely to be deemed a fighting word when a speaker envelops it with other curse words, utters it more than once and/or accompanies it with a threat and, in particular, a racially charged one. In contrast, the lone usage of the "N" word lodged inside a question which, in turn, was nestled inside a series of bizarre queries devoid of swearing and threats, is more likely to be safeguarded by the First Amendment.[227]

3. How Jules Bartow Spoke: Mode of Expression Makes a Difference

In concluding that Bartow's statements were not fighting words, the Fourth Circuit emphasized that the retired Air Force Lieutenant Colonel's mode of expression took the form of "a series of rhetorical questions while

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[221] United States v. Bartow, 997 F.3d 203, 211 (4th Cir. 2021).

[222] *Supra* notes 197–208 and accompanying text.

[223] *Bartow*, 997 F.3d at 211 (quoting Texas v. Johnson, 491 U.S. 397, 409 (1989)) (emphasis added).

[224] *See Bartow*, 997 F.3d at 211.

[225] *Id.*

[226] *See supra* notes 167–70 and accompanying text.

[227] *See Bartow*, 997 F.3d at 210 (noting that "[e]verything about Bartow's remarks was offensive and bizarre").

trying on shoes."[228] In other words, rather than uttering a straightforward, declarative factual assertion such as "she's a n----r," Bartow couched his use of the "N" word in the form of a question about how Johnson-Felder might respond to Bartow were he actually to label her with that term.[229]

Of course, the mere fact that the "N" word is used in a question should not immunize it from being a fighting word, particularly if the harm to be prevented by the doctrine is either a violent physical response by the target or the emotional anguish sustained by the target. For example, one might imagine a white man yelling at a Black man an insulting question such as, "You're just a n----r, aren't you?" While also a rhetorical question such as that posed by Bartow to the extent it is not spoken for purposes of receiving a verbal response,[230] this hypothetical question, given its disdainful nature, seems more likely to generate a responsive physical attack than Bartow's strange query. Such an attack would seem even more likely if, per the description above in Section B, Subsection 2, the "N" word were accompanied with intensifying profanity, such as "You're just a fucking n----r, aren't you?,"[231] or, also per that subsection, were repeated with such profanity, such as "You're just a fucking n----r, aren't you? A fucking n----r, right?" In sum, merely tacking on a question mark should not, standing alone, turn an apparent fighting word into protected speech.

The Fourth Circuit's analysis of Jules Bartow's mode of speaking, however, includes more than the fact that he embedded the "N" word once in a series of rhetorical questions.[232] It also notes that he posed those queries "while trying on shoes."[233] Recall here that Bartow was situated "on the floor" while doing so.[234] In brief, his physical activity, location and stance while speaking seemingly are atypical of a person using the "N" word in a manner likely to provoke violence.[235] Bartow, in other words, was physically preoccupied when he spoke.[236] Perhaps the legal take-away here is that both standing up and devoting undivided attention to the target of speech are important factors in the fighting words analysis. Specifically, they are likely to be indicia of the "N" word being intended

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[228] *Id.* at 211.

[229] *See id.* at 205 ("If I called her a [n****r], would she still say good morning?").

[230] *See* Rhetorical Question, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/rhetorical%20question [https://perma.cc/ZJA2-FQYZ] (last visited Aug. 21, 2021) (defining a rhetorical question as one "not intended to require an answer").

[231] *See supra* note 168 and accompanying text (addressing accompaniment of the "N" word with "other profanity").

[232] *See Bartow*, 997 F.3d at 211.

[233] *Id.*

[234] *See id.* at 210 (noting that Bartow used the "N" word "while sitting on the floor trying on shoes").

[235] *See id.* at 210–11.

[236] *See id.* at 210.

as a direct personal insult (if "used as" means intended as) or understood as such, especially when compared with a speaker who sits on a floor and is engaged in a wholly unrelated activity.[237]

4. What Bartow Did Not Do: Action and Inaction Matters

In holding that Jules Bartow's speech was not fighting words, the Fourth Circuit pointed out that "[h]e did not take any aggressive actions that might have provoked violence" or otherwise act or speak in a "pugnacious" manner.[238] This suggests a "*words + actions*" methodology for deducing an instance of fighting words. Although Bartow "gestured and pointed his finger several times at Johnson-Felder"[239] while addressing her, the Fourth Circuit did not perceive this as the type of pugnacious conduct indicating that a violent response was likely.[240] As noted above, the apparent bulk of his in-store conduct involved trying on shoes.[241]

5. The Actual Responses of Others: Reactions Matter

In determining that a violent response to Bartow's usage of the "N" word was unlikely, the Fourth Circuit examined the actual responses of both the targets of his speech and others situated nearby.[242] It found no evidence that anyone responded in a violent manner.[243] While the court noted that Johnson-Felder was "taken aback" by Bartow's initial question, that occurred before he uttered the "N" word.[244]

Others who seemingly heard Bartow also did not react violently or appear to be ready to do so.[245] According to the Fourth Circuit, a store

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[237] *See supra* notes 197–208 (addressing possible interpretations of the meaning of the Fourth Circuit's phrase "used as").

[238] *Bartow*, 997 F.3d at 211.

[239] *Id.* at 205.

[240] *Id.* at 211.

[241] *Supra* Part III, Section B, Subsection 3.

[242] *Bartow*, 997 F.3d at 210.

[243] *Id.* As the court wrote:

> We turn to the relevant evidence offered with respect to the violent reaction of Johnson-Felder and/or the African American man. But there is no such evidence. The Government offered no evidence that either of them actually responded violently to Bartow's hateful slur or that a reasonable person in their positions would have done so.

Id.

[244] *Id.*

[245] *Id.*

video camera that captured the moment – albeit without audio[246] – revealed that:

> while Bartow was speaking, people stopped to watch the scene unfold, and some engaged with him. But most of the observers left to carry on with their shopping before security escorted Bartow from the store. And those who stayed continued to try on shoes, as Bartow did. There are no signs of violence.[247]

In sum, a dearth of evidence existed regarding either actual or likely violence in response to Jules Bartow's strange series of questions, including one imbued with the "N" word. The Fourth Circuit's multi-factor approach was truly holistic, as the above subsections, when viewed collectively, make evident. While clearly cognizant of the racist and reprehensible meaning of the "N" word,[248] the Fourth Circuit's comprehensive analysis illustrates that its mere utterance directed at a Black person does not alone or always make it a fighting word. Ultimately, the appellate court concluded that the "N" word neither was used as a fighting word nor was it likely to produce violence.[249] While *Bartow* therefore safeguarded deployment of the "N" word, the case addressed immediately below in Section C, which involves a radically different factual scenario and the repeated use of the epithet, provides a stark example of the "N" word used as a fighting word.

C. Connecticut v. Liebenguth[250]

"Fucking n----rs"[251]

Those words, voiced repeatedly by David Liebenguth, a white man, and directed while in close physical proximity to Michael McCargo, a Black parking enforcement official who had just given Liebenguth a $15 ticket, were deemed unprotected fighting words in 2020 by the Supreme Court of Connecticut.[252] That determination reinstated Liebenguth's conviction for breaching the peace.[253] The court's conclusion, as this

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[246] *Id.* at 205.

[247] *Id.* at 210.

[248] *See supra* notes 120–31 and accompanying text (addressing the Fourth Circuit's understanding of the "N" word's racist nature).

[249] *Bartow*, 997 F.3d at 211.

[250] 250 A.3d 1 (Conn. 2020).

[251] *Id.* at 5.

[252] *Id.* at 5–7.

[253] *See id.* at 6 ("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.");

Section later explains, hinged on far more than just Liebenguth's use of the "N" word during his parking-lot encounter with McCargo shortly after Liebenguth discovered his ticket and found McCargo's vehicle idling immediately behind his own.[254]

Initially, however, it is important to note something on which the court's decision did *not* hinge: how McCargo actually responded to Liebenguth's vituperative verbal volley. Specifically, the fact that McCargo, who was not a police officer and thus did not need to tolerate greater verbal abuse, remained calm and nonviolent did not alter the court's free-speech adverse determination.[255] The court reasoned that although McCargo remain peaceful, an average or reasonable Black parking enforcement official in McCargo's position likely would have fought back.[256] Indeed, the court stressed that the *likelihood* of speech triggering immediate violent retaliation is the touchstone of the fighting words analysis, not whether a brawl actually ensues.[257]

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see also CONN. GEN. STAT. § 53a-181 (a) (5) (making it a second-degree class B misdemeanor for a person to breach the peace by acting "with intent to cause inconvenience, annoyance or alarm, or recklessly creating a risk thereof" and by using "abusive or obscene language" in a public place).

[254] *See Liebenguth*, 250 A.3d at 6–8 (describing the circumstances, including the location, that gave rise to the encounter at the heart of the case).

[255] *See id.* at 18 ("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."); *see also supra* notes 53–62 and accompanying text (addressing how police officers generally must withstand more verbal abuse than average citizens under the fighting words doctrine).

[256] The court elaborated:

> We fully agree . . . 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 . . . does not alter our conclusion with respect to the likelihood of a violent reaction to that language.

Liebenguth, 250 A.3d at 19. It added that "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." *Id.* at 18. The court later used the term "reasonable" person interchangeably with "average" person in making this same point. *See id.* at 22 ("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.") (emphasis added).

[257] *See id.* at 14 (noting that "'the fighting words exception is concerned with the *likelihood* of violent retaliation'" and "'is intended only to prevent the *likelihood* of an actual violent response'") (quoting State v. Baccala, 163 A.3d 1, 9, 12 (Conn. 2017)) (emphasis added).

Several facts indicated to Connecticut's highest court that such a violent response was likely. In addition to the meaning of the "N" word, the court focused on another contemporaneous, racially charged statement Liebenguth made: "remember Ferguson."[258] This was an apparent reference to the 2014 killing by a white police officer of Michael Brown, an unarmed young Black man, in suburban St. Louis, Missouri.[259] The court also paid heed to Liebenguth's agitated actions, such as "moving his hands and body in an aggressive and irate manner."[260] It reasoned that such additional words and deeds "further inflamed the situation."[261]

Moreover, Liebenguth's use of profanity – notably, spewing the word "fucking" – to intensify the "contempt and disgust" wrought by the "N" word and another statement influenced the court's judgment.[262] As Justice Richard Palmer wrote for the majority, modifying the "N" word with "fucking" "amplified the assaultive nature of the utterance, making it even more hateful and debasing."[263] Furthermore, Liebenguth's loud and angry repetition of the "N" word swayed the court.[264]

As all of this makes readily transparent, the facts of *Liebenguth* are profoundly different from the ones underlying *United States v. Bartow*.[265] As described earlier, *Bartow* involved the one-time utterance of the "N" word amidst an abstruse series of queries posed by a man shopping for shoes at a military exchange.[266] At the most rudimentary level, then, *Liebenguth* and *Bartow* bring into sharp relief the principle that the specific circumstances of a case are critical when determining if utterance of the "N" word by a white adult directed toward a Black adult amounts to fighting words.

To better understand how the Supreme Court of Connecticut reached its decision in *Liebenguth*, this section first explores the court's understanding of the rules for the fighting words doctrine. It then examines more fully how the court applied those rules to the facts. Finally, it addresses points and problems with the majority's fighting words

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[258] *Id.* at 16.

[259] *Id.*; *see* Julie Bosman & Emma G. Fitzsimmons, *Grief and Protest Follow Shooting of a Teenager*, N.Y. TIMES, Aug. 11, 2014, at A11 (providing background on the shooting of Michael Brown and the protests that it sparked).

[260] *Liebenguth*, 250 A.3d at 16.

[261] *Id.* at 15.

[262] *Id.* at 16. Liebenguth loudly told McCargo that the parking authority in the town of New Canaan for which McCargo worked was "fucking unbelievable." *Id.*; *see also id.* at 15 (asserting that Liebenguth "used the profane adjective 'fucking' – a word of emphasis meaning wretched, rotten or – to intensify the already highly offensive and demeaning character of the word 'n----rs'").

[263] *Id.* at 16.

[264] *Id.*

[265] 997 F.3d 203, 205 (4th Cir. 2021).

[266] *See supra* Part III, Section B (addressing *Bartow*).

analysis emphasized by Justices Maria Araujo Kahn and Steven Ecker in their separate concurrences. As this Article's Introduction suggests, Justice Ecker's concurrence is perhaps most notable for suggesting a fundamental reconceptualization of the fighting words doctrine that would transform it into a vehicle for targeting hate speech rather than preventing fisticuffs.[267] Part III returns to his concurrence in greater detail after briefly noting it here.

In terms of the rules, the Supreme Court of Connecticut opined that the fighting words doctrine imposes on the government a "demanding standard" for proving that speech falls beyond First Amendment protection.[268] This language closely tracks the Fourth Circuit's observation in *Bartow* regarding the doctrine's "stringent evidentiary demands."[269]

Also akin to the Fourth Circuit in *Bartow*,[270] the Supreme Court of Connecticut in *Liebenguth* emphasized that the fighting words analysis entails a "contextual approach" that starts with "an examination of the words themselves."[271] This methodology pivots "on the particular circumstances"[272] under which words are used in order to determine if they would be "understood to be inflammatory or inciting" and,[273] in turn, would likely provoke an immediate violent response.[274]

Fleshing out this test, the Supreme Court of Connecticut turned for guidance to its 2017 decision in *Connecticut v. Baccala*.[275] *Baccala* involved usage of the "C" word directed at a female store manager and was described earlier.[276] The *Liebenguth* court distilled from *Baccala* at least five key factors to examine in the fighting words determination beyond "the words themselves."[277] These contextual variables, each of which taps into "'the actual circumstances'" in which speech occurs,[278] entail consideration of:

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[267] *See supra* Introduction and the sentence immediately following footnote 35.

[268] *Liebenguth*, 250 A.3d at 17.

[269] United States v. Bartow, 997 F.3d 203, 211 (4th Cir. 2021); *see supra* note 171 and accompanying text (referencing this part of this statement in *Bartow*).

[270] *See supra* note 163 (noting *Bartow's* description of a case-by-case, contextual approach for analyzing alleged instances of fighting words).

[271] *Liebenguth*, 250 A.3d at 12, 14.

[272] *Id.* at 12.

[273] *Id.* at 14.

[274] *See id.* at 12 ("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.") (emphasis added).

[275] 163 A.3d 1 (Conn. 2017).

[276] *Id.* at 234.

[277] *Liebenguth*, 250 A.3d at 14.

[278] *Id.* (quoting *Baccala*, 163 A.3d at 12).

> (1) whether a hostile exchange arose before utterance of the alleged fighting words;[279]
>
> (2) whether aggressive conduct accompanied the alleged fighting words;[280]
>
> (3) the reasonably and objectively apparent personal attributes of both the speaker and the target of the speech, including age, gender and race, as well as the physical attributes of the speaker – frailty and physical disabilities, for instance – that may affect the likelihood of the target of the speech fighting back;[281]
>
> (4) the position or occupation of the target of the speech, such as whether the target is a police officer who "'may reasonably be expected to exercise a higher degree of restraint than the average citizen;'"[282] and
>
> (5) the manner in which the speaker utters the words in question.[283]

The court in *Liebenguth* indicated this was a non-exhaustive list.[284] Other factors thus may also filter into the equation for resolving the definitive fighting words question: Would the words uttered be likely to produce an immediate violent response by an average or reasonable person in the position of the target and under the circumstances in which they are used?[285]

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[279] *Id.* at 13.

[280] *Id*.

[281] *Id*. at 13–14. In brief, this factor requires examining "'by whom and to whom the words were uttered.'" *Id.* at 14 (quoting *Baccala*, 163 A.3d at 12). The *Liebenguth* court suggested here that a target of speech, due either to social conventions or legal reasons, may be less likely to violently retaliate against a hostile speaker who is "'a child, a frail elderly person, or a seriously disabled person.'" *Id.* at 13 (quoting *Baccala*, 163 A.3d at 8).

[282] *Id.* at 14 (quoting *Baccala*, 163 A.3d at 9 (quoting Lewis v. New Orleans, 415 U.S. 130, 135 (1974) (Powell, J., concurring)).

[283] *See id.* (asserting that "'a proper contextual analysis'" will "'necessarily include[] the manner in which the words were uttered'") (quoting *Baccala*, 163 A.3d at 12).

[284] *See id.* (asserting that "'any other attendant circumstances that were objectively apparent and bear on the question of whether a violent response was likely'" may be considered) (quoting *Baccala*, 163 A.3d at 12).

[285] This distillation of the ultimate question is drawn from two statements made by the Supreme Court of Connecticut in *Liebenguth* – namely, its consideration of whether "the average person in the same situation as McCargo . . . likely would have had an immediate violent response to the defendant's verbal attack," and its conclusion "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." *Id.* at 22.

Applying these principles to the facts in *Liebenguth*, the Supreme Court of Connecticut began by analyzing the meaning and inflammatory nature of the "N" word.[286] As described earlier in Part III, Section A, the majority's opinion, authored by Justice Richard Palmer, and the two separate concurrences, penned by Justices Maria Araujo Kahn and Steven Ecker, were unified regarding the hateful and harmful nature of the "N" word.[287] As Justice Palmer tidily encapsulated it, "Not only is the word 'n----r' undoubtedly the most hateful and inflammatory racial slur in the contemporary American lexicon; but it is probably the single most offensive word in the English language."[288] Palmer went so far as to call it "uniquely injurious and provocative," thereby intimating that the "N" word rests at the top of an unofficial hierarchy of terms likely to be deemed fighting words.[289]

Turning to the specific factual circumstances of the "N" word's usage in the case, multiple variables influenced the court's decision that the expletive was likely to incite a violent reaction and thus was unprotected.[290] Perhaps most important among them was the fact that the speaker, David Liebenguth, was white and that the target, Michael McCargo, was Black.[291] In other words, the personal and readily apparent racial attributes of both the speaker and the target were front and center in the court's analysis.[292]

Several aspects of the manner in which Liebenguth uttered the "N" word also proved important.[293] These included his: (1) modifying it with "fucking;"[294] (2) stating it while looking directly and angrily at

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[286] *Id.* at 14–15.

[287] *Supra* notes 132–42.

[288] *Liebenguth*, 250 A.3d at 14.

[289] *Id.* at 22.

[290] *Id.* at 13–14.

[291] *See id.* at 14 ("With respect to the language at issue in the present case, the defendant, who is white, uttered the words 'fucking n----rs' 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.").

[292] *See supra* note 281 (identifying "the reasonably and objectively apparent personal attributes of both the speaker and the target of the speech" as one of the factors for consideration in a fighting words analysis).

[293] *See supra* note 283 (identifying "the manner in which the speaker utters the words in question" as one of the factors for consideration in a fighting words analysis).

[294] *Liebenguth*, 250 A.3d at 15–16; *see supra* notes 262–63 and accompanying text (addressing how the court considered the effect of the word "fucking" in its fighting words analysis).

McCargo;[295] and (3) repeating it.[296] In addition to the manner in which the "N" word was expressed, the court emphasized that it was accompanied by other racially freighted statements, thereby ratcheting up its sting and likelihood of triggering violence.[297] Specifically, beyond Liebenguth's implicit reference to the killing of Michael Brown noted earlier,[298] Liebenguth injected race into the encounter prior to uttering the "N" word. He did so by contending "that McCargo had ticketed him because his car is white and then accus[ed] McCargo of issuing him the ticket because [Liebenguth] is white."[299] In other words, the totality of all of Liebenguth's racist and race-baiting statements was significant in declaring his speech unprotected fighting words. The fact that Liebenguth made these other racially provocative jabs before using the "N" word, as well as his prior statement that the local parking authority that employed McCargo was "fucking unbelievable,"[300] also taps into the relevant consideration noted above of whether the alleged fighting words were preceded by a hostile encounter.[301]

In addition to both the manner in which the "N" word was spoken and the fact that it was preceded by a hostile exchange with McCargo in which Liebenguth used other racially incendiary comments, the court concentrated on Liebenguth's conduct.[302] Specifically, while standing in the parking lot near his ticketed vehicle, Liebenguth "stepped toward McCargo . . . moving his hands and body in an aggressive and irate manner."[303] Additionally, after Liebenguth got in his vehicle, he did not simply drive away.[304] Instead, he somewhat sinisterly "drove through the parking lot twice before leaving, cutting through empty parking spaces so he could pass by McCargo and again angrily confront him."[305] The court

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[295] *Liebenguth*, 250 A.3d at 16 (pointing out that Liebenguth spoke the "N" word "while looking angrily at" McCargo).

[296] *See id.* ("The fact that the defendant repeated this epithet only served to exacerbate the provocative and hostile nature of the confrontation.").

[297] *See id.* ("Considering the defendant's offensive remarks together . . . the defendant's reference to Ferguson significantly escalated the already fraught and incendiary confrontation.").

[298] *Supra* notes 258–59 and accompanying text.

[299] *Liebenguth*, 250 A.3d at 16.

[300] *Id.*

[301] *See supra* note 279 (identifying "whether a hostile exchange arose before utterance of the alleged fighting words" as one of the factors for consideration in a fighting words analysis).

[302] *See supra* note 280 (identifying "whether aggressive conduct accompanied the alleged fighting words" as one of the factors for consideration in a fighting words analysis).

[303] *Liebenguth*, 250 A.3d at 16.

[304] *Id.*

[305] *Id.*

reasoned that "such aggressive and menacing behavior increased the likelihood of a violent response."[306] In a nutshell, what mattered was not just what Liebenguth said, the number of times he said it and how he said it; his conduct counted too.[307]

Beyond considering what mattered to the court in its fighting words analysis, it is also constructive to understand something that did not affect its determination that Liebenguth's speech was unprotected. Specifically, Liebenguth and McCargo were not standing face-to-face when the former twice exclaimed "fucking n----rs."[308] Instead, they were seated in their respective vehicles.[309] Despite this double vehicular barrier, the court reasoned that the men were looking directly at each other and were in such close physical proximity that imminent retaliation was still possible.[310] How might such violence have occurred? Justice Palmer explained that McCargo either could have left his vehicle to charge at Liebenguth or remained in it and rammed it into Liebenguth's vehicle.[311] This conclusion suggests that although the fighting words doctrine often is interpreted as requiring a face-to-face encounter, it is perhaps more accurate to describe it as necessitating direct eye contact in such close physical proximity that immediate violent retaliation is possible.[312] A car-to-car exchange of words, as in *Liebenguth*, falls within this broader understanding of the doctrine. The court's logic also suggests that the "fight" in fighting words need not be a fist fight or a direct punch to the body but can take the form of an attack by an automobile or other mechanical means.

Justice Maria Araujo Kahn authored a concurrence in *Liebenguth*.[313] She agreed with the majority about both the outcome of the case and the highly offensive, volatile nature of the "N" word.[314] Justice Kahn,

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[306] *Id*.

[307] *Id*.

[308] *Id.* at 19.

[309] *Id.*

[310] *Id*.

[311] *Id.*

[312] *See* Caine, *supra* note 38, at 450–51 (noting ten possible interpretations of the fighting words doctrine, each of which includes a face-to-face component); *see also* Toni M. Massaro, *Equality and Freedom of Expression: The Hate Speech Dilemma*, 32 WM. & MARY L. REV. 211, 218 (1991) ("Most constitutional experts nevertheless interpret the Court's current position to be that racial and other types of epithets and insults are 'high value,' maximally protected speech, unless they are 'fighting words,' *uttered face-to-face* and likely to trigger physical violence.") (emphasis added).

[313] *Liebenguth*, 250 A.3d at 23 (Kahn, J., concurring).

[314] *See id.* at 26 (agreeing with the majority's conclusion that Liebenguth's exchange with McCargo "constituted fighting words not entitled to protection under the [F]irst [A]mendment," and calling the "N" word a "highly offensive, degrading, and humiliating racial slur" and "one of the most volatile terms in the English language").

however, criticized judicial consideration in the fighting words analysis of the immutable characteristics of the target of such speech, including the target's race, gender and age.[315]

Accounting for such personal attributes of addressees when trying to fathom if they would be likely to violently retaliate is highly problematic, she averred, because it requires courts to create and rely on troublesome stereotypes and assumptions.[316] She provided a vivid example illustrating this point – namely, the stereotype that "women are less likely than men to react to offensive situations with physical violence."[317] Judicial embracement of this stereotype means that women must put up with more hostile speech than men under the fighting words doctrine because they are stereotyped either as being docile or physically unable to fight back.[318] This creates what Justice Kahn aptly called "discriminatory results."[319] In brief, she condemned judicial "consideration of stereotypical propensities for violence when assessing an addressee's likely response to the speaker's words."[320]

Although Justice Kahn's lone example described above focused on stereotypes regarding a target's gender, she was equally concerned with stereotypes about a target's race.[321] A reasonable implication of her approach – one of particular importance for this Article – is that courts should not embrace stereotypes about how a Black person might respond to hostile speech, including the "N" word. In *Liebenguth*, the majority assumed an average Black parking enforcement official likely would have responded violently to the "N" word and the other racially loaded remarks when, in fact, the actual Black parking enforcement official to whom the words were directed – Michael McCargo – did not violently retaliate.[322] The *sub silentio* ramification of this, of course, is that McCargo is not an average Black man; rather, he is above average. This treads perilously close to a court embracing – or, at least playing upon – an incredibly derisive stereotype that the average Black man cannot contain his

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[315] *Id.* at 23.

[316] *Id.* at 25–26.

[317] *Id.* at 26.

[318] *See* Note, *The Demise of the Chaplinsky Fighting Words Doctrine: An Argument for Its Interment*, 106 HARV. L. REV. 1129, 1134 (1993) ("Women, however, often are neither socialized to fight nor physically prepared to do so when they are addressed with abusive epithets.").

[319] *Liebenguth*, 250 A.3d at 26 (Kahn, J., concurring).

[320] *Id.*

[321] *See id.* at 23 ("I also note . . . that I disagree with the holding and reasoning of . . . *Baccala* . . . 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.") (emphasis added).

[322] *Supra* note 256 and accompanying text.

emotions and, instead, can only resort to violence when a white man angrily calls him the "N" word.[323] In none of the three recent cases at the center of this Article, however, did a Black male target of speech respond violently to the "N" word when voiced by a white man.[324] Yet, in *Liebenguth* and *City of Columbus v. Fabich* (addressed later),[325] the respective courts deemed the speech fighting words under the notion that an average Black male would have responded violently.[326]

Apparently, the only attribute of the target of speech that Justice Kahn believes a court may consider in a fighting words analysis is the person's position or occupation, such as being a police officer.[327] She noted the U.S. Supreme Court's suggestion that police officers generally must suffer more verbal abuse, as well as the Supreme Court of Connecticut's prior subscription to that same proposition.[328] Justice Kahn opined that "[t]o 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."[329] In brief, she drew a line between immutable characteristics such as race and age, on the one hand, and changeable ones such as a person's position or occupation, on the other. The former, in Judge Kahn's view, are off the table "when determining whether a reasonable person with those characteristics was likely to respond with violence."[330] The latter, however, may be fully in play.[331]

Justice Steven Ecker also wrote a concurrence in *Liebenguth*.[332] As with Justice Kahn, Justice Ecker agreed with the majority about the

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[323] *See* Michael Pass, Ellen Benoit & Eloise Dunlop, *'I Just be Myself': Contradicting Hyper Masculine and Hyper Sexual Stereotypes Among Low-Income Black Men in New York City*, *in* HYPER SEXUAL, HYPER MASCULINE? GENDER, RACE AND SEXUALITY IN THE IDENTITIES OF CONTEMPORARY BLACK MEN 165, 166 (Brittany C. Slatton & Kamesha Spates eds. 2014) (noting that "[i]n cotemporary times, [B]lack men are similarly imagined as angry and violent" and "are perceived as threatening, animalistic, sexually depraved and crime-prone"); David S. Pedulla, *The Positive Consequences of Negative Stereotypes: Race, Sexual Orientation, and the Job Application Process*, 77 SOC. PSYCH. Q. 75, 77 (2014) (noting that "widespread stereotypes exist among whites that [B]lack men are threatening, violent, and criminal").

[324] *See supra* notes 160 and 238 and *infra* notes 354–55 and accompanying text (noting the lack of violent responses).

[325] 166 N.E.3d 101 (Ohio Ct. App. 2020).

[326] *See infra* Part III, Section D (addressing *Fabich*).

[327] *See* State v. Liebenguth, 250 A.3d 1, 25, n.3 (2020) (Kahn, J., concurring).

[328] *Id.*

[329] *Id.*

[330] *Id.* at 23.

[331] *Id.* at 25.

[332] *Id.* at 26 (Ecker, J., concurring).

repulsive and harmful nature of the "N" word.[333] He wrote separately, however, to criticize the fighting words doctrine, dubbing it "deeply flawed" and "untenable."[334] In making this point, he seconded Justice Kahn's concerns about the doctrine's reliance on stereotypes.[335] Justice Ecker explained that the "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."[336] He seemed especially piqued that some people must tolerate abusive speech because their physical capacity to fight back is diminished and thus a speaker's hostile words are unlikely to trigger a violent response and, consequently, the speaker is shielded by the First Amendment.[337]

Justice Ecker also lambasted the doctrine's reliance on how a mythical average person with particular characteristics would supposedly respond to hostile speech.[338] He emphasized that the average-person standard is a pure legal fiction.[339] First Amendment speech protection – or lack thereof – is wholly dependent upon the stereotypes and preexisting prejudices that judges, police and prosecutors hold in their own heads about how supposedly average people with particular demographic characteristics would respond to certain words.[340] Furthermore, Ecker

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[333] *See id.* at 39 ("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.").

[334] *Id.* at 26, 29.

[335] *See id.* at 33 (opining that "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").

[336] *Id.*

[337] Justice Ecker explained here that:

> [A] bright red light should flash when our [F]irst [A]mendment doctrine leads us to conclude . . . 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.

Id.

[338] *Id.* at 35.

[339] *See id.* (reasoning that "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").

[340] As Justice Ecker much more vividly put it:

> The [F]irst [A]mendment 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"

condemned the fighting words doctrine for its vague, nebulous nature – a problem that raises issues of fundamental fairness and due process.[341] He pointed here to the "intensely contextualized, fact specific, and inherently subjective analysis" upon which First Amendment protection under the doctrine pivots.[342]

Justice Ecker did more, however, than just inveigh against the fighting words doctrine. Crucially, he propounded a fundamental shift in its focus away from trying to predict if words will trigger a violent response.[343] Instead, under a possible reformulation, the doctrine would address the emotional and psychic injuries that "hate speech" may cause in heated, face-to-face situations.[344] As Justice Ecker tentatively defined it, hate speech is:

> 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, and under circumstances indicating that the speaker intends thereby to cause the addressee severe psychic pain.[345]

Justice Ecker admitted not knowing whether such a reformulation would pass constitutional muster, much less whether the U.S. Supreme Court, if given the opportunity, would even consider scrapping the current doctrine and replacing it with one targeting emotional injuries wrought by hate speech.[346] What is certain, however, is that Justice Ecker believes such a paradigm shift in First Amendment jurisprudence merits consideration due to multiple flaws with the extant fighting words doctrine.[347] This Article returns in Part IV to explore this possibility in more depth.

> characteristics of the addressee to decide whether a person with those demographics probably would react with immediate violence.

Id.

[341] *Id.* at 37–38.

[342] *Id.*

[343] *See id.* at 39 ("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.").

[344] *Id.*

[345] *Id.* at 27.

[346] *Id.*

[347] *See id.* ("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.").

With this analysis of *Bartow* and *Liebenguth* in mind, the next Section turns to the final decision in the trio of recent "N" word cases examined in this Article. As in both *Bartow* and *Liebenguth*, in *City of Columbus v. Fabich* usage of the "N" word by a white male adult directed at a Black adult did not spark violent retaliation.[348] Yet, as in *Liebenguth* but not in *Bartow*, the defendant's statements were deemed fighting words.[349]

D. City of Columbus v. Fabich

"*N----r Brown*"[350]

Sean Fabich's repeated use of variations of that phrase, along with the racially antagonistic command "go back to the plantation," directed at his Black, down-the-street neighbor, Willis Brown, led to Fabich's 2019 conviction for both disorderly conduct and ethnic intimidation.[351] In December 2020, an Ohio appellate court upheld Fabich's convictions on both charges.[352] In the process of doing so, the unanimous three-judge panel resolved that Fabich's "N" word-laden rant was fighting words.[353] This result came despite the fact that Brown, although testifying at trial that he felt provoked by Fabich's repeated use of the expletive in phrases such as "Bye N----r Brown" and "[G]o away, N----r Brown," never

[348] 166 N.E.3d 101 (Ohio Ct. App. 2020).

[349] *See id.* at 104 ("Because we find that the slur commonly known as the 'n-word' is a 'fighting word' when uttered under the circumstances in this case, we affirm Fabich's conviction for disorderly conduct.").

[350] *Id.* at 105 (emphasis added).

[351] *See id.* at 104–107 (summarizing the outcome and key facts in the case); *see also id.* at 112 (indicating that Willis Brown is Black by noting that "as here, the n-word [was] insultingly applied to a [B]lack person"); COLUMBUS, OHIO CODE OF ORDINANCES § 2317.11(A)(2) (2020) (setting forth the disorderly conduct statute under which Fabich was prosecuted, and providing, in relevant part, that "[n]o person shall recklessly cause inconvenience, annoyance, or alarm to another, by . . . [m]aking unreasonable noise or offensively coarse utterance, gesture, or display, or communicating unwarranted and grossly abusive language to any person"); COLUMBUS, OHIO CODE OF ORDINANCES § 2331.08 (A) (2020) (setting forth the ethnic intimidation statute under which Fabich was prosecuted, and making it a crime to violate the disorderly conduct statute with the motive of targeting "the victim's race").

[352] *Fabich*, 166 N.E.3d at 122.

[353] *See id.* at 117 ("We have analyzed that the n-word, spoken under the circumstances in which Fabich uttered it, is a fighting word. Fabich's conviction for disorderly conduct was neither against the manifest weight of the evidence nor insufficiently supported.").

physically retaliated.[354] Indeed, one witness stated that "Brown did not get physically aggressive or move toward Fabich" during the encounter.[355]

The verbal skirmish transpired outside, near Fabich's home.[356] The two men, who had known each other for years and may have had a friction-fraught relationship, stood approximately twenty feet from each other.[357] Brown was there looking at the landscaping handiwork that his friend, Dana Moessner, had done for a next door neighbor of Fabich.[358] Video taken by a neighbor revealed that after Fabich directed the "N" word at Brown, Brown shouted back, urging Fabich to "be respectful" and not to "call people names."[359] The verbal altercation turned into a legal battle when Brown filed complaints against Fabich for disorderly conduct and ethnic intimidation.[360] The trial court judge denied Fabich's First Amendment-based motion to dismiss the charges,[361] and a jury later convicted him on both counts.[362] A key issue, in turn, for the appellate court was whether the "N" word, under these circumstances, is a fighting word.[363]

Of the three recent appellate court rulings involving the "N" word that this Article examines, *Fabich* features both the briefest articulation of the fighting words doctrine and the shortest analysis of whether the speech at issue fell within the doctrine's scope.[364] The Ohio appellate court's discussion boiled down to: (1) quoting the U.S. Supreme Court's seminal articulation in *Chaplinsky v. New Hampshire* of the fighting words

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[354] *Id.* at 105–06.

[355] *Id.* at 106.

[356] *Id.* at 105.

[357] *Id.* at 105–106. In terms of the nature of the relationship between Fabich and Brown, the former testified "that there had been bad feelings between him and Brown for some time prior to the events underlying the case." *Id.* at 107. Brown, in contrast, was more equivocal and evasive about the pair's relationship. *See id.* at 106 (noting that during the trial on cross-examination, "when asked if it was safe to say that he did not particularly care for Fabich, Brown said he did not know how to answer" (internal citation omitted)). The appellate court concluded that "it seems undisputed that there was some degree of enmity between the two." *Id.* at 119.

[358] *Id.* at 105.

[359] *Id.* at 105–06.

[360] *Id.* at 104–05 (noting that Brown "filed a pair of complaints against Fabich alleging that . . . Fabich had repeatedly called Brown, 'N----r Brown,' and told him to 'go back to the plantation.' . . . The complaints charged violations of Columbus City Code, Sections 2317.11(A)(2) (disorderly conduct) and 2331.08(A) (ethnic intimidation)." (internal citations omitted)).

[361] *Id.* at 105.

[362] *Id.* at 107.

[363] *See id.* at 111 (writing that one "of the basic questions running through this case" is "[i]s the n-word a fighting word?").

[364] The appellate court's core discussion of the fighting words doctrine spanned only two pages. *Id.* at 112–13.

carveout from First Amendment protection;[365] (2) noting that Columbus, Ohio's disorderly conduct statute had been narrowly construed to only ban speech that entails "confront[ing] another person with 'fighting words;'"[366] (3) citing multiple decisions by other courts across the country for the proposition that "nationwide precedent" generally deems the "N" word a fighting word;[367] and (4) concluding that "where, as here, the ["N"] word is insultingly applied to a [B]lack person (particularly in conjunction with remarks like, 'go back to the plantation'), it amounts to an utterance of fighting words."[368]

Although the Ohio appellate court failed to articulate a list of factors to apply when analyzing whether usage of the "N" word is an unprotected fighting word, its ruling implicitly suggests some criteria. Most notably, the court paid heed to Fabich's other statement embodying racial animus – his directive for Willis Brown to "go back to the plantation."[369] This tracks the concern of the Fourth Circuit in *Bartow* and the Supreme Court of Connecticut in *Liebenguth* with the other statements a defendant makes in addition to uttering the "N" word.[370] In brief, Sean Fabich's admonition for Brown to return to a venue where slaves toiled for white owners seemingly ratcheted up the likelihood of imminent violence under the fighting words doctrine, much in the same way that David Liebenguth's command to Michael McCargo to "remember Ferguson" did in *Liebenguth*.[371]

In addition to taking into account other racially loaded statements made by Fabich, the Ohio appellate court suggested more generally that the overall circumstances under which the "N" word is spoken are crucial in a fighting words analysis.[372] One obvious circumstance was that

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[365] *Id.* at 112; *see supra* notes 37–42 accompanying text (addressing *Chaplinsky*).

[366] *Fabich*, 166 N.E.3d at 112.

[367] *Id.* at 112–13. Perhaps most notable among the cases cited by the Ohio appellate court was *In re Spivey*, 480 S.E.2d 693 (N.C. 1997), which was addressed earlier in this Article. *See supra* notes 2–6 and accompanying text (discussing *Spivey*).

[368] *Fabich*, 166 N.E.3d at 112.

[369] *Id.*

[370] *See supra* note 168 and accompanying text (noting the Fourth Circuit's concern in *Bartow* with "accompaniment of alleged fighting words with other profanity or a threat to commit violence against the target") and note 258 and accompanying text (noting the Supreme Court of Connecticut's concern in *Liebenguth* with the defendant's utterance of the phrase "remember Ferguson").

[371] *See* State v. Liebenguth, 250 A.3d 1, 16 (Conn. 2020) (noting that David Liebenguth, beyond using the "N" word, "employed additional, racially offensive, crude and foreboding language during his interaction with McCargo," including "remember Ferguson").

[372] *See Fabich*, 166 N.E.3d at 117 ("We have analyzed that the n-word, spoken under the circumstances in which Fabich uttered it, is a fighting word.").

Brown, the target of Fabich's words, was Black.[373] Additionally, the court intimated that deployment of the "N" word when there may have been a history of racial tension – even outright animosity – between the speaker and the target influenced its determination that Fabich's words were unprotected by the First Amendment.[374] Furthermore, the manner in which Fabich voiced the "N" word – he did so "insultingly" – was another important factual circumstance.[375] Specifically, the court's view that the "N" word was used insultingly was evidenced by other race-laden statements Fabich directed toward Brown during their verbal sparring.[376] For instance, Fabich exclaimed "[i]f you're going to make fun of my whiteness, we're going to have it out" and "[y]ou called me Tarzan. Let's have some race fun."[377] In other words, Fabich was not asking for Brown's opinion regarding the meaning of the "N" word or whether Brown believed white people ever should be allowed to say it. Instead, he used it in an insulting manner amidst a flurry of "other racially derogatory statements."[378] Finally, the appellate court noted that Fabich repeated the "N" word.[379] This too may have tilted its decision that his speech fell outside the fortress of First Amendment protection.

Keeping in mind the separate analyses above of *Bartow*, *Liebenguth* and *Fabich* in Sections B, C and D, respectively, the next Section synthesizes them to distill key variables that factored into the courts' decisions about whether usage of the "N" word was a fighting word. Particular attention is paid to factors that were relevant in at least two out

[373] *See id.* at 120 ("The n-word is a fighting word in these circumstances. *Fabich employed it against his [B]lack neighbor*, along with several other insulting racial comments, during a confrontation, the origins for which seem to have no other plausible explanation but racial tension between the two men." (emphasis added)); *see also id.* at 112 ("We find that, where, as here, the n-word is insultingly *applied to a [B]lack person* (particularly in conjunction with remarks like, 'go back to the plantation'), it amounts to an utterance of fighting words." (emphasis added)).

[374] *Id.* Fabich contended that, both on the day of the verbal altercation and prior to it, Brown had called Fabich "Tarzan." *Id.* at 107. Fabich testified that Brown had made it clear to him "on prior occasions" that this moniker is "a derogatory term for a white person living in a predominantly black community." *Id. See id.* at 120 ("The n-word is a fighting word in these circumstances. Fabich employed it against his black neighbor, along with several other insulting racial comments, during a confrontation, the origins for which seem to have no other plausible explanation but *racial tension between the two men*." (emphasis added)).

[375] *Id.* at 112.

[376] *Id.*at 112.

[377] *Id.* at 106.

[378] *Id.* at 122.

[379] *See id.* at 105 ("The sounds in the video are somewhat distant and difficult to decipher, but Fabich can be heard to repeatedly say, 'Bye N----r Brown,' 'go away, N----r Brown,' and other similar remarks to someone off screen.").

of the three decisions. Such overlap suggests some level of judicial consonance in the application of an otherwise muddled doctrine.

E. A Constellation of Factors: Evidentiary Considerations for Treating Usage of the "N" Word as a Fighting Word

The appellate courts in *Bartow*, *Liebenguth* and *Fabich* agreed that the "N" word is vile, racist and prone to spawn violence, especially when directed by a white person at a Black person.[380] None, however, either explicitly or implicitly, deemed it a fighting word *per se* such that its use by a white person invariably falls outside of First Amendment shelter when aimed at a Black person.[381] In other words, they failed to break new legal ground and depart from the longstanding principle that no word inherently is a fighting word.[382] Instead, the three courts used various language to stress that the particular circumstances, context and facts under which a message is spoken must be analyzed in each case to decide if it merits constitutional protection.[383]

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[380] *See supra* Part III, Section A.

[381] *See supra* Part III, Section A. All three courts recognized, either explicitly or implicitly, that there are no per se fighting words. S*ee* United States v. Bartow, 997 F.3d 203, 209 (4th Cir. 2021) (noting that the Virginia abusive language statute under which Jules A. Bartow was prosecuted "does not (and could not consistent with the First Amendment) criminalize the mere statement of this abhorrent word. The Government recognizes, 'even the most egregious racial slur is not a fighting word per se. The circumstances in which the word is used matter a great deal'") (quoting a government brief filed in the case); State v. Liebenguth, 250 A.3d 1, 12 (Conn. 2020) ("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."); *Fabich*, 166 N.E.3d at 117 (implying that that there are no per se fighting words in reasoning that the "N" word was a fighting word in the case before it "under the circumstances in which Fabich uttered it," rather than under all circumstances).

[382] *See* Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L.J. 484, 509 (observing that the U.S. Supreme "Court has invalidated regulations that hold certain words to be per se proscribable and insisted that each challenged utterance be evaluated contextually").

[383] *See Bartow*, 997 F.3d at 208, 211 (noting that the fighting words doctrine requires "a case-by-case" analysis that examines "'the actual circumstances surrounding'" the utterance of the speech at issue, and pointing to the government's failure "to offer any contextual evidence" suggesting the defendant's words were likely to cause a violent reaction (quoting Texas v. Johnson, 491 U.S. 397, 409 (1989)); *Liebenguth*, 250 A.3d at 12 (opining that "whether words are fighting words necessarily will depend on the particular circumstances of their utterance" and dubbing this a "contextual approach"); *Fabich*, 166 N.E.3d at 104 (holding that the "N" word constituted "a 'fighting word' when uttered under the circumstances in this case").

More than a half-dozen factual circumstances – ones beyond both the racist and provocative nature of the "N" word itself and its utterance by a white adult targeting a Black adult – emerge from the trio of cases as being especially important. The fact that there is agreement between the courts in *Bartow* and *Liebenguth* regarding some of those circumstances is partly explained by the Fourth Circuit's comparison of the facts before it in *Bartow* in 2021 with those that the Supreme Court of Connecticut faced in *Liebenguth* in 2020.[384] While the Fourth Circuit clearly was not bound to follow a ruling by Connecticut's highest appellate court – the Fourth Circuit is composed of Maryland, North Carolina, South Carolina, Virginia and West Virginia, and *Bartow* pivoted on interpretating Virginia statutory law – it nonetheless turned to *Liebenguth* for direction.[385] The fact that the Fourth Circuit relied on a non-binding Supreme Court of Connecticut ruling for assistance is perhaps a damning objective indicator of the paucity of guidance provided by the U.S. Supreme Court in applying the fighting words doctrine.

Seven critical factors that, when considered collectively and in a totality-of-the-circumstances approach, help to determine if utterance of the "N" word by a white adult directed at a Black adult is a fighting word are addressed below.

1. The Number of Times a Defendant Says the "N" Word

How many times a speaker voices the "N" word during an encounter affects judicial analysis.[386] To wit, in *Bartow*, where the defendant-speaker used the "N" word only once, the Fourth Circuit concluded it was protected by the First Amendment.[387] In contrast, the defendant-speaker in *Liebenguth* engaged in "multiple utterances of the words 'fucking n----rs,'" with the Supreme Court of Connecticut concluding the speech was unprotected.[388] It explained that "[t]he fact that the defendant repeated this epithet only served to exacerbate the provocative and hostile nature of the

[384] *See Bartow*, 997 F.3d at 210–11 (citing *Liebenguth* and comparing it with the facts in *Bartow*).

[385] *See About the Court*, U.S. CT. APP. FOR FOURTH CIR., https://www.ca4.uscourts.gov/about-the-court [https://perma.cc/58JB-AQJX] (last visited Mar. 16, 2022) (noting that the Fourth Circuit "hears appeals from the nine federal district courts in Maryland, Virginia, West Virginia, North Carolina, and South Carolina and from federal administrative agencies"); *Bartow*, 997 F.3d at 206 ("This case requires us to determine whether the Government offered sufficient evidence to prove that Bartow violated Virginia Code § 18.2-416.").

[386] *Bartow*, 997 F.3d at 210–11.

[387] *See id.* at 211 (noting a lack of any evidence that the defendant "repeated the vile slur").

[388] *Liebenguth*, 250 A.3d at 5.

confrontation."[389] Similarly, the defendant-speaker in *Fabich* repeatedly directed the "N" word at a Black target, and an Ohio appellate court regarded it as fighting words.[390]

In brief, in the two cases where the "N" word was expressed repeatedly, it was classified as a fighting word.[391] Conversely, in the one case where it was stated merely once, it was safeguarded by the First Amendment.[392] None of the three courts, however, went so far as to hold that the "N" word must be directed at a target at least two or more times to be classified as a fighting word. Put differently, they did not conclude that there is something akin to a verbal, one-free-bite rule in this domain under which a white person may pillory a Black adult with the "N" word once without fear of forfeiting First Amendment freedom.[393] It thus is perhaps wiser to conclude that while repeating the "N" word may enhance the probability of it being deemed unprotected, using it only once does not guarantee First Amendment protection. And, ultimately, repetition of the "N" word is simply one variable ripe for examination among those identified here.

2. The Manner and Mode in Which a Defendant Expresses the "N" Word

In addition to analyzing the number of times a defendant voices the "N" word, courts consider the manner and mode in which it is said.[394] This principle is an essential part of the fighting words analysis, with the U.S. Supreme Court remarking thirty years ago that fighting words are not protected because they represent "a particularly intolerable (and socially unnecessary) *mode* of expressing whatever *idea* the speaker wishes to convey."[395] In delivering its free-speech friendly ruling in *Bartow*, the Fourth Circuit emphasized that the mode of expression was not

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[389] *Id.* at 16.

[390] *See* City of Columbus v. Fabich, 166 N.E.3d 101, 105 (Ohio Ct. App. 2020) (noting that Sean "Fabich had repeatedly called Brown, 'N----r Brown'").

[391] *See supra* notes 388–90 and accompanying text.

[392] *See supra* note 387 and accompanying text.

[393] *Cf.* J. Hoult Verkerke, *Notice Liability in Employment Discrimination Law*, 81 VA. L. REV. 273, 277, n.10 (1995) ("The much-criticized common-law 'one-free-bite' rule allowed a dog owner to avoid liability unless her dog had previously bitten someone.").

[394] *See* United States v. Bartow, 997 F.3d 203, 211 (4th Cir. 2021) (addressing the "mode of speech" used by defendant Jules Bartow); *Liebenguth*, 250 A.3d 1 (asserting that a fighting words analysis "'necessarily includes the manner in which the words were uttered'" (quoting State v. Baccala, 163 A.3d 1, 12 (Conn. 2017))).

[395] R. A. V. v. City of St. Paul, 505 U.S. 377, 393 (1992). *See supra* notes 49–50 and accompanying text (addressing the mode-of-expression concept in First Amendment free-speech law).

"pugnacious," but rather took the form of "a series of rhetorical questions while trying on shoes."[396] The court, in turn, found that the government had failed to show any evidence that this mode of expressing the "N" word was likely to cause a violent response by either of Jules Bartow's two Black targets.[397] In contrast, the manner of expression in *Liebenguth* was variously described as loud, angry, hostile, provocative and incendiary.[398] Although the Ohio appellate court in *Fabich* did not directly state that either the manner or mode of expression was relevant, it nonetheless described the manner of Sean Fabich's speech as confrontational and involving the "hurl[ing]" of the "N" word rather than it merely being spoken.[399] In sum, how a defendant expresses the "N" word makes a difference.

3. What Else a Defendant Says Beyond the "N" Word

Of particular significance in *Bartow*, *Liebenguth* and *Fabich* was whether the defendant made other racist or racially charged statements, used profanity and/or issued threats of violence.[400] Deployment of the "N" word thus is contextualized by courts within the broader framework of other statements a defendant makes to help forecast whether it would likely trigger a violent reaction from an average or reasonable person in the target's position. In other words, it is the utterance of the "N" word plus what else a defendant says that is paramount.

To wit, stating the "N" word within the context of a confounding, off-the-wall series of questions devoid of profanity, threats or other racist statements was safeguarded in *Bartow*.[401] Conversely, the defendant-speaker in *Liebenguth* used profanity (specifically, "fucking") and told his target to "remember Ferguson," thereby partly leading to the Supreme Court of Connecticut's determination that the "N" word was not shielded

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[396] *Bartow*, 997 F.3d at 211.

[397] *Id.*

[398] *Liebenguth*, 250 A.3d at 16.

[399] *See* City of Columbus v. Fabich, 116 N.E.3d 101, 120 (Ohio Ct. App. 2020) (noting that Fabich "hurled racist invective" at Brown "during a confrontation").

[400] *See Bartow*, 997 F.3d at 211 ("The record contains no evidence that Bartow employed other profanity, repeated the vile slur, or issued any kind of threat, let alone one dripping with racism."); *Liebenguth*, 250 A.3d at 15–16 (noting that the defendant used the word "fucking" to intensify the sting caused by the "N" word and that "the defendant employed additional, racially offensive, crude and foreboding language during his interaction with McCargo"); *Fabich*, 166 N.E.3d at 112 (emphasizing that the "N" word, as used by the defendant, was a fighting word when considered "particularly in conjunction with remarks like, 'go back to the plantation'").

[401] *See supra* Part III, Section B (addressing the Fourth Circuit's analysis in *Bartow*).

by the First Amendment.[402] Additionally, the court in *Liebenguth* examined the fact that the defendant-speaker upped the racist ante, as it were, by exclaiming – before uttering the "N" word – that he was given a ticket because his vehicle was white and because he was white.[403] Indeed, the court was explicit that it considered "the defendant's offensive remarks together."[404] Similarly, the Ohio appellate court in *Fabich*, in determining that the "N" word was unprotected, noted the defendant-speaker's accompanying race-baiting remarks such as "[g]o back to your plantation" and "[l]et's have some race fun."[405] Viewing the three cases collectively, it becomes evident that the likelihood of the "N" word being deemed a fighting word when directed by a white adult at a Black adult increases when profanity, "threatening innuendo" and other language expressing racial animus are contemporaneously used.[406]

4. Defendant's Conduct When Using the "N" Word

The defendant's conduct – not simply his words – was an important consideration for the courts in both *Bartow* and *Liebenguth*. In concluding that Jules Bartow's use of the "N" word was protected, the Fourth Circuit pointed out that "[h]e did not take any aggressive actions that might have provoked violence."[407] As noted earlier, while Bartow pointed at one of his Black targets while speaking, his conduct primarily entailed trying on shoes.[408] In contrast and in the process of holding that David Liebenguth's utterance of the "N" word was not protected, the Supreme Court of Connecticut reasoned that his "aggressive and menacing behavior increased the likelihood of a violent response."[409] Liebenguth's antagonistic actions included "moving his hands and body in an aggressive and irate manner,"[410] as well as his rather reckless driving through the parking lot to confront Michael McCargo.[411] The Ohio appellate court in *Fabich*, however, did not let defendant Sean Fabich's apparent lack of any belligerent action toward Willis Brown affect its decision that Fabich's

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[402] *See supra* Part III, Section C (addressing the Supreme Court of Connecticut's analysis in *Liebenguth*).

[403] *Liebenguth*, 250 A.3d at 16.

[404] *Id.*

[405] *Fabich*, 166 N.E.3d at 106.

[406] *Liebenguth*, 250 A.3d at 18.

[407] United States v. Bartow, 997 F.3d 203, 211 (4th Cir. 2021).

[408] *Supra* Part III, Section B, Subsection 4.

[409] *Liebenguth*, 250 A.3d at 16.

[410] *Id.*

[411] *See id.* ("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.").

speech was fighting words.[412] In sum, the fact that a defendant does not accompany the "N" word with aggressive conduct provides no guarantee that the "N" word will not be deemed a fighting word (*Fabich*),[413] but acting aggressively while using it seemingly increases the chances that it will be classified as such (*Liebenguth*). Words plus deeds thus are relevant.[414]

5. How Bystanders Respond to the "N" Word

The heart of any fighting words analysis, per *Chaplinsky*, is whether the words in question would likely "provoke the average person to retaliation."[415] The U.S. Supreme Court has reiterated this fundamental, average-person principle in subsequent cases.[416] Thus, as *Liebenguth* illustrates, speech can still be deemed fighting words even if the actual target did not retaliate, provided that an average person in the target's position would likely have done so.[417] The same was true in *Fabich* – Willis Brown did not fight back, but Sean Fabich's speech was nonetheless classified as fighting words.[418]

The fact that a target of abusive speech does not violently retaliate therefore does not end the inquiry in a fighting words analysis.[419] This perhaps helps to explain why, as noted earlier, the Fourth Circuit in *Bartow* considered not only the fact that the two Black targets of Jules Bartow's

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[412] *See* City of Columbus v. Fabich, 166 N.E.3d 101, 106–07 (Ohio Ct. App. 2020) (noting that Fabich was unloading shrubberies from his car and placing them in his front yard while interacting with Brown).

[413] *Id.*

[414] *See Liebenguth*, 250 A.3d at 16.

[415] Chaplinsky v. New Hampshire, 315 U.S. 568, 574 (1942).

[416] *See, e.g.*, Texas v. Johnson, 491 U.S. 397, 409 (1989); Bachellar v. Maryland, 397 U.S. 564, 567 (1970).

[417] *See Liebenguth*, 250 A.3d at 19 (noting that "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," and pointing out that what mattered was whether an "average person would have exercised a similar measure of self-control and professionalism under the same circumstances."); *see also* Little Falls v. Witucki, 295 N.W.2d 243, 246 (Minn. 1980) ("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 or object of the words is relevant, but not determinative, of the issue of whether the utterances meet the fighting words test.").

[418] *See Fabich*, 166 N.E.3d at 104, 106 (concluding that the "N" word "is a 'fighting word' when uttered under the circumstances in this case" despite the fact that "Brown did not get physically aggressive or move toward Fabich").

[419] *But cf. id.* (implying that if a Black target *does* respond violently to being called the "N" word by a white speaker and there is no apparent reason to believe that the Black target is not a reasonable individual, then this reduces, if not completely eliminates, the need to examine the reaction of others nearby).

words responded nonviolently, but also that others nearby who seemingly heard his statements reacted peacefully and largely without anxiousness of violence arising.[420] Examining how others in the military exchange store responded to Bartow therefore allowed the Fourth Circuit to buttress its conclusion that the government failed to offer evidence that a reasonable person in the position of the two Black targets would have violently retaliated.[421] In other words, if the determination of whether speech is fighting words hinges not on how the target responded, but rather on speculation about how a hypothetical average people in the target's position likely would have responded, then examining the reaction of others in the immediate vicinity arguably provides circumstantial evidence of how they felt such a fictional person might have reacted.

Under this line of logic in *Bartow*, dual facts – that "most of the observers left to carry on with their shopping" and that those "who stayed continued to try on shoes" along with the Bartow – suggest that close-at-hand witnesses were unconcerned about possible violence unfolding.[422] The Fourth Circuit added that a video of Bartow's encounter at the military exchange did "not reveal any evidence of…the likelihood of a violent response from anyone in reaction to Bartow's epithet."[423] In sum, this seeming lack of worry by others nearby about violence arising, as manifested by their apparent business-as-usual approach to shopping, arguably indicated that they believed a reasonable person in the position of the two Black targets of Bartow's words would not have reacted violently.

In contrast, the Supreme Court of Connecticut noted that a witness to the dispute between David Liebenguth and Michael McCargo "testified that, even from about seventy feet away, the hostility of the encounter made her nervous and upset."[424] The witness's fret and discomfort, especially from such a distance, seemingly bolsters the court's conclusion that a reasonable Black parking enforcement official in McCargo's position would have violently retaliated against Liebenguth.[425] That conclusion certainly seems well founded if the court *sub silentio* interpreted the witness's nervousness and distress as signs that she feared violence was likely imminent.[426]

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[420] *Supra* Part III, Section B, Subsection 5.

[421] United States v. Bartow, 997 F.3d 203, 210 (4th Cir. 2021).

[422] *Id.*

[423] *Id.*

[424] State v. Liebenguth, 250 A.3d 1, 16 (Conn. 2020).

[425] *See id.* at 18 ("[W]e 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.").

[426] *Id.* at 8. The Supreme Court of Connecticut did not explicitly make this connection in its opinion. *Id.*

The bottom line is that the reaction of non-targets of the "N" word who hear it uttered while nearby factors into the fighting words analysis when it comes to estimating how a reasonable person in the position of the target likely would have responded. If such nearby hearers and observers seemed unconcerned about violence ensuing, then this arguably supports the conclusion that a reasonable person in the position of the target would not have violently retaliated.

6. Prior History of Racial Tension Between the Speaker and Target

Fabich was the only case examined here in which a white defendant-speaker and a Black victim-target knew each other prior to the incident that sparked their legal battle.[427] As noted earlier, Sean Fabich and Willis Brown had known each other for years.[428] More significantly, the Ohio appellate court noted that the most plausible impetus for the verbal confrontation was "racial tension between the two men."[429] Indeed, Fabich claimed "there had been bad feelings between him and Brown for some time prior to the events underlying the case."[430]

A white person injecting the "N" word into a discussion with a Black person with whom there is a history of racial animosity is somewhat akin to tossing a lit match into a powder keg: It is likely to spark trouble. This racially contentious history thus provided one of the factual circumstances under which Fabich uttered the "N" word and that, in turn, seemingly helped the court to conclude that it was a fighting word.[431]

7. The Target's Occupation

Liebenguth was the only decision of the three examined here to address whether usage of the "N" word was protected because of the target's occupation.[432] As described earlier, police officers generally are expected to withstand more verbal abuse from citizens before the speech

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[427] *See Bartow*, 997 F.3d at 205–06 (providing no indication in the recitation of the key facts of the case that defendant Jules Bartow previously met or knew Cathy Johnson-Felder or the unnamed Black male target); *Liebenguth*, 250 A.3d at 6 ("As McCargo was returning to his vehicle, he was approached by the defendant, whom he had never before seen or interacted with.").

[428] *Supra* note 357 and accompanying text.

[429] City of Columbus v. Fabich, 166 N.E.3d 101, 122 (Ohio Ct. App. 2020).

[430] *Id.* at 107.

[431] *See id.* at 120 ("The ['N' word] is a fighting word in these circumstances. Fabich employed it against his black neighbor, along with several other insulting racial comments, during a confrontation, the origins for which seem to have no other plausible explanation but racial tension between the two men.").

[432] *See Liebenguth*, 250 A.3d at 18 (addressing whether McCargo's occupation as a parking enforcement officer meant that he had to withstand greater verbal abuse).

is deemed fighting words.[433] Would that make a difference in *Liebenguth*? The answer, as explained below, is no.

Michael McCargo, the target of David Liebenguth's speech, was acting in his professional capacity as a parking enforcement officer when Liebenguth derided him multiple times with the "N" word.[434] Liebenguth argued on appeal that McCargo's occupation meant that Liebenguth's vilification of him was shielded by the First Amendment.[435] The Supreme Court of Connecticut, however, rejected that contention.[436] It distinguished police officers from parking enforcement officers.[437] Using as evidence McCargo's own testimony that he had never before in his five years on the job experienced such a tirade as that launched by Liebenguth, the court reasoned that Liebenguth's assault was beyond the usual level of frustration and anger that parking enforcement officers must tolerate.[438] The latent implication of the court's effort to distinguish police officers from parking enforcement officers is that if McCargo had, in fact, been a police officer, he might have been expected to nonviolently put up with the "N" word. The court never went so far, however, as to explicitly make that point.

Ultimately, by taking into account McCargo's occupation, the court did not simply ask whether an average Black adult or an average Black male adult likely would have retaliated against Liebenguth. Rather, it considered, in gender-neutral terms, how "the average African-American parking official would have" likely responded.[439] Interestingly, the Fourth Circuit in *Bartow* did not frame the issue before it in terms of how an average Black store clerk or an average Black female store clerk would have responded to Jules Bartow's use of the "N" word, despite assuming that Bartow had directed it at Cathy Johnson-Felder, a Black employee at a military exchange store.[440] That is interesting because the Supreme Court of Connecticut in *Connecticut v. Baccala* focused on how "an average store manager" likely would have responded to being called the "C" word.[441] Given that the Fourth Circuit relied partly on another ruling

[433] *Supra* notes 53–62.

[434] *Liebenguth*, 250 A.3d at 5–7.

[435] *Id.* at 18.

[436] *Id.*

[437] *See 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.").

[438] *Id.*

[439] *Id.*

[440] United States v. Bartow, 997 F.3d 203, 205, 210 (4th Cir. 2021) (describing who Johnson-Felder was and assuming the "N" word was directed at her).

[441] State v. Baccala, 163 A.3d 1, 15 (Conn. 2017); *see also supra* notes 66–68 and accompanying text (addressing *Baccala*).

by the Supreme Court of Connecticut – *Liebenguth* – when articulating factors for its fighting words analysis, it is somewhat odd that it did not also consider *Baccala*.[442] The target in *Fabich*, Willis Brown, was not acting in his occupational capacity when he was pilloried with the "N" word, so it is unsurprising there was no discussion of Brown's occupation by the Ohio appellate court.[443] Instead of noting Brown's occupation, the court simply considered the perspective of "a [B]lack person" under the circumstances.[444]

With this examination of the recent "N" word cases of *Bartow*, *Liebenguth* and *Fabich* complete, this Article next takes a more normative turn by critiquing the goal and purpose of the fighting words doctrine. It explores the possibility of refashioning the doctrine into a carveout from First Amendment protection that is less concerned with stopping potential violence than it is with simultaneously preventing emotional injuries from personally abusive epithets and uplifting public discourse on sometimes contentious matters such as race, gender, sexual orientation and religion. In brief, Part IV questions whether the rationale for maintaining the doctrine's existence eighty years after *Chaplinsky v. New Hampshire* should shift from forestalling fights to curbing hate speech when it is publicly directed at a specific person in a face-to-face context and uttered with the intent of being understood as a disparaging insult.

IV. SHIFTING THE DOCTRINAL FOCUS FROM STEREOTYPES AND GUESSING GAMES ABOUT LIKELY VIOLENCE TO PREVENTING EMOTIONAL HARM AND ENRICHING DISCOURSE

All three of the appellate courts in *Bartow*, *Liebenguth* and *Fabich* agreed about the racist, hostile and hateful nature of the "N" word.[445] Yet, in all three cases, none of the Black targets violently retaliated against a white man who uttered it.[446] Despite that lack of a fighting response, two courts nonetheless deemed usage of the "N" word unprotected as fighting

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[442] *Bartow*, 163 A.3d at 210–11 (addressing *Liebenguth*).

[443] City of Columbus v. Fabich, 166 N.E.3d 101, 105 (Ohio Ct. App. 2020) (noting that Brown was admiring the yard of a neighbor of Fabich when the incident took place).

[444] *Id.* at 112.

[445] *Supra* Part III, Section A.

[446] *See Bartow*, 997 F.3d at 210 (noting that there was "no evidence that either of [the Black targets] actually responded violently to Bartow's hateful slur'"); State v. Liebenguth, 250 A.3d 1, 18 (4th Cir. 2020) (noting that Michael McCargo, the Black target, "did not react violently despite the highly inflammatory and inciting nature of the defendant's language and conduct"); *Fabich*, 166 N.E.3d at 106 (citing the testimony of a witness that Willis Brown, the Black target, "did not get physically aggressive or move toward Fabich even though Fabich was being very verbally abusive").

words.[447] This means that those courts must have believed that average Black people in the position of the actual Black targets likely would have responded with violence.[448] A possible and provocative, latent implication of this conclusion, in turn, is that the actual targets in *Liebenguth* and *Fabich* were above average Black men who could control their tempers and harness their hurt and anger, unlike the derisive "stereotype of Black men as violent" and who are "too committed to expressing anger through physical assault to be reached by reason or incentives."[449] Sadly, as Connecticut Supreme Court Justices Maria Araujo Kahn and Steven Ecker expressed in their concurrences in *Liebenguth*, the fighting words doctrine requires reliance on stereotypes lurking in jurists' heads regarding how individuals of a certain race, gender or age will react to abusive speech.[450]

Rather than depend on offensive stereotypes about how mythical "average" people of a particular race supposedly would respond to a word in order to deem it fighting words outside the ambit of First Amendment protection, Justice Ecker suggested that the time has arrived for the U.S. Supreme Court to consider if the doctrine might be reworked to regulate hate speech when used under a very narrow set of circumstances.[451] As Justice Ecker explained in reference to David Liebenguth's repeated use of the "N" word directed at Black parking enforcement officer Michael McCargo, the "Court should consider fashioning a more defensible and

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[447] *See Liebenguth*, 250 A.3d at 22 (concluding "that the language the defendant used to demean, intimidate and anger McCargo were fighting words"); *Fabich*, 166 N.E.3d at 112 ("We find that, where, as here, the n-word is insultingly applied to a [B]lack person (particularly in conjunction with remarks like, 'go back to the plantation'), it amounts to an utterance of fighting words.").

[448] *See Liebenguth*, 250 A.3d at 18 (concluding that "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"). Although the Ohio appellate court in Fabich did not explicitly invoke an "average" Black person standard, it did cite and quote as applicable an Ohio Supreme Court decision using "'the average person'" standard. *Fabich*, 166 N.E.3d at 112 (quoting Ohio v. Hoffman, 387 N.E.2d 239, 241 (Ohio 1979)).

[449] Abigail A. Fuller, *What Difference Does Difference Make? Women, Race-Ethnicity, Social Class, and Social Change*, 11 RACE, CLASS & GENDER 8, 9 (2004); Anita Bernstein, *What's Wrong with Stereotyping?*, 55 ARIZ. L. REV. 655, 666 (2013); *see* Devon W. Carbado & Patrick Rock, *What Exposes African Americans to Police Violence?*, 51 HARV. C.R.-C.L. L. REV. 159, 164 (2016) (noting the "stereotypes of African Americans as violent and dangerous"); *see also supra* note 323 (providing other scholarly sources that describe the stereotype of Black men as violent). In his concurrence in *Liebenguth*, Justice Steven Ecker references these racial stereotypes as an example of an "implicit bias" held in the United States against Black men. *Liebenguth*, 250 A.3d at 35 n.11 (Ecker, J., concurring).

[450] *Supra* notes 316–40 and accompanying text.

[451] *Liebenguth*, 250 A.3d at 27 (Ecker, J., concurring); *see supra* notes 343–47 (addressing this aspect of Justice Ecker's concurrence in *Liebenguth*).

administrable [F]irst [A]mendment framework for deciding when the government may criminalize the kind of hate speech uttered by the defendant in the present case."[452]

Such reconsideration makes sense, especially given that, at least based upon the recent decisions of *Bartow*, *Liebenguth* and *Fabich*, there is little to no judicial disagreement about the abhorrently hateful nature of the "N" word.[453] If courts today are unified about the "N" word's racist nature, then why cannot there be some way to bar it – especially when it is said by a white person with an intent to demean a Black person – other than having to resort to judicial dependence on sordid stereotypes and tenuous guesses about whether a fictional average Black person will swing back at the white speaker?

Bartow, *Liebenguth* and *Fabich* were each decided subsequent to the knee-to-neck killing of George Floyd by a white police officer in Minnesota in May 2020.[454] Perhaps the recent memory of the ghastly video showing Floyd's death and the resulting rallies against racial injustice and police brutality subtly influenced the courts' collective rebuke of the "N" word.[455] Regardless of whether that supposition is true, however, something else is clear about this particular moment in time: That as the nation "anxiously wrestles with long-simmering issues of systemic racism and racial injustice following the killings by police of George Floyd and Breonna Taylor, it is also a propitious time to grapple with hate speech and whether the First Amendment . . . should continue to protect it."[456]

Justice Ecker did more than just call out for such a possibility in *Liebenguth*; he offered up for consideration a possible template for regulating hate speech.[457] Specifically – and it is important to review his complete explication – he proposed carving out from constitutional protection:

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[452] *Liebenguth*, 250 A.3d at 39 (Ecker, J., concurring).

[453] *Supra* Part III, Section A.

[454] *See generally How George Floyd Died, and What Happened Next*, N.Y. TIMES (Nov. 1, 2021), https://www.nytimes.com/article/george-floyd.html [https://perma.cc/N8JY-89NK].

[455] *See, e.g.*, Andrew Tangle et al., *Protests Sparked by George Floyd Death Descend Into Violence Despite Curfews*, WALL ST. J. (June 2, 2020), https://www.wsj.com/articles/minneapolis-unrest-subsides-as-cities-rage-over-death-of-george-floyd-11591018710 [https://perma.cc/TA8B-SBYW].

[456] Clay Calvert, *Confessions of a Free Speech Lawyer: Charlottesville and the Politics of Hate*, CRIM. L. & CRIM. JUST. BOOKS (Nov. 2020), https://clcjbooks.rutgers.edu/books/confessions-of-a-free-speech-lawyer-charlottesville-and-the-politics-of-hate/ [https://perma.cc/5C5K-F2YW] (reviewing RODNEY A. SMOLLA, CONFESSIONS OF A FREE SPEECH LAWYER: CHARLOTTESVILLE AND THE POLITICS OF HATE (2020)).

[457] State v. Liebenguth, 250 A.3d 1, 27 (Conn. 2020) (Ecker, J., concurring).

> 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, and under circumstances indicating that the speaker intends thereby to cause the addressee severe psychic pain.[458]

Unpacking this definition and comparing it with the current fighting words doctrine reveals several important items. First, Ecker's articulation focuses on "psychic pain," not a likelihood of retaliatory violence.[459] Second, it maintains the current doctrine's requirement that the abusive speech be used in a face-to-face encounter.[460] Third, his proposal allows for the regulation of the "N" word because, when addressed by a white person such as David Liebenguth to a Black target such as Michael McCargo, it "demean[s] the addressee on the basis of his . . . race."[461] In brief, both the current fighting words doctrine and Ecker's revamped version of it allow for regulating the "N" word in cases such as *Liebenguth*, but for different reasons (forestalling likely violence v. stopping psychic harm).

Fourth, Justice Ecker's definition explicitly includes an intent component that requires the "N" word to be used in a manner indicating the speaker wanted "to cause the addressee severe psychic pain."[462] This would resolve the intent issue raised by the Fourth Circuit's "used to" language in *Bartow* that was addressed earlier and is discussed again later.[463] The focus on intent, however, under Justice Ecker's definition is on whether a word was used with a "malicious intent" to inflict severe psychic pain, not whether it was intended to be understood as a direct personal insult that would spark violent retaliation.[464]

Fifth and finally, Justice Ecker's inclusion of "severe" to modify the level of psychic pain necessary for speech to fall outside of First Amendment shelter neatly tracks a key requirement for a successful tort cause of action for intentional infliction of emotional distress ("IIED") –

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[458] *Id.*

[459] *Id.*

[460] *See supra* notes 44 and 312 and accompanying text (addressing the general understanding that the current fighting words doctrine entails a face-to-face encounter component).

[461] *Liebenguth*, 250 A.3d at 27 (Ecker, J., concurring).

[462] *Id.*

[463] *See supra* notes 197–208 (addressing the question of subjective intent on the issue of meaning as raised by the Fourth Circuit's ruling in *Bartow*); *see infra* notes 484–89 (addressing the intent issue and calling on the U.S. Supreme Court to resolve it).

[464] *Liebenguth*, 250 A.3d at 39 (Ecker, J., concurring).

namely, that plaintiffs must suffer "severe emotional distress."[465] Adopting Justice Ecker's proposed definition of hate speech as an unprotected category of expression thus seemingly would thwart a First Amendment-based free speech defense to IIED claims in situations such *Liebenguth* and *Fabich*, assuming that all of the other elements of Ecker's definition quoted above were also satisfied.[466]

Significantly, were the Court to adopt Justice Ecker's recommendation, the First Amendment still would continue to shield from tort liability for IIED contentious defendant-speakers such as those in *Snyder v. Phelps*.[467] That is because the defendant-speakers in *Snyder*, who were members of the Westboro Baptist Church: (1) were not speaking in a face-to-face context with the plaintiff, and (2) were not speaking with the intent of causing psychic injury to the plaintiff, but rather were trying to address matters of public concern.[468] Similarly, the First Amendment would also still safeguard defendants from tort liability for IIED in cases such as *Hustler Magazine v. Falwell*.[469] The offensive speech there suggested that the plaintiff had sex with his mother in an outhouse and was a hypocrite who preached while drunk, and it appeared in an ad parody in a print magazine.[470] It thus would not fit under Justice Ecker's definition of prohibited hate speech because it did not occur "in a face-to-face encounter."[471]

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[465] *See* David Crump, *Rethinking Intentional Infliction of Emotional Distress*, 25 GEO. MASON L. REV. 287, 292 (2018) (noting that IIED "requires severe emotional distress").

[466] Intentional infliction of emotional distress typically "consists of four elements: (1) the defendant's conduct must be intentional or reckless, (2) the conduct must be outrageous and intolerable, (3) the defendant's conduct must cause the plaintiff emotional distress and (4) the distress must be severe." Karen Markin, *The Truth Hurts: Intentional Infliction of Emotional Distress as a Cause of Action Against the Media*, 5 COMMC'N. L. & POL'Y 469, 476 (2000).

[467] 562 U.S. 443 (2011). *See generally* Joseph Russomanno, *"Freedom for the Thought That We Hate": Why Westboro Had to Win*, 17 COMMC'N. L. & POL'Y 133 (2012) (providing a comprehensive overview of *Snyder v. Phelps* and the reasoning of the Supreme Court in ruling for the defendants, who were members of the Westboro Baptist Church).

In *Snyder*, the defendant-speakers were "approximately 1,000 feet" from the church where plaintiff Albert Snyder, who sued them for IIED and other tort causes of action, was situated for the funeral of his son, Matthew Snyder. *Snyder*, 562 U.S. at 449. The defendant-speakers spoke in order to communicate their "believes that God hates and punishes the United States for its tolerance of homosexuality, particularly in America's military." *Id.* at 448. Chief Justice John Roberts explained for the eight-Justice majority that the defendant-speakers' "signs plainly relate[d] to broad issues of interest to society at large" and regarded "matters of public import." *Id.* at 454.

[469] 485 U.S. 46 (1988).

[470] *Id.* at 48.

[471] State v. Liebenguth, 250 A.3d 1, 27 (Conn. 2020) (Ecker, J., concurring).

Beyond its role in tort cases, Justice Ecker's carveout also might be used to block a First Amendment defense to crimes such as disorderly conduct and breach of the peace, just as those crimes already must be measured against the current version of the fighting words doctrine when speech allegedly sparks disorder.[472] In other words, if "oral disorderly conduct cases" were based on speech that falls within Justice Ecker's definition of unprotected hate speech, then the First Amendment would be rendered nugatory.[473]

Ultimately, such a revamped approach to the fighting words doctrine means that the Supreme Court would need to emphasize and reinvigorate *Chaplinsky's* concern eighty years ago with the low social value of "insulting" words that "by their very utterance inflict injury."[474] That is the constitutional hook upon which Justice Ecker's proposal seemingly would need to be hung. Conversely, the Court would need to decrease the large role now played by *Chaplinsky's* worry about "fighting" words that "tend to incite an immediate breach of the peace."[475]

As addressed earlier, all of this would amount to a rather radical shift in First Amendment jurisprudence because hate speech typically is protected by the First Amendment unless it is used in the context of another unprotected category.[476] It is protected despite the fact that, as Professor Christina Bohannan recently observed, "hate speech can cause serious harm. Most obviously, it causes harm to the individuals or groups targeted by the speech. Hate speech attempts to degrade, ridicule, or intimidate targeted individuals and groups, which can make it difficult for them to lead full lives."[477] Furthermore, as Dean Erwin Chemerinsky points out, it constitutes "a form of discrimination" that "subordinates minorities."[478]

Perhaps Justice Ecker's proposal provides a viable path forward to addressing these types of harms and would, in the process, also uplift the quality of public discourse on topics such as race, gender and sexual

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[472] *See supra* notes 86–90 (addressing how disorderly conduct and breach of the peace statutes must be narrowly construed to comply with the fighting words doctrine when it is speech that allegedly causes the disorder or breaches the peace).

[473] R. George Wright, *An Emotion-Based Approach to Freedom of Speech*, 34 LOY. U. CHI. L.J. 429, 433 (2003).

[474] Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

[475] *Id.*

[476] *See supra* note 103 (addressing the First Amendment's protection of hate speech).

[477] Christina Bohannan, *On the 50th Anniversary of Tinker v. Des Moines: Toward a Positive View of Free Speech on College Campuses*, 105 IOWA L. REV. 2233, 2245 (2019).

[478] ERWIN CHEMERINSKY & HOWARD GILLMAN, FREE SPEECH ON CAMPUS 85 (2017).

orientation.[479] To wit, it should be emphasized that his articulation of prohibited speech specifically targets "speech communicated publicly."[480] It thus, by definition, affects public discourse. In summary, it is time to take predictions about the likelihood of a fight out of the fighting words doctrine as its central inquiry and to replace it with an emphasis on the psychic pain wrought by speech under a very narrow set of circumstances per Justice Ecker's proposal. As he summed up the need for such reexamination of the extant fighting words formula, "[o]ur 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."[481]

With this in mind, the Article next concludes by calling on the U.S. Supreme Court to soon take up a fighting words case pivoting on usage of the "N" word. In the process, the Court should address several critical items that would both clarify First Amendment jurisprudence and reconceptualize the fighting words doctrine.

V. CONCLUSION

In February 2021, the U.S. Supreme Court denied a petition for a writ of certiorari to weigh in on the Supreme Court of Connecticut's 2020 ruling in *Connecticut v. Liebenguth*.[482] In so doing, the nation's highest court passed on a prime opportunity to reconsider the fighting words doctrine and its contours, as well as the constitutional protection currently extended for what many people might consider to be hate speech such as the "N" word. Rather than squarely tackling those issues, the Court left intact a maddeningly muddled doctrine that necessitates highly fact-specific analyses and, as the concurrences of both Justices Kahn and Ecker in *Liebenguth* illustrate, draws stern judicial rebukes for depending on stereotypes about matters such as age and race, as well as its reliance on a fictitious average-person component.[483]

Eighty years after it adopted the fighting words doctrine in *Chaplinsky v. New Hampshire*, the U.S. Supreme Court should now revisit it in the context of an "N" word case to resolve several essential items. First, as discussed above in the analysis of *Bartow*, the Court must clarify whether the fighting words doctrine includes a subjective intent element

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[479] The topics affected under Justice Ecker's definition of hate speech are a person's "race, color, national origin, ethnicity, religion, gender, sexual orientation, disability, or like trait." State v. Liebenguth, 250 A.3d 1, 27 (Conn. 2020) (Ecker, J., concurring).

[480] *Id.*

[481] *Id.* at 39.

[482] 250 A.3d 1 (Conn. 2020), *cert. denied*, 141 S. Ct. 1394 (2021).

[483] *See supra* notes 316–40 (addressing the criticisms of Justices Kahn and Ecker).

on the question of meaning and, in particular, whether defendant-speakers must intend for their words to be taken as direct personal insults in order for their speech to fall outside of First Amendment coverage.[484] The Fourth Circuit's conclusion that "the Government has not proven the slur was *used as* a 'direct personal insult,'" tees up this question.[485] That is because the emphasized phrase "used as" may reasonably be interpreted to mean "intended as."

Furthermore, the Supreme Court of Connecticut in *Liebenguth* also hinted that the defendant-speaker's intent is relevant, especially in "N" word-centered cases.[486] For example, it wrote that the defendant-speaker used the "N" word to assert "his own perceived racial dominance and superiority over McCargo with the *obvious intent* of denigrating and stigmatizing him."[487] Would it, in other words, have made a difference in the court's fighting words analysis if, as a white person, David Liebenguth had not intended the "N" word to be taken "as an assertion of the racial inferiority of an African-American person"?[488] Importantly, and in line with the Fourth Circuit in *Bartow*, Connecticut's highest court also deployed "used to" language in its fighting words analysis that reasonably could be understood to mean "intended to."[489] The bottom line is that the U.S. Supreme Court now should clarify the relevance of a speaker-defendant's intent in using a particular word or phrase in the fighting words equation.

Second, the Supreme Court must make it clear which characteristics, if any, of both the defendant-speaker and the target of speech – race, gender, age, physical abilities and/or occupation, for instance – a court may permissibly evaluate when trying to predict how an average person in the target's position would have likely reacted to verbal abuse.[490] As suggested by the concurrences of Justices Kahn and Ecker in *Liebenguth*, permitting courts to take into account the immutable characteristics of the target of speech allows stereotypes to infiltrate and influence judicial

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[484] *See supra* notes 197–208 (addressing the question of subjective intent on the issue of meaning as raised by the Fourth Circuit's ruling in *Bartow*).

[485] United States v. Bartow, 997 F.3d 203, 211 (4th Cir. 2021) (quoting Texas v. Johnson, 491 U.S. 397, 409 (1989)) (emphasis added).

[486] *See Liebenguth*, 250 A.3d at 17 ("Born of violence, the word 'n----r,' *when uttered with the intent to personally offend and demean*, also engenders violence." (emphasis added)).

[487] *Id.* at 14 (emphasis added).

[488] *Id.* at 15.

[489] *See id.* at 19 (asserting that "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" (emphasis added)).

[490] *See id.* at 13–14 (suggesting that such characteristics are relevant in a fighting words analysis).

decision-making that affects a fundamental Constitutional right.[491] What is more, accounting for the physical characteristics of the target of hostile speech can lead to the perverse First Amendment result that individuals who are physically challenged and thus are less likely to fight back must tolerate greater verbal abuse than those able-bodied individuals who can strike an abusive speaker.[492] Additionally, and most significantly for purposes of this Article, courts seemingly rely on the worst form of racial stereotypes regarding how Black males will respond to usage of "N" word – violently and without self-control – when, in fact, none of the Black male targets in the three cases examined here violently retaliated against their white antagonists.[493] Three cases, of course, is a very small sample size. Yet, the fact that no violent retaliation occurred in them calls into question the supposed fact about which the Supreme Court of North Carolina in *Spivey* took judicial notice a quarter-century ago: "that a white man who calls a [B]lack man a 'n----r' within his hearing will . . . often provoke him to confront the white man and retaliate."[494]

Third, the U.S. Supreme Court should identify the contextual variables – ones other than either the immutable or occupational characteristics of the speaker or target, as noted immediately above – that courts may permissibly analyze when sorting out when particular language constitutes fighting words. Section E of Part III identified seven factors that were considered in at least one of the three cases of *Bartow*, *Liebenguth* and *Fabich*.[495] In addition to articulating the variables that courts may examine, the Court also should clarify which, if any, of those variables are to be given more weight or play a greater role in the fighting words equation.

Fourth and finally, the Court should, in baseball parlance, swing for the fences. Specifically, it should move from the micro-level issue of distilling factors and pinpointing variables for consideration in the current fighting words calculus to the macro-level question of whether the entire purpose and underlying rationale of the doctrine should shift away from preventing possible violent retaliation to policing the use of hate speech under a narrow set of circumstances. As addressed in Part IV, such a radical change in the purpose of the fighting words carveout from the

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[491] *See supra* notes 316–40 (addressing the problems with judicial reliance on stereotypes in the fighting words doctrine).

[492] *See Liebenguth*, 250 A.3d at 33 (Ecker, J., concurring) (asserting that "a bright red light should flash when our [F]irst [A]mendment doctrine leads us to conclude . . . that an outrageous slur directed at a physically disabled elderly woman is constitutionally protected but the identical words addressed to a physically fit man . . . will subject the speaker to criminal prosecution").

[493] *See supra* note 449 (describing the stereotype of Black men as angry, violent, and threatening).

[494] *In re* Spivey, 480 S.E.2d 693, 699 (N.C. 1997).

[495] *See supra* Part III, Section E.

constitutional protection of speech would potentially: (1) address the emotional harms caused by the use of personally vicious language such as the utterance of the "N" word by a white speaker directed insultingly at a Black target; (2) eliminate a First Amendment-based defense for crimes such as disorderly conduct and tort causes of action such as intentional infliction of emotional distress when personally abusive language is deployed in an extreme and outrageous manner with either the intent or reckless disregard of causing a target to suffer severe emotional distress; and (3) improve the quality of public discourse by disincentivizing the use offensive modes of expressing controversial ideas and incentivizing more rational and thoughtful ways of conveying them that better comport with principles of reasoned discussion in the metaphorical marketplace of ideas.

Ultimately, addressing this final task means the Court might choose to reinvigorate and revitalize the *Chaplinsky* Court's concern about "insulting" words that "by their very utterance inflict injury" while simultaneously reducing and downgrading *Chaplinsky's* fret about "fighting" words that "tend to incite an immediate breach of the peace."[496] Or, to bring this Article full circle, the Court might concentrate on *Spivey's* alarm about the "hurt and anger" a Black man experiences when being called the "N" word by a white man rather than focusing on whether he will "confront the white man and retaliate."[497] After all, while none of the three Black men to whom the "N" word was directed in *Bartow*, *Liebenguth* and *Fabich* violently retaliated, it was clear that at least two were hurt, offended or angered, and that the government simply failed to offer any evidence regarding the response of the third individual.[498] Judicial concern with the emotional distress and anger experienced by a Black target of the "N" word must not take second-tier status or a backseat under the First Amendment behind the current judicial guessing games – ones based on racial stereotypes and fictional average people of a particular race – about whether a white man is likely to be physically attacked by a Black man.

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[496] Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

[497] *In re Spivey*, 480 S.E.2d at 699.

[498] *Compare* State v. Liebenguth, 250 A.3d 1, 7 (Conn. 2020) (noting that Michael McCargo, the Black target of the speech, "was shocked and personally offended by the encounter") *and* City of Columbus v. Fabich, 166 N.E.3d 101, 105 (Ohio Ct. App. 2020) (noting that Willis Brown, the Black target of the speech, "felt provoked" and – although he did not actually do so – "was tempted to engage physically") *with* United States v. Bartow, 997 F.3d 203, 210 (4th Cir. 2021) (noting that "[t]he Government offered no testimony of any kind from the African American man, or about his response to the epithet").