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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	79055664
Applicant	Luxuria, s.r.o.
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Date	03/28/2011

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In re Trademark Application of	)	
	)	
LUXURIA, s.r.o.	)	Law Office: 112
	)	
Serial No.: 79/055,664	)	Trademark Examining Attorney:
	)	Charisma Hampton
Filed: March 12, 2008	)	
	)	
Mark: Design Only	)	

**APPLICANT'S SECOND REQUEST TO SUSPEND AND REMAND APPEAL  
FOR CONSIDERATION OF ADDITIONAL EVIDENCE WITH GOOD CAUSE**

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Applicant LUXURIA, s.r.o. (“Applicant”) respectfully re-requests suspension of the current appeal proceedings relative to U.S. Trademark Serial No. 79/055,664, and remand of the same to the Examining Attorney to consider additional evidence, pursuant to § 1207.02 of the Trademark Trial and Appeal Board Manual of Procedure (TBMP). Applicant had previously made the same request in Applicant’s Request to Suspend and Remand Appeal for Consideration of Additional Evidence, filed March 2, 2011, and attached hereto as Exhibit A. The Trademark Trial and Appeal Board (“TTAB”) issued an order denying this request on March 8, 2011. In that Order, the gave Applicant 20 days to either file a reply brief or to submit an additional request for remand with a showing of good cause. Applicant herein again requests for remand and presents its additional arguments regarding good cause. Applicant also re-submits the evidence and arguments set forth in its previous submission.

First, Applicant submits that while the evidence is not new evidence, *per se*, this information has just come to Applicant’s attention and is germane to the case. Applicant notes that there are an indefinite number of resources where evidence is available, and parties can search for evidence with great diligence before actually being able to locate a particular piece of evidence. Such is the case here, where this evidence has only just come to Applicant’s attention after repeated searches.

Second, Applicant submits that its request is made early in the proceedings. As set forth in TBMP § 1207.02, one of the relevant factors in a finding of good cause is the stage in the appeal process. In the present case, the Board has not yet begun to consider the briefs of the respective parties or the merits of the case. Indeed, as noted in *In re HerbalScience Group, LLC*, the Board does not read appeal briefs prior to a final decision. 96 U.S.P.Q.2D 1321, \*6 (TTAB 2010). As such, there has not been undue delay or any wasted use of the Board’s resources.



Under these circumstances, the requirements for a showing of good cause is less burdensome than it might otherwise be.

Furthermore, there will not be prejudice to either of the parties in the event that the remand is granted. The Examining Attorney will have the opportunity to review the new evidence and reply to the same, if appropriate. However, if the remand is not granted, Applicant will be prejudiced by a failure to consider all available relevant evidence.

Finally, Applicant believes that this evidence is very strong and potentially sufficient to overcome the Examining Attorney's refusal to register the mark. As such, the Board's resources should not be used in this situation, where they could be avoided by the Examining Attorney's consideration of the relevant evidence.

A request for remand for introduction additional evidence is timely where it is made prior to consideration and final decision of the appeal. *In re Carvel Corp.*, 223 U.S.P.Q. 65, \*4 (TTAB 1984), *citing* Trademark Rule 2.142(g). Indeed, the Board is able to suspend an appeal and remand a refused application to the Examining Attorney, and will generally do so in certain situations, "no matter how late the state of the appeal." *In re Empower Technologies, Inc.*, 2006 TTAB LEXIS 435, \*6 (TTAB 2006). In light of the foregoing, Applicant respectfully submits that it has shown good cause for the pending appeal proceedings to be suspended and review of the new evidence and arguments in Exhibit A to be remanded to the Examining Attorney for consideration.

### **CONCLUSION**

For the reasons set forth above, Applicant requests that the pending appeal be suspended and remanded to the Examining Attorney for consideration of the additional evidence showing

that Applicant's Mark is not "immoral or scandalous" with the meaning of Section 2(a) of the Trademark Act. In the event that the Board is not inclined to grant this request, Applicant respectfully requests additional time to file its Reply Brief.

Respectfully submitted,

Dated: 28 March 2011

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# **EXHIBIT A**

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In re Trademark Application of	)	
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	)	Charisma Hampton
Filed: March 12, 2008	)	
	)	
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**APPLICANT'S REQUEST TO SUSPEND**  
**AND REMAND APPEAL**  
**FOR CONSIDERATION OF ADDITIONAL EVIDENCE**

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Ira P. Robbins, <i>Digitus Impudicus: The Middle Finger and the Law</i> , 41 U.C. Davis L. Rev. 1403, 1407-08 (2008) .....	3, 4-5
<i>Darren Aronofsky’s Middle Finger A ‘Digit Of Interest’ In FCC’s Golden Globes Indecency Inquest</i> , Jan. 16, 2009, <a href="http://www.defamer.com.au/2009/01/darren_aronofskys_middle_finger_a_digit_of_interest_in_fccs_golden_globes_indecency_inquest-2/">http://www.defamer.com.au/2009/01/darren_aronofskys_middle_finger_a_digit_of_interest_in_fccs_golden_globes_indecency_inquest-2/</a> .....	5

Applicant LUXURIA, s.r.o. (“Applicant”) respectfully requests suspension of the current appeal proceedings relative to U.S. Trademark Serial No. 79/055,664, and remand of the same to the Examining Attorney to consider additional evidence, pursuant to § 1207.02 of the Trademark Trial and Appeal Board Manual of Procedure. Applicant requests this suspension and remand on the grounds that additional evidence has just recently come to Applicant’s attention.

Attached as new evidence, not previously submitted, are the following:

- Martha Irvine’s article, *Is the Middle Finger Losing Its Shock Value?*
- Ira P. Robbins’ article, *Digitus Impudicus: The Middle Finger and the Law*
- Images showing alternative interpretations of the middle finger gesture
- The Defamer article, *Darren Aronofsky’s Middle Finger A ‘Digit Of Interest’ In FCC’s Golden Globes Indecency Inquest*

This evidence is in support of Applicant’s appeal from the Final Office Action dated May 27, 2009 in which the Trademark Examining Attorney made final the refusal to register the trademark shown in U.S. Trademark Serial No. 79/055,664 under Section 2(a) of the Trademark Act, 15 U.S.C. § 1052(a), on the grounds that Applicant’s Mark “consists of or comprises immoral or scandalous matter.” Applicant filed its Appeal Brief on November 12, 2010 and the Examining Attorney filed her Appeal Brief on January 13, 2011. Applicant filed a request to extend the deadline for filing a Reply Brief on January 26, 2011, and this request was subsequently granted on January 31, 2011. Applicant herein submits additional evidence supporting its position that the Trademark Examining Attorney’s refusal was in error, and should be reversed.

## ARGUMENT

To be considered “scandalous,” the Trademark Examining Attorney must prove that the mark is “shocking to the sense of truth, decency or propriety; disgraceful; offensive; disreputable; . . . giving offense to the conscience or moral feelings; . . . [or] calling out [for] condemnation” in the context of the marketplace as applied to goods and/or services described in the application. *In re Mavety Media Group Ltd.*, 33 F.3d 1367, 1371, 31 USPQ2d 1923, 1925 (Fed. Cir. 1994) (citation omitted). Scandalous is to be determined from “the standpoint of not necessarily a majority, but a substantial composite of the general public, . . . and in the context of contemporary attitudes” (*id.*, at 1371, 31 USPQ2d at 1925 (citation omitted)), while being “mindful of ever-changing social attitudes and sensitivities” *Id.*

### I

#### **THE TRADEMARK EXAMINING FAILED TO CONSIDER CONTEMPORARY ATTITUDES CONCERNING THE GESTURE DEPICTED IN APPLICANT’S MARK**

The Trademark Examining Attorney has failed to consider contemporary attitudes concerning the gesture depicted in Applicant’s Mark, namely, “giving the finger,” as well as alternative possible meanings for the gesture, which are influenced by the shift in attitude. Based on these changes, Applicant submits that the evidence of record shows that contemporary attitudes concerning “giving the finger” have changed, such that the gesture – when appearing in a vacuum, such that it is not directed to a particular individual or group – is not immoral or scandalous within the meaning of Section 2(a) of the Trademark Act.

Indeed, there is ample evidence that both the meaning and the public perception of the middle finger gesture has changed in recent years. As explained by one author, to one

interviewee, it's a "more general symbol of 'Shut up' or 'You're an idiot.'" Martha Irvine, *Is the Middle Finger Losing Its Shock Value?*, COLUMBIAN, Feb. 26, 2003. This article is appended as Exhibit A. In the same article, a father recounts a story in which his six year old son gives the finger to another child who had stuck out his tongue; the father explains that he isn't worried: "The kid who poked out his tongue at my son was just delivering the kiddies version of the finger anyway. [...] So he probably deserved to get the real McCoy fired back at him." *Id.* This subject is a good indicator of modern perception of the middle finger and acceptance of alternative meanings for the same.

Today's public acknowledges that there are multiple situations in which the middle finger may be used, and that it may be taken to have just as many meanings. In discussing a number of news articles and case law citations, Ira P. Robbins notes, "As these stories illustrate, 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." Ira P. Robbins, *Digitus Impudicus: The Middle Finger and the Law*, 41 U.C. Davis L. Rev. 1403, 1407-08 (2008) (internal citations omitted). This article is attached hereto as Exhibit B. Additional evidence shows that the gesture is often used in a cheeky and fun manner, between friends. Attached as Exhibit C are images of various individuals "giving the bird." These images come from a number of different websites that include images of "the bird," including [www.themiddlefinger.com](http://www.themiddlefinger.com). These images include publicity shots, pictures on concert states, smiling poses, and wide variety of other indicators that the gesture is not always meant offensively and is often now used in a good-natured way. Indeed, some of the photos are tagged with the "humor" caption on these websites. These images capture a modern perception of what



it means to “flip the bird” and make it clear that the gesture is not scandalous or obscene, but commonly accepted.

This perception is strengthened by the image attached as Exhibit D, which is a copy of the Notice of Acceptance of §§8 & 15 Declaration issued by the USPTO in support of *In re Bad Frog Brewery*'s U.S. Trademark Registration No. 2278594. The Examining Attorney has made much of the fact that the decision in *In re Bad Frog Brewery*, 1999 TTAB LEXIS 86 (TTAB 1999) would not have applied to a situation involving a humanized hand. In response to this, Applicant reiterates that the specimen of use submitted in that very case shows a woman “flipping the bird” while wearing Bad Frog Brewery's apparel. Not only does this specimen shows a humanized hand raising the middle finger, but the USPTO's acceptance of the specimen unequivocally supports the fact that the USPTO did not find the gesture to be scandalous or offensive. This decision accords with the Board's decision that “even when humans give the finger to a particular individual or a group, that...said gesture may be acceptable” and supports registration of the current mark. *Id* at \*6.

Applicant in the present case plans to market its beverages under the REVOLT! trade name, and intends its visual imagery to be associated with a message of defiance or revolt. This interpretation of its bottle shape is consistent with modern, alternative meanings for the gesture, supported even by the USPTO's acceptance of the specimen in *In re Bad Frog Brewery*, and the mark is therefore entitled to registration.

Even to the extent that the gesture is meant as a gesture for “F--- You,” as contended by the Examining Attorney, it is not true that the general public finds its use offensive. Robbins notes in his article:

The gesture has appeared on streets and highways, in schools, shopping malls, concert venues, stadiums, courts, and execution chambers, in advertisements and on magazine

covers, and even on the hallowed floors of legislatures. Although its meaning has remained relatively constant over time, the middle finger gesture — like the f-word — has become part of the American vernacular and, in the process, shed its “taboo status.” One newspaper reporter recently complained that the excessive use of the gesture is causing it to lose its offensive impact, lamenting that “[o]ur most precious obscene gesture is being overused, abused, and ultimately ruined”; another lamented, “Sad to say, the bird just doesn’t do the trick anymore.”

*Supra*, 1408-10 (internal citations omitted). As explained by another interviewee in the Irvine article, “It’s part of the shift from ‘Have a nice day’ to ‘Make my day.’” Irvine, *supra*.

As evidence of the public perception of the mark, the Examining Attorney points to two articles regarding the Federal Communications Commission’s (FCC) reactions to the middle finger on television. However, these articles are not dispositive, as the Examiner implies. First, the FCC has not made any sort of blanket determination as to the use of the middle finger on television and as the articles imply, this question is context specific and there is a place for these gestures in the public dialogue. Secondly, the FCC’s decision is not at all indicative of the general public perception of the gesture. Indeed, it is clear from the articles that the FCC decision was made in response to eighteen complaints, out of the millions of viewers. This number of scandalized viewers does not constitute “the substantial composite of the general public” necessary to find a mark scandalous. In response to the FCC’s decision to review the matter, an online article noted, “it’s going to take something a lot worse than a middle finger to shock more than 18 Americans these days.” *Darren Aronofsky’s Middle Finger A ‘Digit Of Interest’ In FCC’s Golden Globes Indecency Inquest*, Jan. 16, 2009, [http://www.defamer.com.au/2009/01/darren\\_aronofskys\\_middle\\_finger\\_a\\_digit\\_of\\_interest\\_in\\_fccs\\_golden\\_globes\\_indecency\\_inquest-2/](http://www.defamer.com.au/2009/01/darren_aronofskys_middle_finger_a_digit_of_interest_in_fccs_golden_globes_indecency_inquest-2/). This article is attached as Exhibit E.

Based on the evidence as to public perception of alternative meanings of the middle finger gesture, as well as public perception of the gesture used as the Examining Attorney

narrowly defines it, it is clear that a bottle shaped like a hand with an extended middle finger does not rise to the level of “scandalous or immoral” necessary to deny registration of the mark under Section 2(a) of the Trademark Act. In light of the foregoing, Applicant requests that this refusal be reconsidered and withdrawn.

## II

### **ANY DOUBT AS TO THE IMMORAL OR SCANDALOUS NATURE OF APPLICANT’S MARK MUST BE RESOLVED IN FAVOR OF PUBLICATION**

As previously noted, in this case, there is a clear difference of opinion between Applicant and the Trademark Examining Attorney as to whether Applicant’s Mark is “immoral or scandalous.” In another case involving Section 2(a), the Board stated that “the guidelines for determining whether a mark is scandalous . . . are somewhat vague and the determination [of whether] a mark is scandalous . . . is necessarily a highly subjective one.” *In re Over Our Heads Inc.*, 16 USPQ2d 1653, 1654, n.1 (TTAB 1990) (citation omitted). Therefore, the Board continued, “we are inclined to resolve doubts on the issue of whether a mark is scandalous . . . in favor of applicant and pass the mark for publication with the knowledge that if a group does find the mark to be scandalous . . . , an opposition proceeding can be brought and a more complete record can be established.” *Id.* Thus, Applicant respectfully submits that this practice, which has been commended by the Court of Appeals for the Federal Circuit, *see Mavety Media Group*, 33 F.3d at 1374, 31 USPQ2d at 1928, should be applied here. The same rationale has been used to support publication of a mark in trademark cases where a subjective test leads to doubt as to whether a mark should be denied on the grounds of descriptiveness. *See, e.g., In re Merrill Lynch, Pierce, Fenner and Smith, Inc.*, 828 F.2d 1567 (Fed. Cir. 1987); *In re The Gracious Lady Service, Inc.*, 175 USPQ 380 (TTAB 1972).

This reasoning has also been strengthened by case law upholding the right of members of the general public to oppose registration of an alleged “scandalous” trademark on the basis that the mark caused injury to one’s personal beliefs. Notably, one of these cases followed the Federal Circuit’s decision in *Mavety Media Group*, discussed above. *Boswell and Clement v. Mavety Media Group Ltd.*, 1999 TTAB LEXIS 360 (TTAB 1999) (“As a member of the group which is asserted to be disparaged or brought into contempt or disrepute by the mark BLACK TAIL, she has clearly demonstrated her standing in this proceeding,” citing *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023 (Fed. Cir. 1999); *Harjo v. Pro Football Inc.*, 50 USPQ2d 1705 (TTAB 1999); *Bromberg v. Carmel Self Service, Inc.*, 198 USPQ 176 (TTAB 1978).) In light of this line of precedent, there is ample evidence that third parties can, and do, oppose registration of scandalous trademarks, if there is sufficient public need for the same.

To the extent that there is doubt as to the immoral or scandalous nature of the mark, as is the case here, that doubt must be resolved in favor of publication. *See Mavety Media Group*, 33 F.3d at 1374. As such, Applicant requests that the Section 2(a) refusal be withdrawn and the mark be published for opposition.

### **CONCLUSION**

For the reasons set forth above, Applicant requests that the pending appeal be suspended and remanded to the Examining Attorney for consideration of the additional evidence showing that Applicant’s Mark is not “immoral or scandalous” with the meaning of Section 2(a) of the Trademark Act. In the event that the Board is not inclined to grant this request, Applicant respectfully requests additional time to file its Reply Brief.

Respectfully submitted,

Dated: 2 March 2011

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# **EXHIBIT A**

2/26/03 Columbian (Vancouver, WA) 4  
2003 WLNR 6826562

COLUMBIAN (VANCOUVER, WA)  
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February 26, 2003

Is middle finger losing its shock value?

IRVINE, MARTHA

Even more than a decade later, Laura Kremp is still a little shocked at the gesture her mom made when a man driving a big, ol' Cadillac cut them off in a mall parking lot. "She flipped the guy the bird!" Kremp says, laughing at the childhood memory.

Flashing the middle finger was the ultimate insult when Kremp was growing up, or at least with its vulgar, sexual connotation a very naughty thing to do. These days, "the bird" is flying everywhere and, in many instances, losing its taboo status, especially among the younger set.

Celebrities use it. Star athletes all but flaunt it. Even small children occasionally raise a grumpy middle finger in a world where Ozzie and Harriet have been replaced by Ozzy and Sharon, the foul-mouthed, bird-flipping parents from the MTV reality show, "The Osbournes."

Some say the finger's prevalence is a sign of just how desensitized we've all become to our own crassness.

"It's just another example of the drift further and further into the culture of disrespect," says David Walsh, president of the National Institute on Media and the Family, a Minneapolis-based nonprofit that monitors popular media. "It's part of the shift from 'Have a nice day' to 'Make my day.'"

Others, however, wish we'd all just loosen up. The middle finger doesn't always carry the same meaning to everyone, they say.

Kremp now 24 and a creative director at a communications training firm in suburban Philadelphia still could never imagine her mother becoming a regular bird-flipper, for example.

But she sees plenty of other people using it, to express displeasure at anything from a frozen computer screen to a referee's questionable call or that driver who's riding your tail on the highway.

And, she says, its meaning isn't always negative: "It can be done out of excitement, joy or if you finally found the perfect pair of shoes to go with a new outfit."

Often, the middle finger is used among friends, either to tease or express mild annoyance, says Matt Meyers, a 23-year-old New Yorker who works as an administrative assistant at a bank.

To him, it's "more general symbol of, 'Shut up' or 'You're an idiot.'"

Matt Patterson, a Los Angeles writer who co-authored the tongue-in-cheek book "The Finger: A Comprehensive Guide to Flipping Off," agrees that today's middle finger has many nuances. But context still matters, he says, noting that "a finger given in anger is another story" particularly for celebrities.

That means actress Cameron Diaz might get away with posing, middle finger extended, for an Esquire magazine photo, as she did last year. She might even seem "edgy" or "cool" to some.

But singer Britney Spears found herself apologizing to Mexican fans last summer after they thought she flipped them off. (Spears says the gesture was intended only for aggressive paparazzi who were hounding her.)

New York Giants tight end Jeremy Shockey was fined \$10,000 after he threw ice and gave the finger to fans in San Francisco during a recent playoff game.

And late last month, Indiana Pacers forward Ron Artest gave the Miami crowd both barrels as he backed away from the foul line after hitting a free throw. He was suspended for four games.

The lesson here: Don't flip off the fans.

Outside of sports, however, Savage says TV networks' habit of beeping out foul language and blurring middle fingers including on "The Osbournes" is mostly for show.

"There's an aspect of American culture that's about appearances, rather than reality," he says. "If you beep something, you appear as though you're being a moral guardian."

Meanwhile, MTV sells Osbourne T-shirts and posters with several family members openly extending their middle fingers "There goes the (expletive) neighborhood," one T-shirt reads.

Still, even some parents wonder if critics are taking the gesture one that historians say has been around since ancient Greek times a bit too seriously.



Simon Bloomberg, a newspaper columnist in Nelson, New Zealand, recently wrote about his 6-year-old son giving the finger to another boy who'd stuck his tongue out in a supermarket parking lot.

When asked about it, Bloomberg said he wasn't worried.

"The kid who poked out his tongue at my son was just delivering the kiddies version of the finger anyway," Bloomberg said. "So he probably deserved to get the real McCoy fired back at him."

In the end, even some people who use the bird a lot hope it stays rude and crude.

That includes The Amazing Johnathan, a comedian who regularly flips off his audiences. Earlier this month, he hosted a media event at a Las Vegas hotel complete with a giant middle-finger ice sculpture. He seemed pleased that its presence made hotel officials squirm a little.

"Whenever people get used to it," he says, "then it won't be fun to do anymore."

Caption: Matt Patterson, who co-wrote "The Finger: A Comprehensive Guide to Flipping Off" poses Tuesday with the book in his apartment in Los Angeles.

Copyright Columbian Publishing Company Feb 26, 2003

---- INDEX REFERENCES ---

INDUSTRY: (Entertainment (1EN08); Gen Y Entertainment (1GE14); Celebrities (1CE65); Gen Y TV (1GE33))

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Word Count: 1000

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# **EXHIBIT B**

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# Digitus Impudicus: The Middle Finger and the Law

Ira P. Robbins\*

The middle finger is one of the most common insulting gestures in the United States. The finger, which is used to convey a wide range of emotions, is visible on streets and highways, in schools, shopping malls, and sporting events, in courts and execution chambers, in advertisements and on magazine covers, and even on the hallowed floors of legislatures. Despite its ubiquity, however, a number of recent cases demonstrate that those who use the middle finger in public run the risk of being stopped, arrested, prosecuted, fined, and even incarcerated under disorderly conduct or breach-of-peace statutes and ordinances.

This Article argues that, although most convictions are ultimately overturned on appeal, the pursuit of criminal sanctions for use of the middle finger infringes on First Amendment rights, violates fundamental principles of criminal justice, wastes valuable judicial resources, and defies good sense. Indeed, the U.S. Supreme Court has consistently held that speech may not be prohibited simply because some may find it offensive. Criminal law generally aims to protect persons, property, or the state from serious harm. But use of the middle finger simply does not raise these concerns in most situations, with schools and courts as the exceptions.

---

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While the UC Davis Law Review's *Usage, Style, & Citation Manual* (rev. 5th ed. 2007) does not permit the use of articles in parenthetical explanations, *see id.* at 7, the Editors of the UC Davis Law Review made an exception to accommodate the jargon and nomenclature necessary to this Article.

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*It seems like such an . . . arbitrary, ridiculous thing to just pick a finger and you show it to the person. It's a finger, what does it mean? Someone shows me one of their fingers and I'm supposed to feel bad. Is that the way it's supposed to work? I mean, you could just give someone the toe, really, couldn't you? I would feel worse if I got the toe, than if I got the finger. 'Cause it's not easy to give someone the toe . . .*<sup>1</sup>

*[I]n public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment.*<sup>2</sup>

*One of the prerogatives of American citizenship is the right to criticize public men and measures — and that means not only informed and responsible criticism but the freedom to speak foolishly and without moderation.*<sup>3</sup>

*These days, “the bird” is flying everywhere.*<sup>4</sup>

#### INTRODUCTION

Robert Lee Coggin experienced fifteen minutes of fame<sup>5</sup> in 2003 when he “allegedly gestured with his raised middle finger . . . or ‘shot the bird’” as he passed a motorist on a Texas highway.<sup>6</sup> Convicted of disorderly conduct and fined \$250, during the next year Coggin successfully challenged his conviction, despite incurring nearly \$15,000 in legal defense fees.<sup>7</sup> Although a Texas appellate court ultimately acquitted Coggin, it left open the possibility that motorists

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<sup>1</sup> *Seinfeld: The Robbery* (NBC television broadcast June 7, 1990), available at <http://www.seinfeldscripts.com/TheRobbery.htm>.

<sup>2</sup> *Schenck v. Pro-Choice Network*, 519 U.S. 357, 383 (1997) (quoting *Boos v. Barry*, 485 U.S. 312, 322 (1988) (internal quotation marks omitted)).

<sup>3</sup> *Baumgartner v. United States*, 322 U.S. 665, 673-74 (1944).

<sup>4</sup> *Coggin v. Texas*, 123 S.W.3d 82, 90 n.3 (Tex. App. 2003) (quoting Martha Irvine, *Is Middle Finger Losing Its Shock Value?*, COLUMBIAN (Vancouver, Wash.), Feb. 26, 2003, available at 2003 WLNR 6826562).

<sup>5</sup> Newspapers throughout the country covered Coggin's conviction. See, e.g., Thom Marshall, *'Shooting the Bird' Rude, Crude but Legal*, HOUSTON CHRON., Oct. 15, 2003, at A29; Jeffrey Miller, *Off the Record: The Digitus Impudicus as Free Expression*, LAW. WKLY., Oct. 31, 2003; *The Reading File: Really Free Speech*, N.Y. TIMES, Oct. 19, 2003, § 4, at 2.

<sup>6</sup> *Coggin*, 123 S.W.3d at 85.

<sup>7</sup> Marshall, *supra* note 5. Coggin later stated that he “felt exonerated and [did not] regret spending the money.” *Id.*

could be prosecuted for using the middle finger gesture under Texas law if the gesture accompanied “‘road rage’ or reckless driving.”<sup>8</sup>

After making an “internationally recognized obscene gesture” in a photograph taken by Brazilian immigration officials, an American Airlines pilot arriving from Miami was arrested, taken to federal court, and fined.<sup>9</sup> Apparently the pilot’s gesture was designed to protest a new Brazilian regulation requiring all incoming U.S. visitors to be fingerprinted and photographed.<sup>10</sup>

At the conclusion of a sentencing hearing, as he was being shackled and handcuffed by prison guards, criminal defendant Timothy Mitchell turned to the sentencing judge, raised his hands, and gave the middle finger gesture to the judge.<sup>11</sup> The outraged judge held Mitchell in contempt and sentenced him to five years in prison, with the sentence to run consecutively with the fifteen-year sentence for felony theft he had just received.<sup>12</sup> Two weeks later, the judge reduced Mitchell’s contempt sentence to five months and twenty-nine days.<sup>13</sup>

In August 2000, an Erie, Pennsylvania high school principal flipped the bird and said “Shoot this!” to reporters questioning her about an alleged incident involving a gun.<sup>14</sup> In Thailand, a fifty-year-old man allegedly shot and killed a forty-one-year-old German, who had displayed his middle finger to the shooter.<sup>15</sup> Both a Pennsylvania state court<sup>16</sup> and an Arkansas federal court<sup>17</sup> dismissed criminal charges against individuals who had given the finger in public; the Arkansas federal judge ruled that the gesture was “protected as ‘free speech’

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<sup>8</sup> *Coggin*, 123 S.W.3d at 91-92.

<sup>9</sup> *Brazil Fines ‘Obscene’ US Pilot*, BBC NEWS, Jan. 15, 2004, <http://news.bbc.co.uk/2/hi/americas/3397183.stm>. Three weeks later, a New York banker was fined \$17,200 for giving the finger to a camera when he was being fingerprinted and photographed at a Brazilian airport. See Lisa Fleisher, *Bird-Brained Banker Busted in Brazil Spat*, DAILY NEWS (N.Y.), Feb. 8, 2004, at 28.

<sup>10</sup> See *Brazil Fines ‘Obscene’ US Pilot*, *supra* note 9 (stating that diplomatic tensions between United States and Brazil were high at the time, because United States had recently imposed similar requirements on Brazilian citizens entering United States). The airline and the pilot subsequently apologized. *Id.*

<sup>11</sup> *Mitchell v. State*, 580 A.2d 196, 198 (Md. 1990).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> Chuck Shepherd, *News of the Weird: For the Odds, Here’s Jiminy the Greek*, ORLANDO WKLY., Oct. 25, 2000, available at <http://www.orlandoweekly.com/columns/story.asp?id=1948>.

<sup>15</sup> *Id.*

<sup>16</sup> *Pennsylvania v. Kelly*, 758 A.2d 1284, 1288 (Pa. Super. Ct. 2000).

<sup>17</sup> *Nichols v. Chacon*, 110 F. Supp. 2d 1099, 1110 (W.D. Ark. 2000).

under the First Amendment to the United States Constitution.”<sup>18</sup> A California municipal judge was removed from office for misconduct after, among other inappropriate acts, he gave the finger to a tardy defendant during a traffic court proceeding.<sup>19</sup>

As these stories illustrate, the middle finger gesture<sup>20</sup> serves as a nonverbal expression of anger,<sup>21</sup> rage,<sup>22</sup> frustration,<sup>23</sup> disdain,<sup>24</sup> protest,<sup>25</sup> defiance,<sup>26</sup> comfort,<sup>27</sup> or even excitement at finding a perfect

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<sup>18</sup> *Id.*

<sup>19</sup> *Spruance v. Comm'n on Judicial Qualifications*, 532 P.2d 1209, 1216 n.9, 1226 (Cal. 1975) (en banc). The California Supreme Court noted that, if the judge's "giving the 'finger' to a defendant and his use of an obscenity during a telephone conversation with a deputy district attorney were the only charges brought against him, censure would be the appropriate discipline, since [the court found] little risk of the recurrence of such conduct." *Id.* at 1225.

<sup>20</sup> This Article refers to the middle finger gesture as "the middle finger," "the gesture," or "the D.I." The abbreviation "D.I." stands for *digitus impudicus*. See *infra* note 64 and accompanying text.

<sup>21</sup> See, e.g., *Britney Spears Walks Out on Mexico City Audience*, TORONTO STAR, July 30, 2002, at D5 (noting that pop singer Britney Spears admitted that she used the middle finger gesture as "angry response to paparazzi" who were following her during trip to Mexico); Jim Hewitson, *Fingers Do the Talking*, HERALD (Glasgow, Scot.), Jan. 15, 2000, at 27 (calling the middle finger gesture the "chosen scornful, even warlike, gesture . . . among defiant youth, aggressive motorists, [or] anyone really who feels that life isn't giving them a square deal").

<sup>22</sup> A 1997 cover story in *U.S. News & World Report* discussed the increasing frequency of "road rage" and reported that one-third of drivers in a focus group stated that they used a "hostile gesture" to express road rage. Jason Vest et al., *Road Rage*, U.S. NEWS & WORLD REP., June 2, 1997, at 24.

<sup>23</sup> See Irvine, *supra* note 4 (noting that people use the middle finger gesture to express frustration at "anything from a frozen computer screen to a referee's questionable call or that driver who's riding your tail on the highway").

<sup>24</sup> See *Snow Sculptor Shows Disdain for Winter*, NEWS REC. (Gillette, Wyo.), Mar. 5, 2004, available at <http://www.gillettenewsrecord.com/articles/2004/03/05/news/news02.txt> (reporting that 48-year-old artist created snow sculpture resembling hand with the middle finger raised in his front yard "as a sign to Mother Nature that winter sucks").

<sup>25</sup> See, e.g., *Commonwealth v. Williams*, 753 A.2d 856, 859 (Pa. Super. Ct. 2000) (observing that criminal defendant protested his prison sentence by giving judge the middle finger and saying, "Fuck you").

<sup>26</sup> See, e.g., George Rush & Joanna Molloy, *Avril Flips, MTV Isn't Happy*, DAILY NEWS (N.Y.), May 27, 2004, at 34 (reporting that 19-year-old rock performer Avril Lavigne thrust her middle finger into camera on live television after interviewer asked her "what she thought of the media and the labels that critics have slapped on her"); see also Sean Hamilton, *Lem Walks on the Wild Side*, DAILY STAR (London), Sept. 3, 2003, at 15 (describing how rock star Lemmy of band Motorhead made impression of his middle finger in wet cement when his band was inducted into "Hollywood Rock Walk" and quoting source from Rock Walk who said that it seemed "appropriate as a memorial for a band that stuck their middle finger up to convention and helped create

pair of shoes.<sup>28</sup> The gesture has appeared on streets and highways,<sup>29</sup> in schools,<sup>30</sup> shopping malls,<sup>31</sup> concert venues,<sup>32</sup> stadiums,<sup>33</sup> courts,<sup>34</sup> and

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a new force and style in rock 'n' roll").

<sup>27</sup> See, e.g., Natalie Angier, *G#!y Golly: Almost Before We Spoke, We Swore*, N.Y. TIMES, Sept. 20, 2005, at F1 (noting that "[i]n some settings, the free flow of foul language may signal not hostility or social pathology, but harmony and tranquility," and referring to studies that have shown that individuals tend to swear more when with close friends as way of indicating that they are comfortable and able to "let off steam").

<sup>28</sup> See Irvine, *supra* note 4 (stating that the finger can be used to express "excitement, joy or if you finally found the perfect pair of shoes to go with a new outfit").

<sup>29</sup> See, e.g., *People v. Smith*, 262 N.W.2d 900, 903 (Mich. Ct. App. 1977) (explaining that many drivers use profane language and the middle finger gesture to express frustration with traffic congestion); David Harrison, *British Drivers Best at Rude Hand Signals: Study Shows French and Italians Aren't in the Same Street When it Comes to Abusive Gestures*, SUNDAY TELEGRAPH (London), July 13, 2003, at 13 (noting that 75% of British drivers admitted giving offensive hand or finger gestures to other drivers); Steven Hyden, *It's Time to Start Taking Vulgar Gestures a Little More Seriously*, POST-CRESCENT (Appleton, Wis.), Mar. 29, 2005, at 1B (recounting three incidents in which author was flipped off while driving during span of one week). *The Washington Post* covered the 2004 congressional campaign of Charles R. Floyd, a Republican who waged a campaign to unseat the Democratic incumbent in a heavily Democratic Maryland district. Tim Craig, *GOP Hopeful Fights Uphill Battle in Md. 8th District: Floyd Seeking to Unseat Van Hollen*, WASH. POST, Oct. 27, 2004, at B04. Floyd occasionally would stand along roadways holding his campaign signs, and, as he told the *Post*, if he didn't get at least three middle fingers during the first half-hour, he knew that he was not in Montgomery County. *Id.*

<sup>30</sup> See, e.g., *Estes v. State*, 660 S.W.2d 873, 876 (Tex. App. 1983) (upholding disorderly conduct conviction of student who gave the finger to principal of his high school during commencement exercises).

<sup>31</sup> See *supra* note 28 and accompanying text (discussing shopper's use of the middle finger to express delight at finding pair of shoes).

<sup>32</sup> See, e.g., Renee Graham, *Eminem Dishes Up Rap, Raunch 'n' Roll*, BOSTON GLOBE, Apr. 16, 1999, at C12 (reporting that Detroit rapper Eminem repeatedly flipped off audience during concert and noting that "the obscene gesture was exchanged so often that by evening's end it seemed as innocuous as an air kiss").

<sup>33</sup> See, e.g., Marc Berman, *Artest Can Point at Himself*, N.Y. POST, May 26, 2004, at 70 (discussing professional basketball player Ron Artest's frequent use of the middle finger gesture during games); Hmiel, *Jarrett Still Not Speaking: Drivers Mad at Each Other for Hmiel's Obscene Gesture*, ASSOCIATED PRESS, Apr. 15, 2005, available at <http://msnbc.msn.com/id/7518614> (noting that NASCAR driver Shane Hmiel was fined \$10,000 for giving the middle finger to another driver after the gesture appeared on live television from Hmiel's in-car camera); Glenn Nelson, *Fans Pan Benjamin — Ex-Clipper Center Jeered in Sonic Loss*, SEATTLE TIMES, Apr. 6, 1991, at B1 (noting that Seattle Sonics basketball player flipped off Los Angeles fans and "traded verbal insults" with members of audience during his first performance at Los Angeles Sports Arena after he was traded to Sonics); Clark Spencer, *Notebook: Olsen Chided for Gesture*, MIAMI HERALD, June 3, 2007, at D6 (reporting that Florida Marlins pitcher Scott Olsen



execution chambers,<sup>35</sup> in advertisements<sup>36</sup> and on magazine covers,<sup>37</sup> and even on the hallowed floors of legislatures.<sup>38</sup> Although its

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was “fined an undisclosed amount [by the team] for making an obscene gesture” during game against Milwaukee Brewers on June 1, 2007). See generally M.J. LOHEED ET AL., *THE FINGER: A COMPREHENSIVE GUIDE TO FLIPPING OFF* 56-60 (1998) (providing numerous examples of the middle finger gesture appearing at sporting events).

<sup>34</sup> See, e.g., *People v. Meyers*, 817 N.E.2d 173, 178 (Ill. App. Ct. 2004) (quoting judge’s order to court clerk to reflect in record that defendant “flash[ed] the universal signal of discontent” to judge during criminal proceeding); see also *infra* Part III.C (discussing cases in which individuals have received contempt sanctions for using the middle finger in court). A former police chief related the following story:

Several years ago, I was Chief of Police in Tulsa, Oklahoma. One of my fearless troops was driving down the street when a young man extended his middle finger in an obscene gesture, prohibited by the ordinances of the City of Tulsa. The young man was immediately arrested and charged in Tulsa’s Municipal Court with violating the ordinance. At a motion hearing the officer testified; the judge ruled that extending the middle finger was an act protected by the First Amendment’s freedom of expression . . . and declared the ordinance as applied to extending the middle finger unconstitutional. As the young officer was leaving the court room he stopped, turned back and extended his middle finger while saying, “Thank you very much, Judge.”

E-mail from Harry W. Stege, Chief of Police (Retired), City of Tulsa, Oklahoma, to Ira P. Robbins, Professor of Law, American University, Washington College of Law (Feb. 5, 2008, 18:06:18 EST) (on file with author).

<sup>35</sup> During an “eruption of rage” at his 1995 execution in Arizona, Jimmie Wayne Jeffers “glared through [a] thick glass window, thrust out his middle finger, and let loose with a torrent of obscenities.” Kevin Francis O’Neill, *Muzzling Death Row Inmates: Applying the First Amendment to Regulations that Restrict a Condemned Prisoner’s Last Words*, 33 ARIZ. ST. L.J. 1159, 1164 n.24 (2001). *The Washington Times* reported that he died with his middle finger still extended. *Executed in Arizona*, WASH. TIMES, Sept. 15, 1995, at A13. Likewise, a man executed in Arizona’s gas chamber in 1992 twice gestured at witnesses with a “bitter smile” on his face. *Id.*

<sup>36</sup> See, e.g., Stuart Elliott, *When Products Are Tied to Causes*, N.Y. TIMES, Apr. 18, 1992, at 33 (reporting that advertisement sponsored by Working Assets Funding Service showed protestor giving the middle finger gesture, under headline that read, “Twenty years later, we’ve given people a better way to put this finger to use”). The ad sought customers for a long distance telephone service that donated one percent of long distance phone call charges to groups such as Amnesty International, Greenpeace, and the American Civil Liberties Union. *Id.*

<sup>37</sup> In April 1974, the cover of *MAD Magazine* featured a photograph of a hand with the middle finger extended and the words “The Number One Ecch Magazine.” See LOHEED ET AL., *supra* note 33, at 20 (discussing and showing magazine cover). Many distributors and newsstands refused to distribute the issue and the publisher received hundreds of complaints. The issue now is a collector’s item. *Id.*

<sup>38</sup> See *Senator Sorry Over ‘Rude’ Gesture*, AGE, Aug. 11, 2005, available at <http://www.theage.com.au/news/national/senator-sorry-over-rude-gesture/2005/08/11/1123353438298.html> (stating that Australian Senator Julian McGauran was forced to apologize for making “a rude finger gesture in the Senate”). In Australia, the index

meaning has remained relatively constant over time,<sup>39</sup> the middle finger gesture — like the f-word<sup>40</sup> — has become part of the American vernacular and, in the process, shed its “taboo status.”<sup>41</sup> One newspaper reporter recently complained that the excessive use of the gesture is causing it to lose its offensive impact, lamenting that “[o]ur most precious obscene gesture is being overused, abused, and ultimately ruined”;<sup>42</sup> another lamented, “Sad to say, the bird just doesn’t do the trick anymore.”<sup>43</sup> Similarly, a state appellate court found that, while there was a “period of time in our cultural milieu when the [word ‘asshole’] may well have been inherently

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finger is considered a “provocative finger,” roughly equivalent to the middle finger. *Id.* In the United States the same day on which the U.S. Senate passed the “Defense of Decency Act” by a vote of 99 to 1, a national controversy erupted when Vice President Richard Cheney emphatically told Vermont Senator Patrick Leahy to — as paraphrased by one commentator — “go and attempt an anatomical impossibility.” Christopher Hitchens, *A Very, Very Dirty Word*, SLATE, July 6, 2004, <http://www.slate.com/id/2103467>. Leahy and other Democrats recently had questioned whether Cheney, the former chief executive of defense contractor Halliburton Company, had improperly assisted the company’s successful bids for reconstruction contracts in Iraq. See Helen Dewar & Dana Milbank, *Cheney Dismisses Critic with Obscenity: Clash with Leahy About Halliburton*, WASH. POST, June 25, 2004, at A4, available at <http://www.washingtonpost.com/wp-dyn/articles/A3699-2004Jun24.html>; Richard W. Stevenson, *Cheney Owns up to Profanity Incident and Says He ‘Felt Better Afterwards,’* N.Y. TIMES, June 26, 2004, at A10, available at <http://www.nytimes.com/2004/06/26/politics/campaign/26cheney.html?>

<sup>39</sup> See *infra* Part I.A.

<sup>40</sup> At least two scholarly legal articles have addressed the cultural and legal significance of the word “fuck.” See generally Robert F. Blomquist, *The F-Word: A Jurisprudential Taxonomy of American Morals (In a Nutshell)*, 40 SANTA CLARA L. REV. 65 (1999); Christopher M. Fairman, *Fuck*, 28 CARDOZO L. REV. 1711 (2007).

<sup>41</sup> Irvine, *supra* note 4. Similarly, the attorney for a middle school student who gave the finger to his school principal argued to the South Dakota Supreme Court that the f-word is more common than it was in the past and that it is losing its shock value. *Teen Asks S.D. High Court to Overturn Disorderly Conduct Conviction*, ASSOCIATED PRESS, Mar. 29, 2002, available at <http://www.freedomforum.org/templates/document.asp?documentID=15983> [hereinafter *S.D. High Court*]. In another case, an Idaho Supreme Court justice recently argued that a woman’s speech did not constitute fighting words where the woman shouted “shut your fucking mouth, you bitch” to her daughter’s friend. *State v. Hammersley*, 10 P.3d 1285, 1287, 1291-92 (Idaho 2000) (Kidwell, J., dissenting). In a dissenting opinion, the justice noted that the frequent appearance of these epithets in written and spoken communications negates their inflammatory nature. *Id.* at 1291. The justice emphasized that, although the woman’s words were not acceptable in polite society, they did not form an adequate basis for a criminal conviction. *Id.* at 1291-92.

<sup>42</sup> Hyden, *supra* note 29.

<sup>43</sup> See James Werrell, *When It Comes to Gestures, Bird Is the Word*, HERALD (Rock Hill, S.C.), Feb. 28, 2003, at 7A.

inflammatory,” that word has lost its taboo status and, on its own, could not support a disorderly conduct conviction.<sup>44</sup> A commentator recently argued that the word “sucks” “has become untethered from its past and carries no tawdry implications for those who use it.”<sup>45</sup> Another found that the term “slut” is used so often among teenagers that many use it “affectionately and in jest among friends,” and observed that the term may be shedding its status as a slur.<sup>46</sup>

While the preceding stories may seem innocuous and perhaps even humorous, they illustrate the alarming fact that individuals who use the middle finger run the risk of arrest, prosecution, fines, and possibly incarceration, despite the fact that the gesture often serves as a nonviolent means of releasing stress or expressing frustration.<sup>47</sup> The criminal law generally aims to prohibit serious harm to persons, property, or the state.<sup>48</sup> Nonetheless, our laws have criminalized acts that go well beyond “fundamental offenses,” to include behavior that threatens highly intangible harms “about which there is no genuine consensus,” or even behavior that causes no tangible harm to others.<sup>49</sup>

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<sup>44</sup> *Cavazos v. State*, 455 N.E.2d 618, 620-21 (Ind. Ct. App. 1983) (reversing disorderly conduct conviction where woman called police officer “an asshole”). *But see* Elizabeth Austin, *A Small Plea to Delete a Ubiquitous Expletive*, U.S. NEWS & WORLD REP., Apr. 6, 1998, at 58 (observing that, “[d]espite its near universality, the ‘F’ word remains a fighting word”).

<sup>45</sup> *See* Seth Stevenson, *Suck It Up*, SLATE, Aug. 2, 2006, <http://www.slate.com/id/2146866>.

<sup>46</sup> *See* Stephanie Rosenbloom, *The Taming of the Slur*, N.Y. TIMES, July 13, 2006, at G1.

<sup>47</sup> *See, e.g.*, Angier, *supra* note 27 (noting that cursing is “a coping mechanism” and means of reducing stress for many individuals and underappreciated form of anger management). *But see* Austin, *supra* note 44, at 58 (“[P]ublic use of the [f-]word is a prime example of the ‘broken window’ theory of social decay. When we put private frustrations and the right to be foulmouthed ahead of public order and civility, we coarsen society and risk an avalanche of rage and violence.”).

<sup>48</sup> *See* SANFORD H. KADISH, *The Crisis of Overcriminalization*, in *BLAME & PUNISHMENT: ESSAYS IN THE CRIMINAL LAW* 21, 21 (1987).

<sup>49</sup> *See id.* at 22-28. Examples of activities prohibited on moral grounds in the absence of harm to society include pornography, gambling, drug use, and homosexual and heterosexual conduct. *See* Bernard E. Harcourt, *The Collapse of the Harm Principle*, 90 J. CRIM. L. & CRIMINOLOGY 109, 110, 193 (1999) (discussing legal enforcement of morality and role of harm principle in determining whether to impose criminal sanctions on behaviors or activities, and concluding that “there is probably harm in most human activities and, in most cases, on both sides of the equation — on the side of the persons harmed by the purported moral offense, but also on the side of the actor whose conduct is restricted by the legal enforcement of morality”). Arguing on behalf of a South Dakota middle school student who was convicted of disorderly conduct for giving the finger and mouthing “f- you” to his principal, attorney Marcia Brevik told the court that it is not “a legitimate interest of state government . . . to

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Disorderly conduct and breach-of-peace statutes effectively give law enforcement officials the power to criminalize conduct — including use of the middle finger gesture — that does not merit the full force of legal sanction.<sup>50</sup> Although most convictions for using the middle finger gesture are overturned on appeal, the pursuit of criminal sanctions violates First Amendment rights and fundamental principles of criminal justice, wastes valuable judicial resources, and defies good sense. In the words of one criminal defense lawyer, there should not be “a remedy in the courts for hurting feelings.”<sup>51</sup>

This Article argues that using the middle finger gesture should not be a punishable offense in most circumstances. Part I traces the origin and history of the middle finger gesture and examines its use and meaning around the world. Part II discusses the legal implications of using the middle finger gesture, with a focus on four areas of legal doctrine under the broad umbrella of First Amendment law: fighting words, obscenity, profane and offensive speech, and indecency. This part demonstrates that, contrary to the opinion of some judges and prosecutors, the gesture does not constitute fighting words or obscenity. This part also addresses the law of indecency and special issues related to exhibiting the gesture on television. Part III examines use of the middle finger in specific circumstances, concluding that individuals generally should not be punished for using the gesture in the presence of police officers, but acknowledging that the government has legitimate interests in regulating its use in schools and courtrooms.

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regulate conduct that hurts the feelings of other people.” *S.D. High Court, supra* note 41. *But cf.* CATHARINE MACKINNON, *ONLY WORDS* 3-41 (1993) (contending that pornography causes serious harms to women who participate in its production, to women who are victims of crimes perpetrated by pornography consumers, and to all women who are victims of “mainstream misogyny” that is both enforced and perpetuated by pornography). For a thorough discussion of morality, harm, and the criminal law, see generally 4 JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW: HARMLESS WRONGDOING* (1988).

<sup>50</sup> See *infra* Parts II.A, III.A (arguing that police officers should be trained to tolerate offensive speech and gestures and that they should not arrest individuals who use the middle finger, unless individual’s conduct rises to level of fighting words); *cf.* *United States v. McDermott*, 971 F. Supp. 939, 943 (E.D. Pa. 1997) (noting that “[i]t is one thing to be called vulgar for one’s words, but it is quite another to be held a criminal for them”).

<sup>51</sup> See *S.D. High Court, supra* note 41 (covering oral argument before South Dakota Supreme Court in case involving student giving the middle finger to middle school principal).

## I. BACKGROUND

A. *The Origin of the Middle Finger Gesture*

Scant evidence exists regarding the origin of the middle finger gesture. According to one colorful legend, the gesture first appeared during the Battle of Agincourt, France in 1415.<sup>52</sup> During the battle, French soldiers threatened to cut off the middle and index fingers of captured English bowmen, because the bowmen used those two fingers to draw their longbows.<sup>53</sup> The English called the act of using a longbow “plucking the yew,” as the bows were made from the English yew tree.<sup>54</sup> When French troops failed to capture any prisoners in battle, the English waved their two fingers defiantly and shouted, “We can still pluck yew!”<sup>55</sup> Over the years, according to the legend, the insult evolved into the single-digit middle finger gesture that is used today.<sup>56</sup>

The weight of historical evidence suggests, however, that the middle finger gesture actually originated more than 2500 years ago.<sup>57</sup> According to one commentator, it is the “most ubiquitous and longest lived insulting gesture” in the world,<sup>58</sup> appearing as far back as ancient Greek texts.<sup>59</sup> In *The Clouds*, Aristophanes used the middle finger gesture as a phallic symbol:

Socrates: Polite society will accept you if you can discriminate, say, between the martial anapest and common dactylic — sometimes vulgarly called “finger rhythm.”

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<sup>52</sup> LOHEED ET AL., *supra* note 33, at 14, 24 (concluding that this story is nothing more than historical rumor).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> The V-sign is the English equivalent of the middle finger gesture. See DESMOND MORRIS ET AL., *GESTURES: THEIR ORIGINS AND DISTRIBUTION* 232-33 (1979) (explaining that, although origins of V-sign are unknown, V-sign has become British schoolchildren’s most favored offensive gesture).

<sup>57</sup> LOHEED ET AL., *supra* note 33, at 12 (stating that first recorded account of extended middle finger used as insulting gesture occurred in ancient Greece); Bruce Anderson, *The Illustrated History of Flipping the Bird*, GQ, Feb. 1997, at 169-72 (finding that the gesture is “as old, hallowed and pancultural as civilization itself” and discussing names of the gesture in ancient Greece and Rome).

<sup>58</sup> ROGER E. AXTELL, *GESTURES: THE DO’S AND TABOOS OF BODY LANGUAGE AROUND THE WORLD* 30 (John Wiley & Sons, Inc. 1998).

<sup>59</sup> LOHEED ET AL., *supra* note 33, at 12; Anderson, *supra* note 57, at 170.

Strepsiades: Finger-rhythm? I know *that*.

Socrates: Define it then.

Strepsiades [Extending his middle finger in an obscene gesture]: Why, it's tapping time with *this* finger. Of course, when I was a boy [raising his phallus to the ready], I used to make rhythm with this one.<sup>60</sup>

In 330 B.C., the book *Lives of Eminent Philosophers* referred to the middle finger gesture.<sup>61</sup> A re-enactment of a meeting between Diogenes and Demosthenes has Diogenes expressing his dislike of the pompous orator by extending his middle finger and stating, "There goes the demagogue of Athens."<sup>62</sup>

The ancient Romans adopted the middle finger gesture from the Greeks.<sup>63</sup> The gesture was so popular among Romans that they bestowed the middle finger with a special title: the *digitus impudicus*.<sup>64</sup> The Romans interpreted the middle finger gesture as an abrasive and insulting expression. In one Roman play, for example, the character Martial "points his finger, and the insulting one at that, towards Alcon, Dasius and Symmachus."<sup>65</sup> When Emperor Caligula offered his extended middle finger, rather than his hand, for his subjects to kiss, observers found the act scandalous and offensive.<sup>66</sup> The gesture became so abhorrent that Augustus Caesar banished an actor from Italy for giving the finger to an audience member who hissed at the actor during a performance.<sup>67</sup>

While documentation of the middle finger in ancient Greek and Roman times is prevalent, the gesture seems to have vanished during

<sup>60</sup> LOHEED ET AL., *supra* note 33, at 12 (emphasis added) (quoting ARISTOPHANES, *THE CLOUDS* (W. Arrowsmith, trans., Running Press 1962) (423 B.C.)).

<sup>61</sup> *Id.* at 12-13 (citing DIOGENES LAERTIUS, *LIVES OF EMINENT PHILOSOPHERS* (R.D. Hicks, trans., Harvard Univ. Press 1959)).

<sup>62</sup> *Id.* at 12.

<sup>63</sup> Anderson, *supra* note 57, at 170 (noting that Romans "appropriated the favorite Hellenic gesture of contempt").

<sup>64</sup> The English equivalent of "*digitus impudicus*" is "the impudent finger." MORRIS ET AL., *supra* note 56, at 81. Ancient Romans also referred to the gesture as *famosus*, *infami digito*, *digito destinare* ("the fickle finger of fate"), *petulans* (wanton), *improbum* (wicked), *lascivus*, and *convicium facio* ("I provoke an argument"). JOHN BULWER, *CHIROLOGIA: OR THE NATURAL LANGUAGE OF THE HAND AND CHIRONOMIA: OR THE ART OF MANUAL RHETORIC* 132-33 (James W. Cleary ed., 1974).

<sup>65</sup> MORRIS ET AL., *supra* note 56, at 82 (quoting MARTIAL, *EPIGRAMS*, at V.LLXX (Walter C.A. Ker trans., 1961)).

<sup>66</sup> *Id.*

<sup>67</sup> See LOHEED ET AL., *supra* note 33, at 13.

the Dark Ages.<sup>68</sup> Nineteenth-century German anthropologist Carl Sittl speculated that the temporary disappearance of the middle finger reflects the far-reaching influence of the Catholic Church during the Dark Ages.<sup>69</sup> The Church's encouragement of conservative moral values may have caused the middle finger gesture's temporary departure.<sup>70</sup> Nevertheless, the gesture survived.<sup>71</sup>

Records indicate that Americans imported the gesture as early as 1886.<sup>72</sup> The first recorded appearance of the middle finger gesture on American soil occurred in a professional baseball team photograph, where a pitcher for the Boston Beaneaters gave the middle finger while posing for a joint team picture with the New York Giants.<sup>73</sup> Perhaps this photograph captured an early manifestation of one of the most intense sports rivalries in American culture.<sup>74</sup>

Since 1886, the middle finger has evolved into perhaps the most commonly used insulting gesture in the United States. Known as the finger,<sup>75</sup> the finger wave,<sup>76</sup> the bird,<sup>77</sup> the stork,<sup>78</sup> the bone,<sup>79</sup> the one-

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<sup>68</sup> See *id.* at 14 (stating that “the bird seemed to have flown the coop” during Middle Ages, but noting other obscene gestures, such as the fig, may have replaced the middle finger gesture during this time period).

<sup>69</sup> Anderson, *supra* note 57, at 170-71 (noting Sittl speculated that “the prudish attitude of the Catholic Church sent the bird into hiding”).

<sup>70</sup> *Id.*

<sup>71</sup> An eighteenth-century British account suggests that the middle finger gesture existed in England. In 1712, a London newspaper explained, “The Prentice speaks his Disrespect by an extended finger, and the Porter by sticking out his tongue.” SPECTATOR (London), Apr. 16, 1712, *quoted in* Anderson, *supra* note 57, at 170.

<sup>72</sup> See, e.g., LOHEED ET AL., *supra* note 33, at 14-15 (describing first recorded use of the middle finger gesture in United States); Anderson, *supra* note 57, at 168-201 (surveying use of the gesture in United States and elsewhere).

<sup>73</sup> See, e.g., LOHEED ET AL., *supra* note 33, at 15 (providing reproduction of picture); Anderson, *supra* note 57, at 170 (noting that “ace pitcher” Charles Radbourn was first athlete to use the gesture in team picture).

<sup>74</sup> John Branch, *Where Do Rivals Draw the Line?*, N.Y. TIMES, Aug. 18, 2006, at D1 (referring to “border between Red Sox Nation and Yankees Country, [as] a sort of Mason-Dixon Line separating baseball’s fiercest rivals”).

<sup>75</sup> AXTELL, *supra* note 58, at 30, 105 (explaining that the gesture consists of “holding up the fist, knuckles facing outward, and extending the middle finger upward stiffly”); see also LOHEED ET AL., *supra* note 33, at 7-23 (discussing in great detail meaning, history, and usage of the gesture).

<sup>76</sup> AXTELL, *supra* note 58, at 105.

<sup>77</sup> *Coggin v. State*, 123 S.W.3d 82, 85 n.1 (Tex. Ct. App. 2003) (referring to defendant’s gesture as “the bird”); WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY 153 (9th ed. 1990) (defining “bird” as “an obscene gesture of contempt made by pointing the middle finger upward while keeping the other fingers down — usually used with *the*”).

<sup>78</sup> LOHEED ET AL., *supra* note 33, at 24 (noting that nineteenth-century

finger salute,<sup>80</sup> the obscene gesture,<sup>81</sup> the expressway digit,<sup>82</sup> the *digitus impudicus*,<sup>83</sup> the Trudeau salute,<sup>84</sup> the extreme extremity,<sup>85</sup> the “prodigious protrusion of pent-up frustration,”<sup>86</sup> and (as President George W. Bush once called it) the “one-fingered victory salute,”<sup>87</sup> one may give, shoot, raise, or flip it.<sup>88</sup> Americans use it to communicate a wide variety of messages,<sup>89</sup> and it is recognized throughout the world.<sup>90</sup> Quipped one commentator and expert on the history of the gesture:

[W]e can rest assured that this once endangered bird is thriving. Today the finger enjoys a predator free environment and appears in feature films, books, schoolyards, and most recently, television. Instead of shunning this “obscene”

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ethnographer speculated that ancient Romans referred to the middle finger gesture as “the stork”).

<sup>79</sup> AXTELL, *supra* note 58, at 105.

<sup>80</sup> Miller, *supra* note 5 (noting that Canadian court referred to the gesture as “one-finger salute”).

<sup>81</sup> West v. State, 610 S.E.2d 159, 160-61 (Ga. Ct. App. 2005) (discussing defendant’s use of the middle finger gesture in courtroom).

<sup>82</sup> AXTELL, *supra* note 58, at 31 (observing that the gesture is “used when an impatient, irate driver wishes to signal anger and frustration to another driver”).

<sup>83</sup> *Supra* note 64 and accompanying text (noting that phrase “*digitus impudicus*” translates to “impudent finger”).

<sup>84</sup> Canadians adopted this moniker for the gesture after a photograph surfaced depicting former Prime Minister Pierre Trudeau giving the finger to protesters. See Caroline Mallan, *Still Insist You Didn’t Do It, Mr. O’Toole? Well, Here’s the Photo That Fingered You*, TORONTO STAR, May 13, 2003, at A01 (noting that event occurred in 1982 and discussing other incidents involving Canadian politicians using the gesture); Ned Zeman & Lucy Howard, *Periscope: Buzzwords*, NEWSWEEK, Nov. 2, 1992, at 9 (providing definitions for Canadian lingo and defining “the Trudeau salute” as “[g]iving the finger”).

<sup>85</sup> LOHEED ET AL., *supra* note 33, at 72.

<sup>86</sup> *Id.* (quoting back cover).

<sup>87</sup> In 2005, a video surfaced showing President George W. Bush giving the middle finger to a camera while complaining about an off-camera aide, presumed to be his advisor Karen Hughes, telling him what to do. As an aide wondered whether the camera was on, Bush dismissed the gesture as the “one-fingered victory salute.” See *Watch Bush’s “One-Fingered Victory Salute,”* SALON.COM, Oct. 27, 2004, [http://www.salon.com/news/feature/2004/10/27/victory\\_salute/](http://www.salon.com/news/feature/2004/10/27/victory_salute/).

<sup>88</sup> See generally LOHEED ET AL., *supra* note 33 (providing instructions for using the middle finger gesture and describing situations in which it has been used); Anderson, *supra* note 57 (discussing history of the middle finger gesture).

<sup>89</sup> See *supra* notes 21-28 and accompanying text (explaining contexts in which individuals use the middle finger to convey nonverbal message or emotion).

<sup>90</sup> See *infra* Part I.B.



gesture, we should treasure its rich cultural heritage. We are living in the Golden Age of The Finger. Get used to it.<sup>91</sup>

*B. The Middle Finger and Other Insulting Gestures Around the World*

The middle finger gesture is used throughout the world; its offensive message crosses cultural and linguistic barriers.<sup>92</sup> Deepak Obhrai, a member of Canada's House of Commons, recently gave the finger to another member of the chamber.<sup>93</sup> He later told a news reporter that he used the gesture to express his annoyance at the member's continual screaming and disruptive behavior on the floor.<sup>94</sup> A Chinese newspaper reported that more than 700 complaints were filed after Philip Wong, a "[c]ontroversial pro-government legislator," gave the finger to a crowd of demonstrators outside a government building.<sup>95</sup> The report noted that the Chinese considered the gesture to be "vulgar."<sup>96</sup> A Japanese district court judge reduced a damages award given to an individual who used the gesture during a fight, noting that "[t]he sign of raising the middle finger with the back of one's right hand down is recognized in Japan as an act signifying insult or provocation, although it is not as (common) as in the U.S."<sup>97</sup>

A crew of American sailors, however, demonstrated that the gesture has not always been as common worldwide as the previous stories suggest. In 1968, North Koreans seized a small naval ship off that country's coast, igniting an international crisis.<sup>98</sup> The American sailors were imprisoned for nearly a year, during which they were tortured and forced to make false confessions.<sup>99</sup> In a group photograph that was later released to the American media, several of the soldiers were shown giving the middle finger gesture.<sup>100</sup> When the Korean

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<sup>91</sup> LOHEED ET AL., *supra* note 33, at 18.

<sup>92</sup> See, e.g., *Britney Walks Out on Mexico City Audience*, *supra* note 21 (relating story of Britney Spears using "universally recognized" middle finger insult at Mexican airport to express her anger toward paparazzi who almost caused her vehicle to crash).

<sup>93</sup> David Heyman, *Grit Says Calgary MP Gave Him the Finger: Deepak Obhrai Says He "Expressed his Displeasure,"* CALGARY HERALD, Apr. 30, 2004, at B1.

<sup>94</sup> *Id.*

<sup>95</sup> Carrie Chan, *Honour for Philip Wong Stirs Anger*, S. CHINA MORNING POST, Oct. 17, 2003, at 8.

<sup>96</sup> *Id.*

<sup>97</sup> *Raising Middle Finger Is Insult in Japan Too, Judge Says*, JAPAN WKLY. MONITOR, Sept. 10, 2001, at NA.

<sup>98</sup> See Nicholas D. Kristof, *Remember the Pueblo*, N.Y. TIMES, July 19, 2005, at A21.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*; see also LOHEED ET AL., *supra* note 33, at 17.

photographer asked the soldiers what the gesture meant, they apparently explained that it was a “Hawaiian good luck sign.”<sup>101</sup> The photograph received a great deal of publicity in the United States because it signified that the sailors’ confessions had been forced.<sup>102</sup> When the North Korean captors learned the true meaning of the gesture, they subjected the sailors to a week of particularly severe beatings.<sup>103</sup>

While the gesture’s meaning is understood in many parts of the world today, it also has equivalents in other cultures. The forearm jerk, for example, formed by raising the right arm and bending it in a ninety-degree angle at the elbow while slapping the left hand onto the right forearm,<sup>104</sup> is one common variation of the middle finger gesture.<sup>105</sup> The gesture is seen not only in the United States (where it is often combined with the middle finger gesture to add emphasis),<sup>106</sup> but also in Brazil,<sup>107</sup> England, France,<sup>108</sup> and southern Europe, where men frequently use the forearm jerk to say “Fuck off!” or “Up yours!” to other men.<sup>109</sup> In England, the forearm jerk is a “crude form of sexual admiration,”<sup>110</sup> while in France it sometimes means “Go to hell!” and is directed toward someone who is annoying the gesturer.<sup>111</sup> In the United States, the forearm jerk is another way of saying, “Up

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<sup>101</sup> LOHEED ET AL., *supra* note 33, at 17; Kristof, *supra* note 98.

<sup>102</sup> LOHEED ET AL., *supra* note 33, at 17.

<sup>103</sup> *Id.* (asserting that “the finger sent a coded message that godless communism couldn’t control wily, red-blooded Americans who spoke softly, and carried big flesh-sticks”).

<sup>104</sup> See AXTELL, *supra* note 58, at 33 (stating that “the forearm jerk is done using both arms in a clearly dynamic action: The right arm is bent at the elbow and the left hand then comes chopping down into the crook of the elbow while the fist of the right hand is jerked upward”); LOHEED ET AL., *supra* note 33, at 82 (describing the forearm jerk).

<sup>105</sup> MORRIS ET AL., *supra* note 56, at 82 (noting that the forearm jerk serves as “a complete replacement of the old, finger-sized symbol with the new, improved, arm-sized symbol”).

<sup>106</sup> LOHEED ET AL., *supra* note 33, at 82.

<sup>107</sup> AXTELL, *supra* note 58, at 32 (noting that Brazilians call forearm jerk “the banana”).

<sup>108</sup> MORRIS ET AL., *supra* note 56, at 82 (noting that French sometimes refer to the gesture as “*bras d’honneur*,” or “arm of honor,” equating “male honour with male virility”).

<sup>109</sup> *Id.* at 84-85; see also LOHEED ET AL., *supra* note 33, at 82.

<sup>110</sup> DESMOND MORRIS, *MANWATCHING: A FIELD GUIDE TO HUMAN BEHAVIOR* 199-200 (Gredon Desebrock ed., 1977) (explaining that English men use the gesture to indicate to their male friends that they have noticed attractive woman).

<sup>111</sup> *Id.* at 199.

yours!”<sup>112</sup> In Afghanistan, Australia, Iran, Nigeria, and parts of Italy, Israel, and Greece, the thumbs-up sign roughly translates into, “Sit on my phallus, asshole,” and is considered an obscene and highly offensive equivalent of the middle finger gesture.<sup>113</sup> England’s closest relative of the middle finger gesture is formed by holding the index and second fingers up with the palm facing the gesturer, similar to a peace sign.<sup>114</sup> Anti-war protesters used this form of the gesture on unsuspecting American police officers during the 1960s.<sup>115</sup> More recently, U.S. Supreme Court Justice Antonin Scalia demonstrated the Sicilian version of the middle finger gesture by “flicking his right hand out from under his chin” when a reporter asked what he thought about “critics who might question his impartiality as a judge given his public worship” at a mass at Boston’s Cathedral of the Holy Cross.<sup>116</sup> The incident triggered a vigorous debate over the meaning of the chin-flicking gesture, with some claiming that it was a “gesture of contempt, somewhat less rude than giving a person the finger,” and others arguing that it was identical to giving someone the finger.<sup>117</sup>

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<sup>112</sup> See AXTELL, *supra* note 58, at 32 (arguing that the forearm jerk sends strong, sexual, and insulting message).

<sup>113</sup> LOHEED ET AL., *supra* note 33, at 79; see, e.g., Karen De Young, *The Pentagon Gets a Lesson From Madison Avenue*, WASH. POST, July 21, 2007, at A01 (reporting that, due to “cultural confusion,” President George W. Bush’s use of “hook ‘em horns” gesture at University of Texas parade had capacity to shock some who view that gesture as ‘sign of the devil’ and others who use it as sign of infidelity); see also AXTELL, *supra* note 58, at 38 (noting that “casual, innocent gestures in one society can actually be crude and insulting in another”).

<sup>114</sup> See LOHEED ET AL., *supra* note 33, at 77.

<sup>115</sup> *Id.*

<sup>116</sup> Marie Szaniszló, *Photographer: Herald Got it Right*, BOSTON HERALD, Mar. 30, 2006, at 6; see Laurel J. Sweet, *Judicial Intemperance — Scalia Flips Message to Doubting Thomases*, BOSTON HERALD, Mar. 27, 2006, at 4 (reporting that Justice Scalia made “obscene gesture under his chin” in response to reporter’s question); see also Dahlia Lithwick, *How Do You Solve the Problem of Scalia? The Razor-Thin Line Between Obscenity and Bad Judgment*, SLATE, Mar. 30, 2006, <http://www.slate.com/id/2138117> (explaining differences in opinion regarding offensiveness of Justice Scalia’s gesture). *But see* Szaniszló, *supra*, at 6 (noting that Justice Scalia later claimed that gesture was not offensive and that it merely means, “I couldn’t care less. It’s no business of mine. Count me out.”); see also *2006 White House Correspondents’ Dinner* (C-SPAN television broadcast Apr. 29, 2006), available at <http://tinyurl.com/lnpjz> (mocking Justice Scalia’s gesture and media controversy surrounding it). While giving the keynote address at the 2006 White House Correspondents’ Dinner, comedian and satirist Stephen Colbert directed a portion of his speech at Justice Scalia, who was in attendance, mimicking Justice Scalia’s hand gesture and then explaining to the crowd that he was “[j]ust talking some Sicilian with my paisan.” *Id.*

<sup>117</sup> See Lithwick, *supra* note 116.

The Arab version of “the bird” is similar to the upright middle finger. Arabs gesture with the palm down and the fingers pointing outward, with the middle finger pointing down.<sup>118</sup> The nose jerk also is used as a rough equivalent of the middle finger gesture in Arab countries.<sup>119</sup> It is formed by making a peace sign with the middle and index fingers with the palm facing the gesturer, placing the bottom of the “V” under the nose. The gesture symbolizes sexual intercourse and is believed to be the root of the English equivalent of the middle finger gesture.<sup>120</sup> In Australia, pointing the index finger at individuals is considered “rude” and “provocative.”<sup>121</sup> An equivalent gesture in Russia is formed by bending back the middle finger of one hand with the forefinger of the other hand.<sup>122</sup> This version of the *digitus impudicus* is called “looking under the cat’s tail,” and is considered extremely vulgar.<sup>123</sup> In Greece, Turkey, and central France, “the fig” is an equivalent of the middle finger, and is said to symbolize the “phallus in a taunting fashion.”<sup>124</sup> “The fig” is formed by pushing the thumb through the middle and index fingers; one uses it to send the message of “get lost,” “up yours,” or “take this.”<sup>125</sup> Although these cultures consider “the fig” a boorish insult, other cultures view it as a sexual signal or even a good-luck symbol.<sup>126</sup> Greeks also use a gesture known as “moutza” to tell a person, “Go to hell!”<sup>127</sup> The moutza is formed by holding the hand open with the palm facing down. Interestingly, most Asian cultures do not have an equivalent to the middle finger gesture, although showing someone a single, raised pinkie finger sends the message that the recipient is a worthless person.<sup>128</sup>

Although this Article focuses on the middle finger gesture in the context of the American legal system, the United States is not the only country in which individuals have been punished for using the middle finger or an equivalent gesture. For example, a driver in Essex, England received a fine and a visit from the police for using the

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<sup>118</sup> AXTELL, *supra* note 58, at 31.

<sup>119</sup> LOHEED ET AL., *supra* note 33, at 78.

<sup>120</sup> *Id.*

<sup>121</sup> *See supra* note 38.

<sup>122</sup> AXTELL, *supra* note 58, at 32.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 92.

<sup>125</sup> MORRIS ET AL., *supra* note 56, at 148, 155.

<sup>126</sup> AXTELL, *supra* note 58, at 38, 92.

<sup>127</sup> LOHEED ET AL., *supra* note 33, at 78.

<sup>128</sup> *Id.* at 81.

middle finger gesture.<sup>129</sup> The man was driving within the speed limit and was photographed giving the finger to a stationary speed-detection camera. Within thirty minutes, two police officers knocked on the man's front door and handed him a citation for "making offensive gestures under the Public Order Act."<sup>130</sup>

In Germany, the law of *Beleidigung*, or "insult," broadly criminalizes hate speech as well as words, gestures, and other conduct that indicates "disrespect or lack of respect" for another person.<sup>131</sup> The German law of insult specifically criminalizes use of a gesture known as "the bird," which is formed by tapping the index finger on the forehead and is typically used by car drivers to tell other drivers that they are "mentally defective."<sup>132</sup> An author familiar with German culture has stated that all Germans know that it is illegal to use this gesture.<sup>133</sup> The German law of insult criminalizes words as well as gestures.<sup>134</sup> For example, an individual may be criminally prosecuted for calling another person a "jerk."<sup>135</sup>

Legal scholar James Q. Whitman has argued that some European cultures, especially German and French, tend to be tolerant of laws prohibiting the use of insulting words and gestures because in those cultures "[personal] honor' is a protectable legal interest."<sup>136</sup> In contrast, American law tends to protect only against injuries to reputation through the law of defamation, or against physical injuries to the body that result from insulting remarks, such as intentional infliction of emotional distress in tort law.<sup>137</sup> In addition, American constitutional law extends more protection to free speech values than Continental European legal systems afford.<sup>138</sup> Whereas German and French law balance the speaker's interest in free speech against the listener's legally protected honor, Whitman argues, the American legal system "balances the value of free speech against nothing at all — unless it is the value of the suppression of violence (and sometimes

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<sup>129</sup> See John Troup, *Driver Fingered by Police*, SUN (U.K.), Feb. 1, 2006, available at <http://www.thesun.co.uk/sol/homepage/news/article36359.ece>.

<sup>130</sup> *Id.*

<sup>131</sup> See James Q. Whitman, *Enforcing Civility and Respect: Three Societies*, 109 YALE L.J. 1279, 1295-96 (2000).

<sup>132</sup> *Id.* at 1296.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 1297.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 1282.

<sup>137</sup> See *id.* at 1292, 1382.

<sup>138</sup> *Id.* at 1379-80.

the value of the suppression of indecency).<sup>139</sup> At least in theory, then, the American legal system should be more tolerant of insulting gestures than the Continental legal systems discussed above.<sup>140</sup>

The following parts focus on the American legal system and the First Amendment issues implicated by use of the middle finger gesture.

## II. THE MIDDLE FINGER AND THE FIRST AMENDMENT

While driving her three young children home from school on a September afternoon, Laura Benson gave the finger to a school crossing guard who had admonished Benson for driving too close to a school bus.<sup>141</sup> Angry and offended, the crossing guard promptly called the police, who cited Benson for disorderly conduct.<sup>142</sup> In lieu of formal charges, the prosecutor asked a judge to reprimand Benson for giving the finger to the crossing guard.<sup>143</sup> The judge reminded Benson that she should treat crossing guards and law enforcement officials with respect, but acknowledged that she probably had a constitutional right to use her middle finger.<sup>144</sup>

This incident illustrates that users of the middle finger gesture might be — and often are — stopped, arrested, fined, prosecuted, and even incarcerated under disorderly conduct or breach-of-peace statutes and ordinances.<sup>145</sup> Below the surface of a seemingly innocuous confrontation between a mother and a crossing guard lie important constitutional questions regarding freedom of speech under the First Amendment to the U.S. Constitution.

The First Amendment expressly prohibits the government from abridging freedom of speech.<sup>146</sup> Despite the First Amendment's explicit reference to "speech," the Supreme Court has held that, for First Amendment purposes, speech is not limited to verbal expression,

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<sup>139</sup> *Id.* at 1381.

<sup>140</sup> This comparison is beyond the scope of this Article and will not be addressed further.

<sup>141</sup> John Kass, *New Digital Age in Need of Some Ethical Guidelines*, CHI. TRIB., Nov. 19, 2003, at C2, available at 2003 WLNR 15318588.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> See *infra* Part II.A-B (arguing that, in most cases, prosecution for use of the gesture is unconstitutional).

<sup>146</sup> See U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . .").

but also embraces certain other types of expressive conduct.<sup>147</sup> For example, the Court has extended First Amendment protection to nonverbal expressive acts such as flag burning,<sup>148</sup> participating in a sit-in protest,<sup>149</sup> and displaying a U.S. flag with a peace symbol affixed to its surface.<sup>150</sup> As an initial matter, a court analyzing a constitutional claim involving the middle finger gesture must classify it as speech, conduct, or a combination of speech and conduct.

It is virtually impossible to imagine circumstances in which the middle finger gesture would not constitute expressive conduct, thus implicating the First Amendment, even when the gesture is used without spoken words. In some cases, the gesture is used in place of words, such as when a driver gives the finger to another motorist<sup>151</sup> or when a defendant raises his middle finger to a judge after receiving a prison sentence;<sup>152</sup> in other cases, a verbal message such as “Fuck you!” adds emphasis to the gesture.<sup>153</sup> Regardless of whether the

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<sup>147</sup> See *Spence v. Washington*, 418 U.S. 405, 410-11 (1974) (stating that nonverbal expression constitutes speech within scope of First Amendment when “speaker” intends to convey specific message and it is likely that average viewer would understand speaker’s message); see also *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (recognizing that, while Court has rejected position that any conduct constitutes speech whenever “the person engaging in the conduct intends thereby to express an idea,” it also has acknowledged that “conduct may be sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments” (citations and internal quotation marks omitted)).

<sup>148</sup> See *Johnson*, 491 U.S. at 405-06 (holding that Johnson’s act of burning American flag in public as form of protest constituted expressive conduct that implicated First Amendment’s Free Speech Clause).

<sup>149</sup> See *Brown v. Louisiana*, 383 U.S. 131, 141-42 (1966) (noting that First Amendment rights are not limited to verbal expression and that First Amendment protects certain types of action “which certainly include the right in a peaceable and orderly manner to protest by silent and reproachful presence, in a place [public library] where the protestant has every right to be, the unconstitutional segregation of public facilities”).

<sup>150</sup> See *Spence*, 418 U.S. at 405-06 (finding that defendant intended to convey message by placing peace sign on flag and concluding that, even though he used visual symbol rather than spoken or written words, his act should receive First Amendment protection).

<sup>151</sup> See, e.g., *Coggin v. State*, 123 S.W.3d 82, 85 (Tex. App. 2003) (recounting how defendant “allegedly gestured with his raised middle finger” as he passed another driver on highway).

<sup>152</sup> See, e.g., *Mitchell v. State*, 580 A.2d 196, 197 (Md. 1990) (noting that, immediately after receiving prison sentence, defendant “gave vent to his displeasure by directing a contumelious single-finger gesture at the trial judge”).

<sup>153</sup> See, e.g., *Commonwealth v. Williams*, 753 A.2d 856, 859 (Pa. Super. Ct. 2000) (describing how criminal defendant gave the finger to judge and simultaneously said “Fuck you!” after judge sentenced defendant to prison); *In re S.J.N-K.*, 647 N.W.2d

gesture is used in conjunction with verbal speech, its message is clear and its impact is the same.<sup>154</sup> Because the user almost always intends to convey a message,<sup>155</sup> the legal consequences should not turn on whether the gesture is accompanied by verbal speech. Accordingly, courts have consistently found that the middle finger gesture implicates the First Amendment.<sup>156</sup> In the words of Judge Alvin Rubin of the U.S. Court of Appeals for the Fifth Circuit: “The thumbed nose, the projected middle finger, . . . the grimace and the smile are all conduct . . . intended to convey a message that is sometimes made even more expressive by its bold freedom from a garb of words.”<sup>157</sup>

The Supreme Court consistently has held that speech may not be prohibited simply because some may find it offensive or coarse or because it causes discomfort or anger.<sup>158</sup> At the same time, the Court has made it clear that speech does not enjoy absolute protection and that the government may regulate speech when doing so is necessary to advance a legitimate governmental interest, such as preserving community morality<sup>159</sup> or protecting minors.<sup>160</sup> The Court has

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707, 709 (S.D. 2002) (stating that defendant gave the finger and mouthed words “Fuck you” to middle school principal).

<sup>154</sup> See, e.g., *Nichols v. Chacon*, 110 F. Supp. 2d 1099, 1103-04 (W.D. Ark. 2000) (noting that the middle finger gesture has “commonly understood meaning and connotation” and that, as legal matter, use of the gesture should be analyzed in same manner as use of words “Fuck you”); *Mitchell*, 580 A.2d at 198 (noting that, where defendant gave the middle finger gesture to judge, judge commented that gesture “was saying something” and that “[w]hen one does that, one is speaking to the person he does it to and it is no different than if one says those words audibly”); Max S. Kirch, *Non-Verbal Communication Across Cultures*, 63 MOD. LANGUAGE J. 416, 419 (1979) (stating that gestures such as the middle finger that express mockery or contempt often express complete message and that “[t]he gesture may make verbal communication superfluous”).

<sup>155</sup> See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-7, at 827 (2d ed. 1988) (asserting that “[a]ll communication except perhaps that of the extrasensory variety involves conduct”).

<sup>156</sup> See, e.g., *Nichols*, 110 F. Supp. 2d at 1101-02, 1110 (holding that officer was not entitled to qualified immunity where he arrested and charged driver with disorderly conduct after driver gave officer the finger because it was well-established on date of arrest that the middle finger gesture was protected speech under First Amendment); *Coggin*, 123 S.W.3d at 87 n.2 (acknowledging that the middle finger gesture constitutes speech under First Amendment because of its widely understood meaning).

<sup>157</sup> *Davis v. Williams*, 598 F.2d 916, 920 n.5 (1979).

<sup>158</sup> See *infra* Part II.C.

<sup>159</sup> See *generally infra* Part II.B (arguing that use of the middle finger is not obscene).

<sup>160</sup> See, e.g., *New York v. Ferber*, 458 U.S. 747, 756-57 (1982) (distinguishing pornography involving consenting adults from pornography depicting children



established that the government may prevent and punish certain classes of speech, including “the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words — those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.”<sup>161</sup> Consequently, prosecutors frequently argue that the middle finger gesture falls within an unprotected category of speech, such as fighting words or obscenity.

A. *The Fighting Finger: Why the Middle Finger Gesture Is Not a Fighting Word*

Although the First Amendment generally protects offensive, vulgar, or unpleasant language,<sup>162</sup> the U.S. Supreme Court has carved out for special status a category of unprotected speech known as “fighting words.”<sup>163</sup> In *Chaplinsky v. New Hampshire*,<sup>164</sup> the Court defined fighting words as “words . . . which by their very utterance inflict injury or tend to incite an immediate breach of the peace.”<sup>165</sup> The *Chaplinsky* Court focused on both the content of the speech<sup>166</sup> and the context in which it occurs,<sup>167</sup> but did not give explicit guidance regarding the relative importance of each.<sup>168</sup> 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.<sup>169</sup>

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engaged in sexual acts and noting that “[i]t is evident beyond the need for elaboration that a State’s interest in safeguarding the physical and psychological well-being of a minor is compelling” (internal quotation marks omitted)).

<sup>161</sup> *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

<sup>162</sup> See generally *infra* Part II.C (arguing that profane or offensive speech, without more, falls under First Amendment protection).

<sup>163</sup> *Chaplinsky*, 315 U.S. at 572.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* (noting that fighting words “are no essential part of any exposition of ideas, and are of such slight social value as a step to truth” that their regulation is permissible).

<sup>167</sup> *Id.* at 573 (emphasizing that fighting words must “have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed” (citation and internal quotation marks omitted)).

<sup>168</sup> See, e.g., Michael J. Mannheimer, Note, *The Fighting Words Doctrine*, 93 COLUM. L. REV. 1527, 1536-37 (1993) (highlighting tension between dual justifications underlying fighting words doctrine and noting that Court’s degree of reliance on each justification was unclear).

<sup>169</sup> Cf. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573 (1942) (describing state

Although the Court has not directly addressed whether the middle finger gesture constitutes fighting words, it has decided a case involving an individual's use of the word "fuck." In *Cohen v. California*,<sup>170</sup> the Court overturned a conviction for disturbing the peace by offensive conduct where the defendant was arrested for wearing in a courthouse a jacket bearing the words "Fuck the Draft."<sup>171</sup> The Court described fighting words as "those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction."<sup>172</sup> In overturning Paul Cohen's conviction, the Court emphasized that, in order to qualify as fighting words, the speech must be directed toward a particular person as a personal insult.<sup>173</sup> This requirement was not met in *Cohen*; the Court found that the jacket bore a general message and no one present in the courthouse could interpret the words as a personal insult.<sup>174</sup> Similarly, in *Texas v. Johnson*,<sup>175</sup> the Court held that the act of flag burning could not be prohibited as fighting words because no reasonable witness could interpret the flag burning as "a direct personal insult or an invitation to exchange fisticuffs."<sup>176</sup>

In addition, the Supreme Court has emphasized that fighting words are prohibited not because of the thought or idea they express, but because of the manner and potentially violent consequences of the speech. In *R.A.V. v. City of St. Paul*,<sup>177</sup> the Court explained that fighting words are excluded from the scope of the First Amendment not because of the content of the communication, but instead because of the "intolerable (and socially unnecessary) *mode* of expressing *whatever* idea the speaker wishes to convey."<sup>178</sup> In other words, a speech act — such as using the middle finger gesture — may be protected by the First Amendment in most circumstances. Where imminent violence is likely to result from the speech, however, use of

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court's analysis of offensive words).

<sup>170</sup> 403 U.S. 15, 16 (1971).

<sup>171</sup> *Id.* at 16-17, 26 (finding that California could not criminalize mere public display of "this single four-letter expletive").

<sup>172</sup> *Id.* at 20.

<sup>173</sup> *See id.*

<sup>174</sup> *Id.* The Court noted that no one in the courthouse was "violently aroused" by the message on Cohen's jacket. *Id.*

<sup>175</sup> 491 U.S. 397 (1989).

<sup>176</sup> *Id.* at 409.

<sup>177</sup> 505 U.S. 377 (1992).

<sup>178</sup> *Id.* at 393 (emphasis added).

the gesture may constitute unprotected fighting words.<sup>179</sup> In *Cohen*, the Court acknowledged the distasteful nature of Cohen's language, but emphasized that the Constitution leaves the choice of personal taste and decorum to individuals precisely because the government "cannot make principled distinctions in this area."<sup>180</sup> Writing for the majority, Justice John Marshall Harlan famously recognized that "one man's vulgarity is another's lyric."<sup>181</sup>

The Court's fighting words jurisprudence reflects an attempt to protect controversial or critical speech, which lies at the core of the First Amendment,<sup>182</sup> while acknowledging a legitimate state interest in preventing violence and maintaining public order.<sup>183</sup> Accordingly, the Court has found unconstitutional state disorderly conduct or breach-of-peace statutes that are not limited in scope to fighting words.<sup>184</sup> In

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<sup>179</sup> See Mannheim, *supra* note 168, at 1528 (stating that fighting words doctrine serves important purpose of "preventing breaches of the peace that are both imminent and likely to occur").

<sup>180</sup> *Cohen v. California*, 403 U.S. 15, 25 (1971).

<sup>181</sup> *Id.*

<sup>182</sup> See, e.g., *N.Y. Times v. Sullivan*, 376 U.S. 254, 270 (1964) (recognizing "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials").

<sup>183</sup> See, e.g., *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-74 (1942) (noting that "the right of free speech is not absolute" and that it may be trumped by state's interest in preventing breach of peace); Aviva O. Wertheimer, Note, *The First Amendment Distinction Between Conduct and Content: A Conceptual Framework for Understanding Fighting Words Jurisprudence*, 63 *FORDHAM L. REV.* 793 (1994) (examining theoretical basis of fighting words doctrine).

<sup>184</sup> See, e.g., *Gooding v. Wilson*, 405 U.S. 518, 522-28 (1972) (striking down breach-of-peace statute because Georgia courts had not appropriately limited scope of statute, for statute could be violated merely by speaking words that might offend listener); see also *Lewis v. New Orleans*, 415 U.S. 130, 132-34 (1974) (striking down local ordinance that prohibited use of "obscene or opprobrious language toward or with reference to any member of the city police while in the actual performance" of officer's duty). In *Lewis*, the Court noted that the Louisiana Supreme Court had not limited the definition of "opprobrious language" to encompass only fighting words, and that the ordinance was "susceptible of application to protected speech." *Id.* at 133-34. In a concurring opinion, Justice Lewis Powell criticized the state court's interpretation of the ordinance because it conferred upon police virtually unlimited discretion in making arrests. *Id.* at 134-36 (Powell, J., concurring). Justice Powell noted that the ordinance was likely to be invoked only when an officer has no other valid reason for arresting a suspicious person, and that the state court's open-ended interpretation of the ordinance created unacceptable opportunities for abuse by law enforcement officials. *Id.* at 136.

*Gooding v. Wilson*,<sup>185</sup> for example, the Court struck down a Georgia statute that proscribed the use of “opprobrious words or abusive language, tending to cause a breach of the peace” in the presence of others and without provocation.<sup>186</sup> The Court found that the Georgia courts had not limited the scope of the statute to words that tend to cause the average addressee to respond violently, and in turn found the statute unconstitutional because it had the potential to reach protected speech.<sup>187</sup>

In prosecuting users of the middle finger gesture, law enforcement officials often rely on disorderly conduct or breach-of-peace statutes or ordinances. In order to survive constitutional scrutiny after *Gooding*, state courts must limit these statutes to reach offensive language only if the speech rises to the level of fighting words.<sup>188</sup> Thus, like the f-word, the middle finger gesture should fall within the scope of the fighting words exception only when it is accompanied by highly threatening language or aggressive movement.<sup>189</sup> For example, a police officer in Kansas stopped a car and arrested a passenger who had “flipped the bird” as he passed a parked patrol car.<sup>190</sup> Because the Kansas Supreme Court had limited the state’s disorderly conduct statute<sup>191</sup> to fighting words,<sup>192</sup> the State argued that the gesture

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<sup>185</sup> 405 U.S. 518 (1972).

<sup>186</sup> *Id.* at 518-19.

<sup>187</sup> *Id.* at 524, 528.

<sup>188</sup> See *supra* notes 184-87 and accompanying text. Many disorderly conduct statutes also prohibit obscene speech or gestures, and courts have interpreted these provisions to prohibit speech only when the speech falls within the legal definition of obscenity. See *infra* Part II.B.

<sup>189</sup> See, e.g., *State v. Lynch*, 392 N.W.2d 700 (Minn. Ct. App. 1986) (holding that defendant’s actions amounted to disorderly conduct where crowd formed carrying clubs while defendant yelled “motherfucking pigs” to officers); see also *Biddle v. Martin*, 992 F.2d 673, 674-75 (7th Cir. 1993) (deciding that defendant’s actions amounted to disorderly conduct where defendant made violent movements and screamed at officer who was smaller than him on highway at three o’clock in morning); *State v. Brahy*, 529 P.2d 236 (Ariz. Ct. App. 1975) (finding disorderly conduct where defendant spit and screamed at officer).

<sup>190</sup> *Cook v. Bd. of County Comm’rs*, 966 F. Supp. 1049, 1051 (D. Kan. 1997). Cook was arrested and charged under the state disorderly conduct statute. He subsequently brought a civil rights action in federal district court under 42 U.S.C. § 1983 against the police officer and other law enforcement officials. *Id.*

<sup>191</sup> KAN. STAT. ANN. § 21-4101 (2003) (providing that “[d]isorderly conduct is, with knowledge or probable cause to believe that such acts will alarm, anger or disturb others or provoke an assault or other breach of the peace . . . [u]sing offensive, obscene, or abusive language or engaging in noisy conduct tending reasonably to arouse alarm, anger or resentment in others”).

<sup>192</sup> *State v. Huffman*, 612 P.2d 630, 635-36 (Kan. 1980) (expressly construing

amounted to fighting words.<sup>193</sup> The federal district court expressly rejected the State's "unprincipled assertion" that one who gives the finger to a police officer automatically forfeits First Amendment protection.<sup>194</sup> The court went on to find that the police officer was not entitled to qualified immunity for making the arrest.<sup>195</sup> It concluded that a reasonable police officer would not have grounds to believe that the defendant was engaged in disorderly conduct when he gave the middle finger to the officer, because the statute only applied to words that "by their very utterance inflict[ed] injury or tend[ed] to incite an immediate breach of the peace."<sup>196</sup> Similarly, in *Sandul v. Larion*,<sup>197</sup> the U.S. Court of Appeals for the Sixth Circuit stated that police officers should know that use of the words "Fuck you," accompanied by the middle finger gesture, do not constitute fighting words, and therefore could not fall within the scope of any disorderly conduct statute.<sup>198</sup> In that case, Sandul was arrested after he shouted "Fuck you!" and gave the middle finger to protestors outside an abortion clinic as he drove past them at a high speed.<sup>199</sup> The court explicitly stated that use of foul language alone does not constitute criminal conduct.<sup>200</sup>

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statute to apply to fighting words only).

<sup>193</sup> *Cook*, 966 F. Supp. at 1051-52.

<sup>194</sup> *Id.* at 1052.

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> 119 F.3d 1250 (6th Cir. 1997).

<sup>198</sup> *Id.* at 1255-56.

<sup>199</sup> *Id.* at 1252. An officer followed Sandul's truck and later arrested him. *Id.* Sandul was acquitted of the disorderly conduct charge in state court and filed claims under 42 U.S.C. § 1983 against the police officers involved in his arrest. *Id.* at 1253.

<sup>200</sup> *Id.* at 1255. Other courts have declined to adopt a bright-line rule, acknowledging that words or gestures can fall within the scope of a disorderly conduct statute in some circumstances. A Michigan appeals court acknowledged that the middle finger gesture could fall within the scope of a disorderly conduct statute. *People v. Smith*, 262 N.W.2d 900, 901 (Mich. Ct. App. 1977). The court overturned a conviction where the defendant gave the finger to a police officer after nearly avoiding a collision with the officer's unmarked patrol car. *Id.* at 903. Noting that the defendant's use of the middle finger gesture in this situation was nothing more than a "spontaneous reaction to a sudden emergency which commonly occurs each day," the court nonetheless stated that the middle finger gesture could fall within the scope of the disorderly conduct statute under certain circumstances. *Id.* Similarly, an Ohio appeals court found that the words "Fuck you," whether spoken or delivered via the middle finger gesture, can constitute fighting words if delivered "specifically and intentionally" toward an individual. *State v. Wood*, 679 N.E.2d 735, 740 (Ohio Ct. App. 1996). In *Wood*, an alumnus of Kent State University approached two university police officers, gave them the middle finger, and spoke to the officers in offensive and abusive language. *Id.* at 737. This result is consistent with constitutional

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Thus, individuals should not be punished for using the middle finger gesture as long as the gesture is not accompanied by words or other gestures that “by their very utterance [or use] inflict injury or tend to incite an immediate breach of the peace.”<sup>201</sup> As an alternative to the fighting words theory, prosecutors sometimes charge individuals who use the middle finger gesture under provisions of disorderly conduct statutes that prohibit the use of obscene language or gestures.<sup>202</sup> The following section examines the middle finger gesture in the context of obscenity law and argues that, while the gesture may be offensive and vulgar to some individuals, it does not fall within the current legal definition of obscenity.

B. *Of Sex and Social Value: Why the Middle Finger Is Not Legally Obscene*

Arrests and prosecutions under statutes prohibiting the use of obscene language or gestures have resulted from a student giving the finger to a police officer from a school bus,<sup>203</sup> a driver giving the finger to a police officer while driving past the officer’s stopped car,<sup>204</sup> and a woman giving the finger and shouting “Fuck you, asshole!” to a public highway worker.<sup>205</sup> Convictions on these grounds, however, typically are overturned at the appellate level because the lower courts have ignored prevailing Supreme Court obscenity jurisprudence and issued rulings that violate the First Amendment.<sup>206</sup> That a gesture may be

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requirements, as long as the scope of the disorderly conduct statute is limited to fighting words. *Id.* at 739.

<sup>201</sup> *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

<sup>202</sup> *See, e.g.*, 18 PA. CONS. STAT. § 5503(a)(3) (2005) (providing that “[a] person is guilty of disorderly conduct if, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he . . . uses obscene language, or makes an obscene gesture”).

<sup>203</sup> *State v. Anonymous*, 377 A.2d 1342, 1343 (Conn. Super. Ct. 1977) (noting that officer arrested defendant high school student under disorderly conduct statute prohibiting use of obscene gestures).

<sup>204</sup> *Brockway v. Shepherd*, 942 F. Supp. 1012, 1015 (M.D. Pa. 1996) (observing that Brockway was arrested pursuant to Pennsylvania statute that prohibited use of obscene gestures).

<sup>205</sup> *Commonwealth v. Kelly*, 758 A.2d 1284, 1285 (Pa. Super. Ct. 2000) (explaining that defendant was arrested under obscene word and gesture provision of Pennsylvania’s disorderly conduct statute).

<sup>206</sup> *See, e.g., Brockway*, 942 F. Supp. at 1015-16 (finding that the middle finger gesture does not fall within scope of legal definition of obscenity because it is not sexual in nature); *Anonymous*, 377 A.2d at 1343 (overturning disorderly conduct conviction because the gesture is likely to provoke anger rather than sexual arousal); *Kelly*, 758 A.2d at 1288 (reversing disorderly conduct conviction based on obscene

described as obscene in the common parlance is not determinative of whether that gesture falls within the legal definition of “obscene” speech.<sup>207</sup>

The middle finger gesture traditionally has been associated with the male genitalia.<sup>208</sup> Anthropologist Desmond Morris has linked the middle finger gesture to dominance behavior among monkeys and apes.<sup>209</sup> Comparing the middle finger gesture to an erect penis, Morris notes that “the act of male erection or copulation becomes symbolic of male dominance and can be used as a dominance gesture in totally non-sexual situations.”<sup>210</sup> To the ancient Romans, who called the gesture the “obscene middle-finger,”<sup>211</sup> the raised middle finger signified anal intercourse and was intended to threaten and intimidate the victim.<sup>212</sup> Although the gesture undoubtedly retains this phallic connotation,<sup>213</sup> it does not fall within the current legal definition of obscenity.<sup>214</sup>

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gesture language in disorderly conduct statute because the gesture was “angry” expression and had “nothing to do with sex”).

<sup>207</sup> See *United States v. McDermott*, 971 F. Supp. 939, 943 n.11 (E.D. Pa. 1997) (finding that expression, “This is bullshit,” was “certainly . . . obscene in everyday parlance,” but concluding that it was not legally obscene); *Brockway*, 942 F. Supp. at 1016 (noting that *Miller*’s definition of obscenity differs significantly from meaning of “obscene gesture” in everyday speech, and concluding that the middle finger gesture is not legally obscene because it does not appeal to prurient interest); *Kelly*, 758 A.2d at 1288 (acknowledging that words “Fuck you asshole” and the middle finger gesture may be obscene in common parlance, but finding that they were not legally obscene).

<sup>208</sup> See, e.g., LOHEED ET AL., *supra* note 33, at 11-13 (referring to the middle finger as “penile proxy”).

<sup>209</sup> See MORRIS, *supra* note 110, at 198 (explaining that monkeys and apes employ simulated sexual actions to assert dominance and threaten other animals).

<sup>210</sup> *Id.* (noting that members of either sex can use the middle finger gesture as expression of dominance); cf. Don Aucoin, *Curses! ‘The Big One’ Once Taboo, The Ultimate Swear Is Everywhere, and Losing its Power to Shock*, BOSTON GLOBE, Feb. 12, 2004, at B13 (noting that, where group of 14-year-old girls “dropp[ed] F- bombs left and right” on busy New York street, bystander perceived that their language was “assertion of dominance” and that girls were “muscling [him] linguistically”).

<sup>211</sup> See MORRIS ET AL., *supra* note 56, at 82 (noting that ancient Romans found the middle finger gesture so offensive that actor was banished from Italy after giving the finger to member of audience who had heckled him).

<sup>212</sup> See LOHEED ET AL., *supra* note 33, at 13.

<sup>213</sup> See, e.g., *State v. Anonymous*, 377 A.2d 1342, 1343 n.2 (Conn. Super. Ct. 1977) (stating that the middle finger gesture is a phallic symbol “of ancient origin”); AXTELL, *supra* note 58, at 106 (asserting that most historians agree that the middle finger gesture is viewed as crude and obscene due to its phallic connotation); Miller, *supra* note 5 (acknowledging that the middle finger gesture is commonly understood as phallic symbol).

<sup>214</sup> See, e.g., *Commonwealth v. Danley*, 13 Pa. D. & C.4th 75, 77 (1991) (finding

In 1957, the Supreme Court expressly held, in *Roth v. United States*, that the First Amendment does not protect obscene speech.<sup>215</sup> The Court emphasized that “ideas having even the slightest redeeming social importance” receive First Amendment protection, but concluded that obscenity may be regulated because it completely lacks this attribute.<sup>216</sup> The Court carefully distinguished material depicting sex in an artistic, literary, or scientific way from obscenity, which portrays sex “in a manner appealing to the prurient interest.”<sup>217</sup> Having established an exception to the First Amendment and sketched an imprecise definition of obscenity,<sup>218</sup> the Court revisited the issue fifteen years later in order to provide additional guidance to lower courts as they repeatedly struggled to identify obscenity.<sup>219</sup>

In a five-to-four decision, the Court in *Miller v. California*<sup>220</sup> adopted a three-part test to determine whether challenged speech or material constitutes obscenity.<sup>221</sup> Under the *Miller* test, material is obscene if: (1) “the average person, applying contemporary community standards[,] would find that the work, taken as a whole, appeals to the prurient interest”;<sup>222</sup> (2) “the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law”;<sup>223</sup> and (3) “the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.”<sup>224</sup> Thirty years later,

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that the middle finger gesture is offensive act, but not obscene). A recent article made a similar comparison involving the word “sucks.” The author argues that the word “sucks” has lost any association it previously had with “a certain sex act,” concluding that “[w]hat was once offensive is now simply abrasive.” See Stevenson, *supra* note 45.

<sup>215</sup> 354 U.S. 476, 485 (1957) (“We hold that obscenity is not within the area of constitutionally protected speech or press.”).

<sup>216</sup> *Id.* at 484-85 (citing treaties, state statutes, and federal laws prohibiting obscenity as evidence of proposition that obscenity lacks any redeeming social value and therefore is not protected by First Amendment).

<sup>217</sup> *Id.* at 487.

<sup>218</sup> See *id.* at 491 (noting that publishers argued that prurient interest standard violated due process because it did not provide adequate notice of which materials would be prohibited).

<sup>219</sup> See *Miller v. California*, 413 U.S. 15, 22, 29 (1973) (noting that obscenity issue had produced range of opinions among Justices unmatched by any other aspect of constitutional law, and that absence of majority view caused strain on lower courts).

<sup>220</sup> 413 U.S. 15 (1973).

<sup>221</sup> *Id.* at 24.

<sup>222</sup> *Id.* (internal quotation marks omitted).

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*



*Miller's* three-part test remains the standard for determining whether material is legally obscene.<sup>225</sup>

Depending on the context in which it is used, the middle finger gesture likely fails to satisfy any of the three prongs of the *Miller* test.<sup>226</sup> Under the first element, the trier of fact must determine “whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest . . . .”<sup>227</sup> The Court did not, however, provide precise guidance regarding whether material “appeals to the prurient interest”; instead, it requires that the trier of fact make the determination based on the standards of the local community.<sup>228</sup> In almost all circumstances, the middle finger gesture is used to express frustration, anger, or defiance — not to cause sexual arousal.<sup>229</sup> As one judge observed: “It would be a rare person who would be ‘turned on’ by the display of a middle finger.”<sup>230</sup>

Under the second element, the trier of fact must determine “whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law.”<sup>231</sup> Although the Court gave individual states and communities a great deal of discretion in determining which depictions of sexual conduct could be prohibited under an obscenity law, it suggested specific sexual acts that might fall within the definition of obscenity, including graphic depictions of “ultimate sexual acts, . . . masturbation, excretory functions, and lewd exhibition of the genitals.”<sup>232</sup> While the middle finger gesture has been associated with male genitals and sexual acts, individuals generally use the gesture in order to convey a message of anger or disdain, and not to depict a sexual act.<sup>233</sup>

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<sup>225</sup> See, e.g., *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 240-46 (2002) (discussing and applying *Miller* obscenity test in child pornography case).

<sup>226</sup> See *supra* notes 222-24 and accompanying text.

<sup>227</sup> *Miller*, 413 U.S. at 24 (internal quotation marks omitted).

<sup>228</sup> *Id.*

<sup>229</sup> See, e.g., *Commonwealth v. Kelly*, 758 A.2d 1284, 1288 (Pa. Super. Ct. 2000) (stating that sexual connotation of the gesture and f-word is tangential to speaker's actual message).

<sup>230</sup> *Brockway v. Shepherd*, 942 F. Supp. 1012, 1016 (M.D. Pa. 1996).

<sup>231</sup> *Miller*, 413 U.S. at 24.

<sup>232</sup> *Id.* at 25.

<sup>233</sup> See, e.g., *Brockway*, 942 F. Supp. at 1017 (noting that using f-word or the middle finger gesture is not sexual act); *Kelly*, 758 A.2d at 1288 (holding that individual's use of the gesture and profanities directed at construction worker expressed disrespect and anger and lacked any relevance to sexual conduct).

Finally, under the third element, the fact-finder must evaluate “whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.”<sup>234</sup> Although this inquiry is highly context-specific, in most cases the middle finger gesture possesses political or artistic value. For example, an individual who gives the finger to a police officer or a judge likely intends to express disrespect or anger toward the individual officer or the institution that the officer represents.<sup>235</sup> Such speech is often directed at a governmental official in that person’s representative capacity, rather than personally, and the actual target of the speech or gesture is the government.<sup>236</sup> Thus, one could reasonably conclude that such speech has meaningful political value. Similarly, if the gesture is included in a photograph, such as when a single extended middle finger appeared on the cover of *MAD Magazine*,<sup>237</sup> one could conclude that the portrayal, as a whole, possesses at least a modicum of artistic value.

The Supreme Court has not directly ruled on whether the middle finger gesture falls within this definition of obscenity, but it has intimated that the f-word — the verbal equivalent of the middle finger gesture — does not.<sup>238</sup> In *Cohen v. California*, the Court emphasized that an expression must be erotic in order for the government to punish the speech as obscenity.<sup>239</sup> Because “Fuck the Draft” conveyed a political statement, rather than an erotic message that would appeal to an observer’s sexual desires, the Court dismissed the notion that the language on Cohen’s jacket was obscene.<sup>240</sup> Similarly, in *Hess v. Indiana*,<sup>241</sup> the Court overturned a disorderly conduct conviction where a sheriff overheard a protestor loudly say the word “fuck”

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<sup>234</sup> *Miller*, 413 U.S. at 24.

<sup>235</sup> See *supra* notes 21-26 and accompanying text (observing that individuals often use the gesture to express rage, protest, anger, or defiance).

<sup>236</sup> Mark C. Rutzick, *Offensive Language and the Evolution of First Amendment Protection*, 9 HARV. C.R.-C.L. L. REV. 1, 10 (1974); see also *Commonwealth v. Williams*, 753 A.2d 856, 863 (Pa. Super. Ct. 2000) (noting that criminal defendant who gave the middle finger to judge was not only personally attacking judge, but also “belittling the entire process of the administration of justice”).

<sup>237</sup> See *supra* note 37 (discussing *MAD Magazine* cover and noting that issue has become collector’s item).

<sup>238</sup> See *Cohen v. California*, 403 U.S. 15, 20 (1971) (finding that “[i]t cannot plausibly be maintained that this vulgar allusion to the Selective Service System would conjure up such psychic stimulation in anyone likely to be confronted with Cohen’s crudely defaced jacket”).

<sup>239</sup> *Id.*

<sup>240</sup> *Id.* at 16, 20.

<sup>241</sup> 414 U.S. 105 (1973).

during an anti-war demonstration on a college campus.<sup>242</sup> The Court indicated that it would be untenable to argue that the defendant's use of the f-word constituted obscenity in light of *Roth* and *Cohen*.<sup>243</sup> During the same time period, the Court decided several other cases involving the f-word, each time finding that it was not legally obscene.<sup>244</sup>

While some may perceive the middle finger gesture to be offensive, vulgar, or foul, it does not fall within the legal definition of obscenity; consequently, its use should not be punished through the criminal justice system.<sup>245</sup> In the words of one federal district judge, “[e]mphatic and vulgar expressions of one’s discontent with an official’s actions, while distasteful to the ear and offensive to the ego, are not — standing alone — ‘obscene’ under the First Amendment.”<sup>246</sup> The middle finger gesture, like the word “fuck,” does have a sexual connotation,<sup>247</sup> but one could not plausibly argue that it appeals to the prurient interest or depicts sexual conduct in a “patently offensive way,” as *Miller* requires.<sup>248</sup>

Despite the apparent clarity of the *Miller* test as applied to the middle finger gesture and the f-word, prosecutors continue to charge

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<sup>242</sup> See *id.* at 106-08. Witnesses later stated that they heard the defendant say, “We’ll take the fucking street later,” and “We’ll take the fucking street again.” *Id.* at 107.

<sup>243</sup> *Id.*

<sup>244</sup> See, e.g., *Papish v. Bd. of Curators*, 410 U.S. 667, 667-70 (1973) (reiterating that f-word is not obscene and overturning expulsion of graduate student who distributed newspaper containing headline, “M— f— Acquitted” on university campus); *Brown v. Oklahoma*, 408 U.S. 914 (1972) (vacating defendant’s conviction for using obscene language while giving speech at Black Panther meeting); *Lewis v. City of New Orleans*, 408 U.S. 913 (1972) (determining that calling officer “motherfucker” did not constitute fighting words and articulating higher expectation of restraint by officers); *Rosenfeld v. New Jersey*, 408 U.S. 901 (1972) (holding that use of profanity at public school board meeting was not punishable as legal obscenity).

<sup>245</sup> Cf. *Lawrence v. Texas*, 539 U.S. 558, 571 (2003) (“These considerations do not answer the question before us, however. The issue is whether the majority may use the power of the State to enforce [views regarding the morality of homosexual conduct] on the whole society through operation of the criminal law. ‘Our obligation is to define the liberty of all, not to mandate our own moral code.’” (quoting *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992))).

<sup>246</sup> *United States v. McDermott*, 971 F. Supp. 939, 940, 942 (E.D. Pa. 1997) (overturning disorderly conduct conviction where defendant said “This is bullshit” to security guard on military base).

<sup>247</sup> See *Miller*, *supra* note 5 (observing that curled fingers on either side of extended middle finger look like male genitalia, as well as bird); see also *supra* notes 208-14 and accompanying text.

<sup>248</sup> *Miller v. California*, 413 U.S. 15, 24 (1973).

individuals who use the gesture under disorderly conduct statutes.<sup>249</sup> This practice violates the First Amendment, wastes valuable judicial resources, and defies good sense.

There are lesser forms of offensive speech than fighting words and obscenity, forms that government actors have tried to curtail at various times. The next section discusses these forms of offensive speech, which are constitutionally protected.

### C. Profane and Offensive Speech

*The history of the law of free expression is one of vindication in cases involving speech that many citizens may find shabby, offensive, or even ugly.*<sup>250</sup>

*It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.*<sup>251</sup>

As these excerpts indicate, the Supreme Court has reiterated that profane or offensive speech, without more, warrants First Amendment protection. In *Chaplinsky v. New Hampshire*,<sup>252</sup> for example, the Court found that the State of New Hampshire could prohibit “disorderly words,” such as “profanity, obscenity, and threats,” but only to the extent that the words, when spoken face-to-face, are “plainly likely to cause a breach of the peace by the addressee.”<sup>253</sup> Writing in 1942, the Court found that epithets including “damn racketeer” and “damn Fascist” were likely to cause an average addressee to retaliate, and thus could be punished by the state.<sup>254</sup> By contrast, in *Cohen v. California*, the Court ruled that California could not use its power as a guardian of public morality to remove offensive language, such as the word

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<sup>249</sup> See, e.g., *State v. Anonymous*, 377 A.2d 1342, 1343 (Conn. Super. Ct. 1977) (overturning criminal disorderly conduct conviction where defendant was charged with making obscene gesture and holding that the middle finger gesture is not obscene under *Miller* test because it does not “arouse sexual desire”); *Commonwealth v. Kelly*, 758 A.2d 1284, 1286, 1288 (Pa. Super. Ct. 2000) (noting that defendant was charged with disorderly conduct under provision of statute prohibiting obscene gestures).

<sup>250</sup> *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 826 (2000).

<sup>251</sup> *Street v. New York*, 394 U.S. 576, 592 (1969) (citations omitted).

<sup>252</sup> 315 U.S. 568 (1942).

<sup>253</sup> *Id.* at 573.

<sup>254</sup> *Id.* at 574.

“fuck,” from the public’s vocabulary.<sup>255</sup> In overturning Cohen’s conviction for wearing a jacket with the words “Fuck the Draft” stitched onto the back, the Court reasoned that, because the government cannot make principled distinctions between offensive and nonoffensive speech, the Constitution allows individuals, rather than the government, to make their own decisions about matters of taste, style, and decorum.<sup>256</sup> The Court also stressed that an individual’s use of profane or offensive language may capture the emotive aspect of the communication more than the cognitive.<sup>257</sup> In other words, the use of language or gestures to express an emotion may have as much meaning for First Amendment purposes as “language which expresses a precise idea.”<sup>258</sup> Finally, the Court recognized the potential for the government to suppress unpopular or critical ideas by prohibiting particularly offensive words, a result that would contravene the very spirit of the First Amendment.<sup>259</sup>

In holding that the government may regulate profane or offensive language only when it rises to the level of fighting words or obscenity, the *Cohen* Court emphasized the distinction between speech in public places and speech that intrudes into the privacy of the home.<sup>260</sup> The Court stressed that First Amendment protections are stronger in public places, but recognized that, in some circumstances, the government may prohibit the intrusion of unwelcome expression into the home.<sup>261</sup> The government generally may not censor discourse in public places merely because unwilling listeners may find the speech offensive.<sup>262</sup> The Court noted that a broader rule would “effectively empower a majority to silence dissidents simply as a matter of

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<sup>255</sup> 403 U.S. 15, 22-23, 25 (1971) (noting that government may not cleanse public discussion “to the point where it is grammatically palatable to the most squeamish among us”).

<sup>256</sup> *Id.* at 25 (stating that “one man’s vulgarity is another’s lyric”).

<sup>257</sup> *Id.* at 25-26 (suggesting that Constitution protects emotive element of speech, even if it is offensive, because it may be heart of message conveyed by communicator).

<sup>258</sup> See Rutzick, *supra* note 236, at 19 (noting that word “Fuck” on Cohen’s jacket stimulated emotional response in viewers, drew attention to his political message, and expressed intensity of his own feelings with force that he may not have been able to achieve absent offensive language).

<sup>259</sup> *Cohen*, 403 U.S. at 26.

<sup>260</sup> *Id.* at 21.

<sup>261</sup> *Id.*

<sup>262</sup> *Id.*; see also Jeffrey M. Shaman, *The Theory of Low-Value Speech*, 48 SMU L. REV. 297, 313-14 (1995) (asserting that government may not ban profanity from public places because — although offensive to some — it is protected under First Amendment).

personal predilections.”<sup>263</sup> Thus, the government cannot punish use of the middle finger gesture, when used in a public place, unless the accompanying words or conduct rise to the level of fighting words.

As Justice John Paul Stevens observed more than three decades ago, however, the First Amendment “has a special meaning” in the context of television or radio broadcasting as opposed to a traditional public forum, such as a sidewalk or a public park, where the First Amendment provides its maximum protection.<sup>264</sup> The following section discusses the government’s ability to regulate use of the middle finger gesture on television. (Obviously it is not a problem on radio.)

#### D. Indecency: The D.I. on T.V.

From *Springer*<sup>265</sup> to *Seinfeld*,<sup>266</sup> the middle finger gesture is no stranger to television viewers. Although the Federal Communications Commission (“FCC” or “Commission”) — the agency charged with regulating the broadcasting industry — has not explicitly prohibited the middle finger gesture on television,<sup>267</sup> broadcasters almost always choose to censor it themselves. This section examines the Commission’s changing position regarding use of the f-word on television, concluding that the Commission likely would punish a broadcaster for airing the gesture on television.<sup>268</sup> A great deal is at stake in this debate, as a result of the recent enactment of the Broadcast Decency Enforcement Act, which increases the maximum

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<sup>263</sup> *Cohen*, 403 U.S. at 21.

<sup>264</sup> See *FCC v. Pacifica Found.*, 438 U.S. 726, 741 n.17 (1978).

<sup>265</sup> See David Barboza, “Too Hot for TV,” *the New Video Verite Is All Too Real for Some*, N.Y. TIMES, Feb. 2, 1998, at D6 (explaining how Jerry Springer show is known for displays of vulgarity and crudeness, and describing incident in which guests used the middle finger gesture).

<sup>266</sup> *Seinfeld: The Pledge Drive* (NBC television broadcast Oct. 6, 1994), available at <http://www.seinfeldscripts.com/ThePledgeDrive.html>; see also LOHEED ET AL., *supra* note 33, at 22 (noting that episode 85 of popular sitcom *Seinfeld* entitled “The Pledge Drive” featured story line in which character George Costanza believed that everyone was giving him the finger).

<sup>267</sup> See LOHEED ET AL., *supra* note 33, at 55 (noting that FCC official told author that FCC did not have any specific guidance about the middle finger gesture, in part because FCC had never received any complaints in response to the gesture being shown on television).

<sup>268</sup> *But see infra* notes 317-21 and accompanying text (noting that recent circuit court decision could change Commission’s likely response in future).

penalty for broadcasting indecent material from \$32,500<sup>269</sup> to \$325,000 per incident.<sup>270</sup>

The U.S. Code authorizes the FCC to regulate speech transmitted over broadcast airwaves, including television and radio.<sup>271</sup> Specifically, the Code prohibits the utterance of “obscene, indecent, or profane language by means of radio communication.”<sup>272</sup> Pursuant to this statutory authority, the Commission has implemented regulations prohibiting the broadcasting of obscene material via radio or television at any time of day;<sup>273</sup> the regulations also prohibit the broadcasting of indecent material between six o’clock in the morning and ten o’clock in the evening.<sup>274</sup> The Commission’s regulations currently do not apply to cable television or satellite broadcasts.<sup>275</sup>

Based on the Commission’s guidance regarding obscenity, indecency, and profanity, it is likely that the Commission would punish a broadcaster for displaying the middle finger gesture on television under its indecency or profanity regulations, but not under its authority to prohibit obscenity. To determine whether material is obscene, the Commission uses the test set forth in *Miller v. California*;<sup>276</sup> as explained above, it is doubtful that the Commission could find that the middle finger gesture satisfies this test. Thus, if the Commission has the authority to prohibit use of the middle finger gesture on television, it must derive from its ability to regulate indecency and profanity. Although the Commission has not expressly

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<sup>269</sup> See Lisa de Moraes, *A Wardrobe Malfunction and You’ll Lose Your Shirt, So to Speak*, WASH. POST, June 16, 2006, at C07 (noting President Bush’s belief that this fine was not effective deterrent to large broadcasters).

<sup>270</sup> See Broadcast Decency Enforcement Act of 2005, § 193, Pub. L. No. 109-235, 120 Stat. 491, 491 (2006); see also Peter Baker, *Bush Signs Legislation on Broadcast Decency*, WASH. POST, June 16, 2006, at A6 (summarizing legislation).

<sup>271</sup> 18 U.S.C. § 1464 (2000).

<sup>272</sup> *Id.*

<sup>273</sup> Enforcement of 18 U.S.C. § 1464 (restrictions on transmission of obscene and indecent material), 47 C.F.R. § 73.3999(a) (2002).

<sup>274</sup> *Id.*

<sup>275</sup> See, e.g., *Complaints Regarding CNN’s Airing of the 2004 Democratic National Convention*, 20 F.C.C.R. 6070, 6070-71 (2005) (distinguishing over-the-air television and radio signals from cable and satellite programs, because cable and satellite services are subscription based and, in case of cable television, transmitted over “coaxial cables or wires”). See generally Joel Timmer, *The Seven Dirty Words You Can Say on Cable and DBS: Extending Broadcast Indecency Regulation and the First Amendment*, 10 COMM. L. & POL’Y 179 (2005) (arguing that recent congressional attempt to extend regulation of broadcast indecency to cable and satellite television would exceed FCC’s authority and violate Constitution).

<sup>276</sup> 413 U.S. 15, 24 (1973). For a discussion of the *Miller* test, see *supra* Part II.B.

stated that the middle finger gesture is indecent or profane, its guidance regarding the f-word suggests that it would punish a broadcaster for displaying the middle finger gesture on television during times that indecency is prohibited. As a result, most broadcasters err on the side of caution and voluntarily blur it out.<sup>277</sup>

In *FCC v. Pacifica Foundation*,<sup>278</sup> the Supreme Court affirmed the Commission's ability to regulate speech that is indecent, but not necessarily obscene, by distinguishing broadcast speech from other forms of communication.<sup>279</sup> In sanctioning a radio station for airing, during the afternoon, comedian George Carlin's monologue on the seven "Filthy Words" one cannot say in public, the Commission offered four justifications for its power to regulate indecent material: (1) children have access to broadcast material, often without parental supervision; (2) broadcast material often is consumed in the home, a place in which the individual's privacy interests are entitled to special protection; (3) "unconsenting adults may tune in a station without any warning that offensive language is being or will be broadcast"; and (4) the government has a responsibility to license scarce spectrum space "in the public interest."<sup>280</sup>

Pursuant to these concerns, the Commission established guidelines for determining whether speech is indecent. Although the Commission has consistently applied a two-pronged test to determine whether speech is indecent — determining (1) whether the speech depicts or describes "sexual or excretory activities or organs" and (2) whether the speech is "patently offensive as measured by contemporary community standards for the broadcast medium" — the Commission's interpretation of each prong has vacillated.<sup>281</sup> These

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<sup>277</sup> Cf. Mooninites Shut Down Boston, FOXNEWS.COM, Feb. 2, 2007, <http://www.foxnews.com/story/0,2933,249378,00.html> (reporting on guerilla marketing campaign that went awry and created bomb scare in Boston, Fox News blurred image of cartoon's middle finger on its website). The device was a pixilated image of a Mooninite, an alien character from Cartoon Network's *Aqua Teen Hunger Force*. Katie Zezima, *Prosecutors Drop All Charges in Boston Terrorism Scare*, N.Y. TIMES, May 12, 2007, at A11. The devices, which resembled large Lite-Brite toys, were mistaken for bombs when discovered, leading police to close roads, bridges, and part of the Charles River for hours in response. *Id.* Prosecutors eventually dropped the charges for planting a hoax device, a felony, and disorderly conduct, a misdemeanor, against the two men who placed the devices. *Id.* The men were not charged for the depiction of the middle finger. *Id.*

<sup>278</sup> 438 U.S. 726 (1978).

<sup>279</sup> *Id.* at 731, 737-38.

<sup>280</sup> *Id.* at 731 n.2.

<sup>281</sup> *In re Citizen's Complaint Against Pacifica Found. Station WBAI(FM)*, N.Y., N.Y., 56 F.C.C.2d 94, 94 (1975).



variations largely stem from prevailing political considerations and pressure from the public and special interest groups, such as the Parents Television Council.<sup>282</sup> The Commission's current position on indecency, as reflected in its decisions regarding use of the word "fuck" on television,<sup>283</sup> suggests that it would sanction a broadcaster for airing the middle finger gesture during the time in which indecency is prohibited.

In 2001, the Commission issued a policy statement to clarify its indecency regulations and enforcement policies.<sup>284</sup> The policy statement described indecency as "language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs," emphasizing that the Supreme Court in *Pacifica* had quoted this definition with "apparent approval."<sup>285</sup> In the policy statement, the Commission eschewed a bright-line rule that certain words or gestures are always indecent; instead, it emphasized that "the *full context* in which the material appear[s] is critically important."<sup>286</sup> The policy statement discussed three important factors that guide the Commission in making patently offensive determinations: (1) whether the "description or depiction of sexual or excretory organs or activities" is explicit or graphic;<sup>287</sup> (2) "whether the material *dwells on or repeats at length*" the sexual or

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<sup>282</sup> See Clay Calvert, *Bono, the Culture Wars, and a Profane Decision: The FCC's Reversal of Course on Indecency Determinations and Its New Path on Profanity*, 28 SEATTLE U. L. REV. 61, 82 (2004) (quoting journalist Eric Deggans's observation that former "FCC Commissioner Michael Powell's efforts to control broadcast indecency have 'kickstarted an issue that speaks directly to President Bush's conservative base during an election year'"); see also FCC Campaign — Parents Television Council, <http://www.parentstv.org/PTC/fcc/Complaints.asp> (last visited Jan. 22, 2008) (detailing Parents Television Council's campaign to end broadcast indecency, and reporting that Parents Television Council campaign led to nearly 300,000 complaints between December 2003 and January 2007).

<sup>283</sup> See *infra* notes 284-326 and accompanying text.

<sup>284</sup> *In re* Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency, 16 F.C.C.R. 7999, 8016-17 (2001).

<sup>285</sup> *Id.* at 8000.

<sup>286</sup> *Id.* at 8002.

<sup>287</sup> *Id.* at 8003. The Commission stated that a direct correlation exists between the explicitness or graphicness of the description or depiction of sexual or excretory activities and the likelihood that it would find that the material was patently offensive. *Id.* at 8003. It also stated that material consisting of "double entendre or innuendo" could fall within the definition of indecency "if the sexual or excretory import is unmistakable." *Id.* at 8003-04.

excretory organ or function;<sup>288</sup> and (3) whether the material seems to pander or titillate or whether it seems to be presented for shock value.<sup>289</sup>

During the next two years, the Commission applied these guidelines to complaints on a case-by-case basis, often declining to impose sanctions if it found that use of a potentially indecent word or gesture was fleeting, unintentional, or isolated.<sup>290</sup> For example, the Commission declined to impose sanctions when a newscaster said, “Oops, fucked that one up.”<sup>291</sup> It also declined to impose sanctions when a discussion of sexual organs or activities had an educational purpose, as well as when the depiction was historically accurate or possessed artistic value, such as the depictions of adult frontal nudity in the film *Schindler’s List*.<sup>292</sup> In contrast, broadcasts that referred to sexual or excretory organs or activities in a manner that was prolonged, explicit, gratuitous, or suggestive of sexual acts with children were likely to be sanctioned.<sup>293</sup>

In 2003, rock musician Bono said “This is really, really, fucking brilliant” on live television during a Golden Globe Awards broadcast.<sup>294</sup> After receiving numerous complaints, most of which were associated with the Parents Television Council, the FCC’s Enforcement Bureau (“Bureau”) decided not to sanction the broadcaster.<sup>295</sup> In a memorandum opinion and order, the Bureau applied its indecency test.<sup>296</sup> The Bureau found that, while Bono’s remark may have been “crude and offensive,” it did not “describe or depict sexual and excretory activities and organs.”<sup>297</sup> Rather, the Bureau concluded that Bono used the word “fucking” as an adjective to add emphasis to his statement.<sup>298</sup> Referring to previous decisions, the Bureau noted that, when used as an insult rather than to depict

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<sup>288</sup> *Id.* at 8003, 8008 (noting that, “where sexual or excretory references have been made once or have been passing or fleeting in nature, this characteristic has tended to weigh against a finding of indecency”).

<sup>289</sup> *Id.* at 8003.

<sup>290</sup> *Id.* at 8004-15 (comparing cases in which Commission imposed sanctions to those in which it did not).

<sup>291</sup> *Id.*

<sup>292</sup> *Id.*

<sup>293</sup> *Id.*

<sup>294</sup> *In re Complaints Against Various Broadcast Licensees Regarding Their Airing of the “Golden Globe Awards” Program*, 18 F.C.C.R. 19,859, 19,859 (2003).

<sup>295</sup> *Id.* at 19,860-62.

<sup>296</sup> *Id.*; *see supra* text accompanying note 281.

<sup>297</sup> 18 F.C.C.R. 19,861.

<sup>298</sup> *Id.*

sexual or excretory functions, offensive language does not fall within the scope of the prohibition against indecent programming and that “[t]he use of specific potentially offensive words is not in and of itself indecent.”<sup>299</sup> Finally, in keeping with its previous statements about indecency, the Bureau reiterated that “fleeting and isolated” remarks such as Bono’s use of the f-word generally do not warrant regulatory action.<sup>300</sup>

Dissatisfied with this outcome, the Parents Television Council convinced the Commission to review the decision.<sup>301</sup> In a sweeping opinion, the Commission reversed the Bureau’s findings, stating that, “given the core meaning of the ‘F-Word,’ any use of that word or a variation, in any context, inherently has a sexual connotation, and therefore falls within the first prong of [the Commission’s] indecency definition.”<sup>302</sup> The Commission also found that the f-word satisfies the second prong of the indecency test, because it is “one of the most vulgar, graphic and explicit descriptions of sexual activity in the English language,” and it “invariably invokes a coarse sexual image.”<sup>303</sup> The Commission expressly overruled its previous position that it would not punish isolated or fleeting use of the f-word, stating that failure to enforce the indecency rules in all cases would lead to widespread use of indecency on television.<sup>304</sup>

The Commission went even further, finding that Bono’s remarks constituted profane speech, despite its previous rulings that profanity must contain an element of “blasphemy or divine imprecation.”<sup>305</sup> The Commission did not provide specific guidance for its new definition of profanity, but simply warned broadcasters that it would likely find that the f-word and similar “highly offensive” variants fit within the definition of profanity.<sup>306</sup> The opinion concluded by

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<sup>299</sup> *Id.* at 19,860-61 & n.12.

<sup>300</sup> *Id.* at 19,861.

<sup>301</sup> *In re Complaints Against Various Broadcast Licensees Regarding Their Airing of the “Golden Globe Awards” Program*, 19 F.C.C.R. 4975, 4975 (2004) (noting that Council sought reversal of Enforcement Bureau’s decision that Bono’s remark was not indecent).

<sup>302</sup> *Id.* at 4978.

<sup>303</sup> *Id.* at 4979.

<sup>304</sup> *Id.*

<sup>305</sup> *Id.* at 4981 n.37 (citing cases in which Commission had found that “sonofabitch,” “God damn it,” and “damn” were not profane).

<sup>306</sup> *Id.* at 4981. *But see* *Fox v. FCC*, 489 F.3d 444, 462 (2d Cir. 2007) (suggesting that “the FCC’s new profanity definition appears to be largely (if not completely) redundant with its indecency prohibition”), *cert. granted*, 2008 U.S. LEXIS 2361 (U.S. Mar. 17, 2008) (No. 07-582).

advising broadcasters that, in the future, the Commission would pursue license-revocation proceedings for “serious multiple violations,” and that it would issue monetary forfeitures against broadcasters for each indecent expression within a broadcast.<sup>307</sup> The Commission urged broadcasters to adopt time-delay technology in order to censor speech during live broadcasts.<sup>308</sup>

After the second *Golden Globes* decision (“*Golden Globes II*”), it seemed clear that even isolated use of the f-word on television could subject a broadcaster to monetary forfeitures. In 2005, however, the FCC declined to punish broadcasters who aired the World War II film *Saving Private Ryan*, despite the film’s repeated use of words such as “fuck,” “shit,” “bastard,” “hell,” “bullshit,” “Jesus,” and “God damn.”<sup>309</sup> In applying an indecency analysis, the Commission focused on the f-word and, as it had in *Golden Globes II*, found that the f-word described sexual activity and therefore satisfied the first prong of the indecency test.<sup>310</sup> Although it had apparently created a bright-line rule in *Golden Globes II*,<sup>311</sup> in the *Saving Private Ryan* decision the Commission ultimately concluded that the f-word was not patently offensive in the context in which it was presented; therefore, the Commission found that the language failed the second prong of the indecency analysis.<sup>312</sup> Noting that it must consider the full context of a broadcast in making an indecency determination, the Commission highlighted three considerations that affect its determination of whether material is patently offensive: (1) whether the material is explicit or graphic; (2) whether the potentially indecent material is dwelled upon or repeated; and (3) whether the material “appears to pander or is intended to titillate or shock the audience.”<sup>313</sup> Under the

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<sup>307</sup> 19 F.C.C.R. at 4982.

<sup>308</sup> *Id.* at 4980.

<sup>309</sup> See *In re Complaints Against Various Television Licensees Regarding Their Broadcast on November 11, 2004, of the ABC Television Network’s Presentation of the Film “Saving Private Ryan,”* 20 F.C.C.R. 4507, 4507, 4509 (2005).

<sup>310</sup> *Id.* at 4510.

<sup>311</sup> See *In re Complaints Against Various Broadcast Licensees Regarding Their Airing of the “Golden Globe Awards” Program*, 19 F.C.C.R. at 4978 (“[G]iven the core meaning of the ‘F-word,’ any use of that word or a variation, in any context, inherently has a sexual connotation, and therefore falls within the first prong of our indecency definition.”). Under the second prong of the indecency analysis (whether the material is patently offensive), it found that the “‘F-word’ . . . invariably invokes a coarse sexual image,” suggesting that it would almost always fall within the second prong of the test. *Id.* at 4979.

<sup>312</sup> 20 F.C.C.R. at 4510.

<sup>313</sup> *Id.* at 4512.

third factor, the Commission stated that it would consider the social, scientific, or artistic value of the material.<sup>314</sup> If a broadcast repeatedly dwells on a depiction of sexual or excretory organs or activities or appears to have little value other than “shock value,” the Commission is more likely to find that the material is indecent.<sup>315</sup> In the case of *Saving Private Ryan*, the Commission concluded that the offensive language was “integral to the film’s objective of conveying the horrors of war through the eyes of . . . soldiers, [who were] ordinary Americans placed in extraordinary situations,” and that it was not used to “pander, titillate, or shock.”<sup>316</sup> In that case, the Commission did not fine the broadcaster for airing the f-word on television.

The confused nature of the FCC’s current regulation of the f-word is highlighted by one recent case, which calls the controlling nature of *Golden Globes II* into question. In *Fox v. FCC*,<sup>317</sup> the U.S. Court of Appeals for the Second Circuit found the FCC’s “180-degree policy change” regarding the use of “fleeting expletives” to be “arbitrary and capricious.”<sup>318</sup> The court held that the policy change made in *Golden Globes II* and applied in this case represented a “significant departure” from previous FCC decisions, and that the FCC had failed to articulate a “reasoned explanation” for such a departure, as required under the Administrative Procedure Act.<sup>319</sup> (The court noted that, applying the standard the Commission had established in *Golden Globes II*, the FCC found Fox’s broadcast of two instances of fleeting and isolated uses of expletives<sup>320</sup> indecent and profane, possibly sufficient to warrant forfeiture in future cases.<sup>321</sup>)

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<sup>314</sup> *Id.*

<sup>315</sup> *See id.* at 4510-11.

<sup>316</sup> *Id.* at 4512-13.

<sup>317</sup> 489 F.3d 444 (2d Cir. 2007), *cert. granted*, 2008 U.S. LEXIS 2361 (U.S. Mar. 17, 2008) (No. 07-582).

<sup>318</sup> *Id.* at 446-47, 455.

<sup>319</sup> *See id.* at 446-47, 456 (holding that FCC was free to change rulings but needed to provide reasonable explanation). *But see* Protecting Children from Indecent Programming Act, S. 1780, 110th Cong. § 2 (2007) (authorizing FCC to regulate single words or images as indecent programming).

<sup>320</sup> 489 F.3d at 452-54 (explaining that Cher’s statement, “People have been telling me I’m on the way out every year, right? So fuck ’em,” at 2002 Billboard Music Awards and Nicole Richie’s statement, “Have you ever tried to get cow shit out of a Prada purse? It’s not so fucking simple,” at 2003 Billboard Music Awards were indecent and profane, while dismissing claim against NYPD Blue on procedural grounds and finding that use of expletive on *The Early Show* was acceptable since it occurred during “*bona fide* news interview”).

<sup>321</sup> *Id.* at 453 (noting that forfeiture does not apply retrospectively because instances in *Fox* occurred before *Golden Globes II* was decided).

The Second Circuit held that the FCC's reasoning for the policy change was insufficient and remanded the case to the FCC.<sup>322</sup> In evaluating the FCC's asserted reasoning behind the shift in policy, the court rejected both the FCC's "first blow" theory<sup>323</sup> and the FCC's argument that one cannot distinguish between a word being used as an expletive or as a literal description of sexual or excretory functions.<sup>324</sup> The court concluded that the FCC had failed "to provide a reasoned explanation for why a single, isolated expletive now should fit within the articulation of that test set forth in *Golden Globes [II]*,"<sup>325</sup> and suggested in dicta that any additional reasoning provided by the FCC probably will not "adequately respond to the constitutional and statutory challenges raised by the Networks."<sup>326</sup>

The cases of *Golden Globes II* and *Saving Private Ryan* exist at opposite ends of the spectrum — one involving a controversial musician using the f-word during a live broadcast of an awards show, the other involving a graphic but truthful depiction of the horrors of war. Because it is exceedingly difficult, if not impossible, for broadcasters to determine how the Commission would rule on a case that falls between these two examples,<sup>327</sup> broadcasters take no chances when it comes to the middle finger gesture. They will sometimes allow "references and indirect allusions" to the gesture,<sup>328</sup> but they will

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<sup>322</sup> See *id.* at 458, 467.

<sup>323</sup> *Id.* at 457-59 (noting that FCC argued that regulation of fleeting expletives is proper because to argue that viewer "may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow").

<sup>324</sup> *Id.* at 459 ("Bono's exclamation that his victory at the Golden Globe Awards was 'really, really fucking brilliant' is a prime example of a non-literal use of the 'F-Word' that has no sexual connotation.").

<sup>325</sup> *Id.* at 460.

<sup>326</sup> *Id.* at 467.

<sup>327</sup> See *infra* notes 332-33 and accompanying text (quoting broadcaster and television writer who expressed uncertainty about predicting FCC's position on indecency).

<sup>328</sup> LOHEED ET AL., *supra* note 33, at 55; see also *supra* note 266 (discussing episode of popular sitcom *Seinfeld* in which one character believes that people are giving him the finger); see also *Friends: The One with Joey's New Girlfriend* (NBC television broadcast Oct. 30, 1997), available at <http://www.twiztv.com/cgi-bin/friends.cgi?episode=http://dmca.free.fr/scripts/friends/season4/friends-405.htm> (noting that Season 4, episode 5 contained gesture simulating the middle finger, and consisting of one of main characters, Ross, pounding his backwards fists together). When asked what the gesture meant, Ross's sister, Monica, responded, "It's this dumb thing that Ross made up 'cause he was trying to fool our parents. It's a way of giving the finger, without actually having to give it. I remember I cried the night you made it up, 'cause it was the first time that I realized that I was actually cooler than my older brother."

not show someone directly giving the finger to the audience or to another person.<sup>329</sup> While some broadcasters admit that they do not want to air the gesture because “showing the bird on TV is like flipping it to the entire audience,”<sup>330</sup> most are motivated by fear of FCC fines and sanctions.<sup>331</sup>

Under *Golden Globes II*, it is a virtual certainty that a broadcaster would be fined for showing the middle finger gesture on television. Because the gesture is used as a nonverbal equivalent of the f-word, the Commission’s analysis in *Golden Globes II* would likely control; even isolated use of the gesture on television could render a broadcaster subject to forfeiture. While the Commission has not explicitly stated that the middle finger gesture falls within its definition of indecency, broadcasters seem to operate on the assumption that it does. A television writer recently told *Time Magazine*, “You don’t know where the line is . . . and that’s what’s scaring people.”<sup>332</sup> A television executive referred to the FCC’s indecency definition as a “dynamic target.”<sup>333</sup> As a result, broadcasters engage in various forms of self-censorship, such as the Fox Network’s imposition of a five-second delay in live programming.<sup>334</sup> In fact, a broadcasting industry observer commented that the recent increase in FCC fines would be a windfall for companies that manufacture time-delay technology machines.<sup>335</sup>

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*Id.*

<sup>329</sup> LOHEED ET AL., *supra* note 33, at 55.

<sup>330</sup> *Id.* (quoting representative from NBC’s Broadcast Standards Department).

<sup>331</sup> See, e.g., Frank Ahrens, *Six-Figure Fines for Four-Letter Words Worry Broadcasters*, WASH. POST, July 11, 2006, at A1 (noting that “the cost of uttering a dirty word over the air has turned a minor annoyance into a major business expense”).

<sup>332</sup> James Poniewozik, *The Decency Police*, TIME MAG., Mar. 28, 2005, at 24 (quoting John Ridley, who has written for broadcast and cable television).

<sup>333</sup> See John Eggerton, *Watch Your @\$%ing Language!*, BROADCASTING & CABLE, Aug. 28, 2006, available at <http://www.broadcastingcable.com/article/CA6366161.html?display=Feature&referral=SUPP> (quoting Roger Ogden, President of Gannett’s TV-station group).

<sup>334</sup> See Richard Huff, *“Idol” Hand’s in a Flip Flap*, DAILY NEWS (N.Y.), Mar. 25, 2004, at 104 (reporting that Fox imposed delay in its popular show, *American Idol*); cf. *supra* note 277 and accompanying text (noting that Internet news provider has self-censored the middle finger).

<sup>335</sup> See Ahrens, *supra* note 331 (noting that, after President Bush signed into law increased indecency fines, one company received more than three dozen orders per day for product that allows broadcasters to edit offensive language, up from average of less than one order per day prior to new law; another executive said that sales of his time-delay product had been “skyrocketing”).

In a recent incident, complaints from viewers of Fox's *American Idol* claimed that judge Simon Cowell was discreetly flipping the bird when he rested his middle finger on his cheek.<sup>336</sup> Denying these allegations, Cowell and Fox executives reported that his gesture was merely the result of a normal body position.<sup>337</sup> If Fox executives actually decided to censor the gesture before broadcasting it on the West Coast,<sup>338</sup> the decision would probably have led to added controversy, because the actual censorship — the blurred image masking the finger — often draws greater attention to the gesture than had it been ignored in the first place.<sup>339</sup> When a broadcaster censors verbal speech, at least viewers have a variety of words to choose from in deciding what was censored.<sup>340</sup> But when a broadcaster blurs out a hand, most viewers know that the middle finger is the gesture hidden from the audience's view.

The FCC's seemingly stricter enforcement of indecency standards may have merely been a political campaign strategy,<sup>341</sup> making the

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<sup>336</sup> See Huff, *supra* note 334, at 104 (noting that Cowell had just participated in avid disagreement with fellow judge Paula Abdul, perhaps giving him reason to give the middle finger).

<sup>337</sup> See *id.* (clarifying that Fox runs *American Idol* on five-second delay, but executives still determined that the gesture was natural body position and not the D.I.); see also *id.* (noting that, in response to charges that he intentionally gave co-host Paula Abdul the finger, Cowell said, "Sometimes I lean on my index finger. Sometimes a different finger. Sometimes two at the same time, or, God help me, even the whole hand. I never even thought about it until now.").

<sup>338</sup> See Ann Oldenburg, *They're Flipping Out over Simon's Finger*, USA TODAY, Mar. 25, 2004, at 1D (adding that Fox reviewed Simon's pose but decided to air it on West Coast with no edits).

<sup>339</sup> See, e.g., Philip Kennicott, *Theater of the Odd Birds; With Jenny Jones, Reality Is Beside the Point*, WASH. POST, Apr. 18, 2002, at C1 (suggesting that "the visual bleep, hiding the raised middle finger [is] . . . a peculiarly chaste gesture that only emphasizes it"); cf. Calvert, *supra* note 282, at 90 (observing that, when broadcasters bleep out certain words, listeners end up thinking about possible curse words that bleep replaced).

<sup>340</sup> See Calvert, *supra* note 282, at 90.

<sup>341</sup> *Id.* at 82 (describing recent indecency enforcement as political strategy to attract social conservatives). Unfortunately, the short-term goal of the 2004 election had some serious long-term effects for the First Amendment and the media. *Id.*; see also Baker, *supra* note 270 (stating that Bush administration officials decided to highlight President's signing of Broadcast Decency Enforcement Act "at a time when Bush and Republican congressional allies are trying to reassure disaffected conservative supporters that they remain committed to conservative causes"); Mike McDaniel, *Janet Jackson Started it; the Decency Debate*, HOUSTON CHRON., Jan. 1, 2005, at 3 (foreseeing Bush administration's most harmful action as its encouragement of government involvement in broadcast regulations, and resulting chilling effect on free speech).



ensorship era short-lived.<sup>342</sup> If not, however, the result of the more stringent indecency standards likely will be a chilling effect on the media that severely undercuts First Amendment principles.<sup>343</sup> The tougher regulations threaten live television and sports programming because the guidelines urge broadcasters to air these shows with five-to ten-second delays.<sup>344</sup> Even a delay of a few seconds threatens the very essence of live television.<sup>345</sup> When it comes to sports, anything can happen in a few seconds, and viewers should be entitled to watch the events as they unfold<sup>346</sup> — even if it means watching a cursing fan, player, or coach. Heightened censorship even affects the true broadcasting of the news, as it often forces broadcasters to choose between risking a fine and deleting content that has literary, artistic, or political value merely because the FCC might find the material indecent.<sup>347</sup> For example, the FCC recently found that language

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<sup>342</sup> See Bill Carter, *Broadcasters Wrestle F.C.C. for Remote; Pushed on Obscenity, Networks Turn to Delays, Even on Sports*, N.Y. TIMES, Mar. 15, 2004, at C1 (suggesting that complaints regarding indecency in broadcasting are common during election year and, after election, media companies generally prevail over indecency complaints because of boundaries of First Amendment). However, the indecency complaints for the 2004 election year appear to be harsher and greater than the norm. *Id.*

<sup>343</sup> See, e.g., Ahrens, *supra* note 331 (stating that producers and performers detected chilling effect even before Congress raised indecency fines, and noting that comedian Ralphy May purchased indecency insurance to indemnify himself against any potential FCC fines).

<sup>344</sup> See *Airing of the "Golden Globe Awards" Program*, 19 F.C.C.R. 4975, 4980 (2004) (assuming that, because technological advances allow blocking of offensive words or actions, all broadcasters should invoke delays for all programming). In making its suggestion, the FCC believes that preventing a single, gratuitous offensive word or action outweighs the importance of live broadcasting. *Id.*

<sup>345</sup> See McDaniel, *supra* note 341, at 3 (questioning how programming can be "live" if broadcasters use delay mechanisms).

<sup>346</sup> See Carter, *supra* note 342 (noting that CBS Network's plans to invoke 10-second delays for basketball games as well as for on-field football interviews are actions that are likely to upset fans expecting to witness events as they occur, not 10 seconds later); see also Eggerton, *supra* note 333 (stating that cable sports network ESPN does not time-delay its broadcasts).

<sup>347</sup> See Calvert, *supra* note 282, at 64-65 (suggesting that broadcasters over-censor themselves, fearing fines from FCC and loss of advertisers known to disassociate themselves from broadcasters airing offensive or indecent material); see also McDaniel, *supra* note 341, at 3 (observing that FCC's indecency restrictions are causing networks to compromise content on live news coverage that they have freely broadcasted in past). One example is the live coverage of former football player Pat Tillman's funeral. *Id.* Tillman gave up football to enlist in the army, and subsequently died in Afghanistan. *Id.* The public, touched by his patriotism and dedication, wanted to be part of the funeral, but when a relative began to use expletives, networks ended the live coverage. *Id.* Another recent example occurred during Fox's 2007 Emmy Awards

(including “the ‘F-Word,’ the ‘S-Word’ and various derivatives of those words”) in a Martin Scorsese documentary about blues musicians was indecent, over the objection of FCC Commissioner Jonathan Adelstein.<sup>348</sup> In a subsequent speech, Adelstein stated:

It was clear from a commonsense viewing of the program that coarse language is a part of the culture of blues musicians and performers. To accurately reflect their viewpoint and emotion for blues music requires the airing of certain material that, if prohibited, would undercut the ability of the filmmaker to convey the reality of the subject of the documentary.<sup>349</sup>

In another recent example, the president and CEO of the Public Broadcasting Service publicly stated that she was concerned about incurring substantial fines if she aired interviews of World War II veterans as part of a Ken Burns documentary, because the veterans’ descriptions of their combat experiences included potentially indecent language.<sup>350</sup>

The reality of this censorship era is that television content is increasingly determined by what government agencies, politicians, and small conservative organizations want to view or listen to, and not what the public wants.<sup>351</sup> By adopting a blanket policy of banning all variants of the word “fuck,” or even the middle finger gesture, the government is deciding what is appropriate or offensive to the public’s

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broadcast, when the network cut away from Sally Field’s acceptance speech as she said, “If the mothers ruled the world, there would be no goddamn war in the first place!” *The Emmys; Moments; Fox Cuts Away as Sally Field Speaks Her Mind*, L.A. TIMES, Sept. 17, 2007, at E4. According to a network spokesperson, Field’s speech was censored because of her use of the words “god” and “damn” together. *Id.*

<sup>348</sup> See *Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, 21 F.C.C.R. 2664, 2683-85, 2728 (2006).

<sup>349</sup> See John Eggerton, *Adelstein: Indecency Decisions Go ‘Dangerously’ Too Far*, BROADCASTING & CABLE, Aug. 24, 2006, available at <http://www.broadcastingcable.com/article/CA6365703.html> (quoting Jonathan Adelstein, Comm’r, FCC, Address to the Progress & Freedom Foundation (Aug. 20, 2006)).

<sup>350</sup> See *PBS Offers “Clean” War*, CALGARY SUN, Sept. 3, 2007, at 30 (noting that, in effort to avoid fines for indecency, PBS has offered two feeds of film, one censored and one uncut, to PBS stations). The concern arises out of four words over the course of the 14½ hour documentary: two instances of the f-word, one instance of “holy s---,” and one instance of “a--hole.” *Id.*

<sup>351</sup> See, e.g., *Complaints Against Various Broadcast Licensees Regarding Their Airing of the “Golden Globe Awards” Program*, 18 F.C.C.R. 19,859, 19,859 n.1 (2003) (finding Parents Television Council responsible for 217 of 234 initial complaints regarding Bono “Golden Globe Awards” incident).

eyes and ears.<sup>352</sup> The irony of such censorship is that this was the very result the Supreme Court in *Cohen* sought to prevent when it stated that “government officials cannot make principled distinctions” between acceptable content and vulgar or offensive material because “the Constitution leaves matters of taste and style so largely to the individual.”<sup>353</sup>

In limited circumstances, however, the government’s interest in maintaining order may outweigh individuals’ First Amendment rights. In the context of schools and courtrooms, for example, the Supreme Court has granted the government a limited ability to prohibit certain speech and conduct based on the government’s legitimate and important interest in providing a safe educational environment (in the case of schools) and a fair and efficient judicial forum (in the case of courtrooms). The following part discusses regulation of the middle finger gesture in three circumstances: (1) when the gesture is directed toward or used in the presence of a police officer; (2) when the gesture is used in a school; and (3) when the gesture is used in court. In the first circumstance, the First Amendment rights of the individual generally should prevail, but in schools and courtrooms, prohibition of the gesture generally should be permitted.

### III. COPS, CLASSROOMS, AND COURTS: SHOULD IT MATTER WHERE THE GESTURE IS USED OR TO WHOM IT IS DIRECTED?

#### A. A Matter of Discretion: The Middle Finger and Law Enforcement

Convictions for use of the middle finger often arise from its use in the presence of a police officer.<sup>354</sup> Through disorderly conduct and breach-of-peace statutes and ordinances, police officers have enormous discretion in making arrests; they often use that power to arrest individuals whose offense consists of nothing more than displaying the middle finger gesture.<sup>355</sup> For example, disorderly

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<sup>352</sup> See Calvert, *supra* note 282, at 91 (observing that FCC has adopted “paternalistic attitude” toward speech and is deciding for itself what public wants to hear). In reality, however, it is restricting speech that most of the public does not mind. *Id.*

<sup>353</sup> *Cohen v. California*, 403 U.S. 15, 25 (1971).

<sup>354</sup> See, e.g., *infra* notes 356-61 and accompanying text (discussing cases in which individuals were arrested, prosecuted, and convicted for using the middle finger gesture).

<sup>355</sup> See *Cook v. Bd. of County Comm’rs*, 966 F. Supp. 1049, 1051-53 (D. Kan. 1997) (reversing Cook’s arrest for disorderly conduct for giving parked highway

conduct or breach-of-peace convictions have resulted from the following circumstances: a state trooper observed a garbage truck driver giving the finger to other drivers;<sup>356</sup> an unruly bar patron who had been escorted out of a nightclub by a police officer gave the finger to the officer during a subsequent encounter;<sup>357</sup> an officer observed a woman giving the finger to drivers who honked their horns when she hesitated at a green traffic light;<sup>358</sup> a university alumnus gave the finger and said "Fuck you!" to two officers in a university library;<sup>359</sup> and a juvenile gave the finger and shouted "You fucker!" to officers as he passed their parked patrol car.<sup>360</sup> In all but one of these cases, the

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patrol car the middle finger as Cook was driving past car); *see also* Sandul v. Larion, 119 F.3d 1250, 1252 (6th Cir. 1997) (discussing arrest of John Sandul after police officer observed Sandul yell vulgarities and give the middle finger to abortion protesters). While passing a group of abortion protestors picketing outside a local restaurant, Sandul, a passenger in a passing car, gave the finger to the group and screamed, "F--k you." *Id.* Unfortunately for Sandul, a police officer spotted the flying bird. *Id.* The officer pursued the car to Sandul's house and arrested him for "trying to start a riot." *Id.* The Sixth Circuit concluded that Sandul's words and actions were not likely to incite an immediate breach of the peace and therefore they did not constitute fighting words. *Id.* at 1255.

<sup>356</sup> Commonwealth v. Danley, 13 Pa. D. & C.4th 75, 77-78 (1991) (finding that police officer's observation of Danley giving the middle finger gesture to other drivers did not give officer probable cause to stop Danley). After stopping Danley, the officer noticed that Danley was driving under the influence and charged him with disorderly conduct and driving under the influence. *Id.* at 76-78. The charges eventually were dismissed because the court found that the middle finger gesture is offensive but not obscene. *Id.* at 77.

<sup>357</sup> Duran v. City of Douglas, 904 F.2d 1372, 1374-75 (9th Cir. 1990). In the defendant's suit against the officer and the city for an allegedly unlawful stop and arrest, the court ruled that the defendant's conduct could not have disturbed the peace or incited a riot, because the officer was the only addressee. *Id.* at 1378.

<sup>358</sup> State v. Rivenburgh, 933 S.W.2d 698, 700 (Tex. App. 1996). Rivenburgh was in her car at a red light; when the light turned green people began to honk their horns at her because she was holding up traffic. *Id.* A police officer testified that he saw Rivenburgh make the middle finger gesture and mouth an obscenity in her rearview mirror. *Id.* The officer stopped Rivenburgh for disorderly conduct, found that she was drunk, and arrested her. *Id.* The appellate court affirmed the trial court's decision to dismiss the case based on its conclusion that the gesture did not tend to incite an immediate breach of peace. *Id.* at 700-01.

<sup>359</sup> State v. Wood, 679 N.E.2d 735, 735-39 (Ohio Ct. App. 1996) (finding that Wood's middle finger gesture to two Kent State University police officers in university library constituted fighting words under state disorderly conduct statute). The court acknowledged that the standard for fighting words is heightened in cases in which a police officer is the "offended party," because officers should expect to encounter "some degree of verbal abuse." *Id.* at 739.

<sup>360</sup> *In re Glenn*, No. 35352, 1977 Ohio App. LEXIS 7217, at \*1-2, 10-13 (Ohio Ct. App. Jan. 20, 1977) (reversing lower court's finding that juvenile engaged in

conviction was overturned on appeal.<sup>361</sup> While law enforcement officers have the right to use their arrest power to preserve order, to protect the general public, and to ensure their own safety, their training should teach them to respect, and actively protect, the First Amendment rights of middle finger users.<sup>362</sup> Case law and commentary, as well as practicality, suggest that society should expect police officers — based on their experience, training, and legal obligation to preserve the peace — to exercise restraint and tolerance when faced with criticism and offensive speech.

In reviewing disorderly conduct convictions based on an individual's use of the middle finger gesture or offensive language, courts often discuss the importance of protecting the right to speak freely, including the right to criticize the government by giving the middle finger to a police officer.<sup>363</sup> In a series of cases, the Supreme Court has stated that offensive or vulgar language directed at a police officer, without more, provides an insufficient basis for criminal liability.<sup>364</sup> The Court likely would reach the same conclusion with

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disorderly conduct, on ground that the middle finger gesture is neither fighting words nor obscene).

<sup>361</sup> The Ohio Court of Appeals upheld a disorderly conduct conviction, distinguishing nonpersonal language not directed toward a particular officer from offensive language specifically directed toward a particular officer. *Wood*, 679 N.E.2d at 739. The court reasoned that the defendant sought out the officers and continued to use abusive language and the middle finger gesture even after officers asked the defendant to desist. *Id.* at 737, 739-40.

<sup>362</sup> See NEW YORK POLICE DEPARTMENT, POLICE STUDENT'S GUIDE ch. 5, at 1, 9, 21 (2004) (stating that, when police officers are assigned to maintain order at public demonstrations, their obligation includes protecting "constitutional rights of the demonstrators to free speech and peaceful assembly," as well as protecting rights of nonparticipating members of public). A police officer's power to affect lives and liberty is "not a license to do whatever [the officer] want[s] to do." *Id.* at 9. Instead, "[a]ll police decision-making must occur within limits imposed by the United States Constitution, federal, state, and local ordinances, and precedents set forth by court decisions." *Id.* ch. 6, at 1.

<sup>363</sup> See, e.g., *Duran v. City of Douglas*, 904 F.2d 1372, 1377 (9th Cir. 1990) (discussing importance of allowing citizens to criticize police); *Cook v. Bd. of County Comm'rs*, 966 F. Supp. 1049, 1052 (D. Kan. 1997) (rejecting county's argument for per se rule that one who "flips the bird" to police officer forfeits all constitutional rights); cf. *Diehl v. State*, 451 A.2d 116, 122 (Md. 1982) (holding that individual usually does not commit criminal violation by verbally protesting police officer's unlawful order, and overturning disorderly conduct conviction where defendant refused to get into his car as ordered by police and shouted "Fuck you," "I know my rights," and "You can't tell me what to do" to officer).

<sup>364</sup> See *infra* notes 365-91 and accompanying text; see also *Brockway v. Shepard*, 942 F. Supp. 1012, 1015-18 (M.D. Pa. 1996) (reversing lower court's ruling and finding that use of the middle finger alone does not rise to level of disorderly

respect to the middle finger gesture. Justice Powell urged the Court to adopt this position in a concurring opinion in *Lewis v. New Orleans*,<sup>365</sup> in which the Court evaluated the constitutionality of a New Orleans ordinance that prohibited “wantonly” cursing, reviling, or using “obscene or opprobrious language directed toward or with reference to any member of the city police while in the actual performance of his duty.”<sup>366</sup> The case arose when a police officer stopped Mallie Lewis and her husband in their pickup truck.<sup>367</sup> The Lewises were following a police car that was transporting their son to a police station after his arrest.<sup>368</sup> Although the parties’ recollections of the encounter differed,<sup>369</sup> the officer alleged that, when he asked for Lewis’s driver’s license, she responded by saying, “You god damn m. f. police — I am going to [the Superintendent of Police] about this.”<sup>370</sup> The officer charged Mallie Lewis with breach of the peace under the ordinance.<sup>371</sup> The Louisiana Supreme Court ultimately upheld Lewis’s conviction, finding that, although the ordinance only prohibited fighting words, Lewis’s words and conduct fell within the scope of the ordinance.<sup>372</sup> The U.S. Supreme Court reversed, holding that the ordinance was “susceptible of application to protected expression” and, therefore, was constitutionally overbroad.<sup>373</sup> Specifically, the ordinance prohibited the use of “opprobrious language” toward a police officer,

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conduct); Martin A. Schwartz, *First Amendment Protects Crude Protest of Police Action*, N.Y. L.J., Feb. 20, 2001, at 3 (encouraging individuals to treat law enforcement officers with respect, but noting that, when individuals “slip up in their choice of words,” arrest and prosecution should not result); Sean P. Gallagher, Note, *First Amendment Free Speech Issues Concerning Pennsylvania’s Local and State Police When Policing Political Demonstrations*, 9 WIDENER J. PUB. L. 143, 164 (1999) (explaining that, in addition to use of the middle finger, other factors such as threats of physical force and repeated aggressive actions are needed to raise such behavior to level of disorderly conduct).

<sup>365</sup> 415 U.S. 130 (1974).

<sup>366</sup> *Id.* at 132.

<sup>367</sup> *Id.* at 131 n.1.

<sup>368</sup> *Id.*

<sup>369</sup> Lewis claimed that she did not use any profanity during the encounter and alleged that the officer said, “[L]et me see your god damned license,” and “Get your black ass in the god damned car or I will show you something.” *Id.*

<sup>370</sup> *Id.*

<sup>371</sup> *Id.* at 131.

<sup>372</sup> *New Orleans v. Lewis*, 269 So. 2d 450, 456 (La. 1972). The Louisiana Supreme Court found that directing obscene or offensive language toward a police officer while in the performance of his duty “would be unreasonable and basically incompatible with the officer’s activities and the place where such activities are performed.” *Id.*

<sup>373</sup> *Lewis*, 415 U.S. at 134.

including words “conveying or intended to convey disgrace.”<sup>374</sup> The Court found that this term could reach speech that did not rise to the level of fighting words, thus rendering the statute facially invalid.<sup>375</sup>

Although the majority in *Lewis* declined to decide whether police officers should be held to a higher standard than the average citizen when faced with verbal criticism or offensive speech,<sup>376</sup> Justice Powell addressed the issue in a concurring opinion.<sup>377</sup> A “properly trained officer,” he wrote, should exhibit a higher degree of self-restraint than the average citizen would exhibit in similar circumstances; thus, the officer should be less likely to react violently to offensive language or criticism.<sup>378</sup> Justice Powell also expressed concern about the ordinance’s broad scope, noting that it conferred on police virtually unfettered discretion in arresting and charging individuals with a violation.<sup>379</sup> He opined that police tend to invoke this type of ordinance when they lack a valid basis for arresting “objectionable or suspicious” individuals.<sup>380</sup>

Justice Powell’s view gained the support of the Supreme Court more than a decade later, in *City of Houston v. Hill*.<sup>381</sup> Justice William Brennan, for the majority, wrote that a police officer should exercise a higher degree of restraint than a private citizen when faced with vulgar or offensive language or behavior.<sup>382</sup> The Court examined the

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<sup>374</sup> *Id.* at 133.

<sup>375</sup> *Id.* at 133-34.

<sup>376</sup> *Id.* at 132 n.2 (stating that Court did not rule on question of whether fighting words “should not be punished when addressed to a police officer trained to exercise a higher degree of restraint than the average citizen”).

<sup>377</sup> *Id.* at 134-36 (Powell, J., concurring).

<sup>378</sup> *Id.* at 135.

<sup>379</sup> *Id.*; see also Wertheimer, *supra* note 183, at 839 (stating that, in both *Gooding v. Wilson* and *Lewis v. City of New Orleans*, fact that addressee was police officer compelled Court to overturn conviction). Although the Court adheres to the principle that fighting words are not protected speech, Wertheimer argued that the Court will not “uphold such proscriptions when the speech is directed at police officers” because that would “put extraordinary discretion at the hands of the police who are often the only witnesses to a defendant’s use of so-called fighting words.” *Id.* at 839.

<sup>380</sup> *Lewis*, 415 U.S. at 136.

<sup>381</sup> 482 U.S. 451 (1987).

<sup>382</sup> *Id.* at 471 (stating that Constitution requires police officers to “respond with restraint” when faced with verbal challenges to their official actions); see also *Oratowski v. Civil Serv. Comm’n*, 123 N.E.2d 146, 151 (Ill. App. Ct. 1954) (noting that “words addressed to an officer in an insolent manner do not without any other overt act tend to breach the peace because it is the sworn duty and obligation of the officer not to breach the peace and beyond this to conduct himself so as to keep others from so doing”).

constitutionality of a municipal ordinance that proscribed interrupting a police officer in the performance of the officer's duties.<sup>383</sup> Noting that, in effect, the ordinance could reach *any* verbal interruption of a police officer, the Court invalidated it on overbreadth grounds, emphasizing that the First Amendment protects a "significant amount of verbal criticism and challenge directed at police officers."<sup>384</sup> Justice Brennan asserted that "one of the principal characteristics by which we distinguish a free nation from a police state" is the ability of individuals to "oppose or challenge police action without . . . risking arrest."<sup>385</sup> He also stated that the ordinance gave police nearly unlimited discretion in making arrests.<sup>386</sup> He observed that, while violations of the ordinance's plain language occur on a daily basis, police choose to arrest only some violators. Justice Brennan concluded that the ordinance gave officers too much unguided discretion and, therefore, that it was susceptible to abuse.<sup>387</sup>

The Court in *Hill* traced the roots of the proposition that police officers should exercise a higher degree of self-restraint to the common law.<sup>388</sup> The Court cited several cases from the nineteenth and early twentieth centuries in which courts upheld a citizen's right to verbally challenge police action. In one case, an individual named Cook, who was described as "a troublesome, talkative individual, who evidently regards the police with disfavour and makes no secret of his opinions on the subject," loudly told a group of bystanders that the police had wrongfully arrested a man and that their decision to make the arrest was unjustified.<sup>389</sup> The court held that individuals should be allowed to voice their opinions as long as they are not encouraging others to violate the law, and stated that "policemen are not exempt

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<sup>383</sup> *Hill*, 482 U.S. at 461 (noting that ordinance proscribed opposing, molesting, abusing, or interrupting officer engaged in performance of law enforcement duties).

<sup>384</sup> *Id.* at 461-66.

<sup>385</sup> *Id.* at 462-63; see also Note, *Types of Activity Encompassed by the Offense of Obstructing a Public Officer*, 108 U. PA. L. REV. 388, 407 (1960) ("It may be convincingly argued that to allow the challenge of police actions is conducive to the improvement of the quality of those actions; but the strongest case for allowing challenge is simply the imponderable risk of abuse — to what extent realized it would never be possible to ascertain — that lies in the state in which no challenge is allowed." (footnote omitted)).

<sup>386</sup> *Hill*, 482 U.S. at 466 (finding that ordinance reached speech protected by Constitution and gave police "unconstitutional discretion in enforcement").

<sup>387</sup> *Id.* at 466-67.

<sup>388</sup> *Id.* at 463 n.12.

<sup>389</sup> See *id.* (quoting *The King v. Cook*, [1906] 11 Can. Crim. Cas. Ann. 32, 33 (Can.)).



from criticism any more than Cabinet Ministers.”<sup>390</sup> In another case cited in *Hill*, an English court found that an individual who objected to the arrest of a boy who had been in a fight had “done no wrong” by telling the officer that he had “no right to handcuff the boy.”<sup>391</sup> These cases lent support to the Court’s conclusion that it is reasonable for society to hold police officers to a higher standard by expecting that they will tolerate verbal criticism and abuse when carrying out their daily law enforcement duties.

State and federal courts in the United States are divided on the extent to which officers should be required to tolerate offensive speech and the extent to which the middle finger gesture is protected by the First Amendment.<sup>392</sup> Some jurisdictions have adopted the reasoning of *Hill* and Justice Powell’s concurrence in *Lewis*, finding that it is reasonable to expect police officers to abide verbal criticism.<sup>393</sup> For

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<sup>390</sup> *Id.*

<sup>391</sup> *Id.* (quoting *Levy v. Edwards*, (1823) 171 Eng. Rep. 1094 (K.B.)).

<sup>392</sup> See *Diehl v. State*, 451 A.2d 115, 121 (Md. 1982) (noting that it is not clear whether words addressed to law enforcement officer can constitute fighting words or whether “a different and higher standard applies”). Compare *H.N.P. v. State*, 854 So. 2d 630, 632 (Ala. Crim. App. 2003) (“The fact that [a police] officer encounters . . . vulgarities with some frequency, and the fact that his training enables him to diffuse a potentially volatile situation without physical retaliation . . . means that words which might provoke a violent response from the average person do not, when addressed to a police officer, amount to ‘fighting words.’”), *State v. John W.*, 418 A.2d 1097, 1106 (Me. 1980) (“We presume that a police officer would not so readily respond violently to conduct of the sort engaged in by John W.”), and *City of Bismarck v. Schoppert*, 469 N.W.2d 808, 813 (N.D. 1991) (reversing disorderly conduct conviction where “testimony confirmed the notion . . . that those well-trained and experienced police officers were able to hear Schoppert’s vulgar and abusive speech as part of their duties”), with *Duncan v. United States*, 219 A.2d 110, 112-13 (D.C. 1966) (explaining that it does not matter that insults were addressed to officer, because despite fact that it is officer’s duty to preserve peace, “he is like other human beings and under great stress of abuse may forget his official duty and fight back,” and noting that officer “does not lose his human nature simply because he wears a star”), and *City of St. Paul v. Morris*, 104 N.W.2d 902, 903 (Minn. 1960) (“While it is obvious that not every abusive epithet directed toward police officers would be sufficiently disturbing or provocative to justify arrest for disorderly conduct, there is no sound reason why officers must be subjected to indignities such as present here, indignities that go far beyond what any other citizen might reasonably be expected to endure.”).

<sup>393</sup> See *Duran v. City of Douglas*, 904 F.2d 1372, 1378 (9th Cir. 1990) (stating that police officers may resent, but must endure, insulting words and gestures directed against them); *Nichols v. Chacon*, 110 F. Supp. 2d 1099, 1107 (W.D. Ark. 2000) (recognizing that, while police officers have difficult job for which they deserve courteous treatment, they must respect individual’s right to question and challenge police). In both cases, the courts held that the arrests violated the First Amendment because the conduct directed at police officers did not amount to fighting words. *Duran*, 904 F.2d at 1378; *Nichols*, 110 F. Supp. 2d at 1110. The *Nichols* court

example, the U.S. Court of Appeals for the Second Circuit held that an individual's "right to criticize the police without reprisal" is protected by the First Amendment, and that "[s]peech directed at police officers will be protected unless" it rises far above mere "inconvenience, annoyance, or unrest."<sup>394</sup> In a case in which an individual gave the middle finger to a police officer, the U.S. Court of Appeals for the Ninth Circuit held that such "expression[s] of disapproval" of the officer's actions constitute protected speech, noting that police "may not exercise the awesome power at their disposal to punish individuals for conduct that is . . . protected by the First Amendment."<sup>395</sup> The Supreme Judicial Court of Maine noted that police officers "must exercise the greatest degree of restraint in dealing with the public," holding that the "nature of the experience, training and responsibilities of police officers" should be considered when deciding whether conduct amounts to fighting words.<sup>396</sup> An Alabama court found that, since officers encounter offensive language and conduct on a regular basis and that they are trained to handle "potentially volatile situation[s] without physical retaliation," words or gestures that might provoke an ordinary person to respond violently do not necessarily amount to fighting words when directed toward an officer.<sup>397</sup> These cases do not hold that any and all speech directed toward a police officer is protected; rather, they suggest that the fact that a trained police officer is involved in an encounter is an important consideration when determining whether an individual's conduct constitutes fighting words. In other words, a court might reach a different conclusion under the fighting words doctrine in a case involving an encounter between two citizens and a case involving a citizen and a police officer.

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emphasized that police officers "may not exercise their authority for personal motives, particularly in response to real or perceived slights to their dignity." 110 F. Supp. 2d at 1107. Addison DeBoi was awarded \$3000, to be paid by the Mobile, Alabama Police Department, after being arrested for disorderly conduct for making an obscene gesture at two police officers who were sitting in their car. See Susan Daker, *Motorists Who Made Obscene Gesture Awarded \$3,000: Police to Pay \$3K to Angry Motorist*, MOBILE REG., Aug. 5, 2007, at A6 (finding against Police Department, Mobile County District Judge stated that police officers must have "thicker skin" than members of general public).

<sup>394</sup> *Kerman v. City of New York*, 261 F.3d 229, 242 (2d Cir. 2001) (quoting *City of Houston v. Hill*, 482 U.S. 451, 461 (1987); *Posr v. Court Officer Shield No. 207*, 180 F.3d 409, 415 (2d Cir. 1999)).

<sup>395</sup> *Duran*, 904 F.2d at 1374, 1378.

<sup>396</sup> *John W.*, 418 A.2d at 1107.

<sup>397</sup> *H.N.P.*, 854 So. 2d at 632.

Similarly, the Model Penal Code, in its disorderly conduct provision,<sup>398</sup> offers three justifications for distinguishing encounters with police officers from those involving ordinary citizens. First, it improves the overall prestige of law enforcement if officers take a “conservative approach to penalizing petty wounds to policemen’s sensibilities,” because hostility toward the police often arises when individuals feel that officers are abusing the discretionary power given to them through disorderly conduct statutes.<sup>399</sup> Second, the drafters of the Code recognized “the special circumstances of the policeman’s calling and the likelihood that even his lawful actions will provoke disorderly conduct by arrestees.”<sup>400</sup> In other words, the nature of police work is especially likely to result in altercations in which outraged individuals use offensive or abusive language or gestures, and police officers frequently must deal with “the most unruly and unrefined elements of the population.”<sup>401</sup> Third, the drafters’ Official Comments discuss Justice Powell’s concurrence in *Lewis v. New Orleans*, noting that it is reasonable to expect a police officer, whose job is to preserve order, to be least susceptible to provocation.<sup>402</sup> The drafters suggest that states wishing to exclude cases involving police officers from the disorderly conduct statute should add language explicitly stating that the provision does not apply to words addressed to a police officer “unless it would deter an officer of reasonable firmness from carrying out his duties.”<sup>403</sup> Thus, states following the Model Penal Code approach would exclude most instances of individuals using the middle finger gesture toward police officers from the scope of their disorderly conduct provisions.

Some courts have rejected the idea that police officers should be held to a higher standard than average citizens when faced with the middle finger gesture or offensive language.<sup>404</sup> For example, a federal district court in Pennsylvania stated:

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<sup>398</sup> MODEL PENAL CODE § 250.2 cmt. 7 (1962).

<sup>399</sup> *Id.*

<sup>400</sup> *Id.*

<sup>401</sup> *Id.*

<sup>402</sup> *Id.*

<sup>403</sup> *Id.*

<sup>404</sup> See, e.g., *State v. Groves*, 363 N.W.2d 507, 510 (Neb. 1985) (“We specifically reject the . . . concurrence of Mr. Justice Powell in *Lewis v. City of New Orleans* . . . wherein it is suggested that the words here used cannot be fighting words when directed at a police officer because he is trained to accept such abuse without violent reaction.” (citation omitted)). The court held that the defendant’s insults, including “fuckhead” and “motherfucker,” were directed to a police officer and constituted fighting words. *Id.*

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Police officers, notwithstanding their devotion to the duty and the excellence of their training, are human beings and subject to the same failings as butchers, bakers and candlestick makers. We do not see the logic in finding that police officers can be expected to remain stoic in the face of vitriolic comments that one would expect to elicit violence from someone else. Moreover, we think it contrary to public policy to send out a signal to the general public that policemen are fair game for any amount of verbal abuse some may choose to heap upon them.<sup>405</sup>

An Ohio court expressly refused to adopt a different standard for police officers than for average citizens on the ground that such a standard would create incongruous results and potentially lead to application of a different standard for professions that “encounter the uncouth” on a regular basis.<sup>406</sup> The Nebraska Supreme Court similarly rejected the argument that police officers are “somehow less susceptible to abuse than other members of the general public.”<sup>407</sup> A concurring judge found that society does not pay police officers enough to expect them to “quash, if they could, all the same human reactions that other people have.”<sup>408</sup>

Some courts have stressed the importance of the state’s police power and the ability of law enforcement officers and other public officials to carry out their duties without being subjected to “abusive behavior” by the citizenry.<sup>409</sup> For example, a Florida appellate court stated that, “[i]f this country is to preserve in its citizens any sense of discipline and respect for others in our society,” the First Amendment cannot be interpreted to permit an arrestee to say, “Man, you pussy-assed mother fucker,” to a police officer.<sup>410</sup> The court found that an evaluation of

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<sup>405</sup> *Pringle v. Court of Common Pleas*, 604 F. Supp. 623, 629 (M.D. Pa. 1985).

<sup>406</sup> *City of Akron v. Bozic*, No. 20351, 2001 WL 1240137, at \*3 (Ohio Ct. App. Oct. 17, 2001). The court noted that such professions might include: construction workers, teachers in high-crime school districts, social workers, and judges.

<sup>407</sup> *Groves*, 363 N.W.2d at 510.

<sup>408</sup> *City of Bismarck v. Schoppert*, 469 N.W.2d 808, 814 (N.D. 1991) (VandeWalle, J., concurring).

<sup>409</sup> See, e.g., *Commonwealth v. Kelly*, 758 A.2d 1284, 1288-89 (Pa. Super. Ct. 2000) (Stevens, J., concurring) (asserting, where driver gave the middle finger and said “Fuck you, asshole” to public highway construction workers, that “[p]ublic employees, volunteer firefighters and emergency personnel” should not be expected to tolerate offensive language while carrying out their duties of protecting safety of citizens); Schwartz, *supra* note 364, at 3 (stating that private citizens have obligation to treat law enforcement officials with respect).

<sup>410</sup> *L.J.M. v. State*, 541 So. 2d 1321, 1322-23 (Fla. Dist. Ct. App. 1989).

whether offensive language constitutes fighting words based on the identity of the recipient is “unwarranted and unsupported” by First Amendment jurisprudence.<sup>411</sup> These courts reject the premise that police officers should “remain stoic in the face of vitriolic comments” that would elicit a violent response from an average citizen;<sup>412</sup> thus, the result of a fighting words analysis will be the same whether or not a police officer is involved in the encounter. However, because the middle finger gesture alone arguably does not fall within the scope of the fighting words doctrine, individuals should not be arrested merely for giving the finger to a police officer.

The best approach is illustrated by a decision of the Supreme Court of North Dakota reversing the conviction of a man who, during a confrontation with police officers, gave them the middle finger and said, “Fucking, bitching cop,” “Fuck you,” “Fuck my ass,” and “You don’t know who you’re fucking with.”<sup>413</sup> Finding that there was “no evidence that [the defendant’s] language or conduct tended to incite an immediate breach of the peace,” based on testimony from several witnesses who said that they would not have reacted violently to the defendant’s words and gesture, the court overturned the disorderly conduct conviction.<sup>414</sup> The court noted that “whether particular words are ‘fighting words’ depends on the circumstances of their utterance and the fact that the words are spoken to police is a significant circumstance.”<sup>415</sup> This approach gives judges and juries flexibility in determining whether a defendant’s conduct amounts to fighting words, while still recognizing that a police officer’s duties, obligations, and training warrant special consideration when making that determination. Given that the middle finger gesture alone should not support a disorderly conduct conviction (especially when it is directed toward a police officer), this approach allows individuals to criticize the police in a nonviolent way without risking arrest and prosecution.

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<sup>411</sup> *Id.*

<sup>412</sup> *Pringle v. Court of Common Pleas*, 604 F. Supp. 623, 626 (M.D. Pa.) (denying habeas relief where defendant had been charged with disorderly conduct after she became upset when officers were arresting her friend with what she believed to be excessive force and called officers “goddamn fucking pigs,” with crowd of 30 to 50 people watching), *rev’d on other grounds*, 778 F.2d 998 (3d Cir. 1985).

<sup>413</sup> *Schoppert*, 469 N.W.2d at 809.

<sup>414</sup> *Id.* at 812-13.

<sup>415</sup> *Id.* at 812 (quoting *Lewis v. New Orleans*, 415 U.S. 130, 135 (1974) (Powell, J., concurring)).

While appellate review serves as an important check on law enforcement discretion, the nature of police work necessarily includes exposure to protest and verbal assault; it is thus not unreasonable to ask that police officers be trained to respond to face-to-face confrontations without resorting to violence or abusing their law enforcement powers.<sup>416</sup> Disorderly conduct and breach-of-peace statutes, which are commonly used to prosecute D.I. users, vest police and prosecutors with vast latitude<sup>417</sup> in deciding whether to arrest and prosecute for speech that, in most circumstances, should fall within the scope of First Amendment protection. Professor Sanford Kadish argues that disorderly conduct and vagrancy laws provide a “disingenuous means of permitting police to do indirectly what the law forbids them to do directly,”<sup>418</sup> by giving them so much discretion in performing their law enforcement duties.<sup>419</sup> Disorderly conduct statutes typically allow officers to act in situations before any real harm to persons, property, or the state has occurred.<sup>420</sup> Concurring in *Lewis v. New Orleans*, Justice Powell argued that a New Orleans breach-of-peace ordinance gave police “virtually unrestrained power” to make arrests.<sup>421</sup> He discussed the potential for abuse of this power,

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<sup>416</sup> See Schwartz, *supra* note 364, at 3 (quoting police sergeant responding to New York criminal court ruling that dismissed disorderly conduct charge where the individual told the arresting officer, “Fuck you . . . I’m not leaving . . . It’s a free country”).

<sup>417</sup> See *Lewis*, 415 U.S. at 135 (Powell, J., concurring) (arguing that breach-of-peace ordinance “confers on police a virtually unrestrained power to arrest and charge persons with a violation”); NEW YORK POLICE DEPARTMENT, *supra* note 362, ch. 6, at 1 (suggesting that police officers have more discretion than any other category of public official).

<sup>418</sup> KADISH, *supra* note 48, at 22.

<sup>419</sup> *Id.* at 30-32.

<sup>420</sup> See, e.g., MODEL PENAL CODE § 250.2 cmt. 4(a) (1962) (noting that Model Penal Code’s disorderly conduct statute “explicitly includes utterance, gesture, or display that is ‘offensively coarse,’” even when it is unlikely to generate violent response from recipient); see also KADISH, *supra* note 48, at 21 (explaining that “American criminal law typically has extended the criminal sanction well beyond [fundamental offenses involving serious harm to persons, property, and the state,] to include very different kinds of behavior, kinds which threaten far less serious harms, or else highly intangible ones about which there is no genuine consensus, or even no harms at all”).

<sup>421</sup> In *Lewis*, Justice Powell noted that the police often invoke disorderly conduct statutes only when no other valid legal reason exists for arresting a person who seems suspicious; he remarked that the “opportunity for abuse . . . is self-evident.” 415 U.S. at 135-36 (Powell, J., concurring). The Court struck down on overbreadth grounds a New Orleans ordinance that prohibited the use of “obscene or opprobrious language toward or with reference to any member of the city police while in the actual performance of his duty.” *Id.* at 131-32.

because many arrests occur without witnesses other than the arresting officer and the arrestee.<sup>422</sup>

In addition, because members of the public are conscious of police officers' power and mindful of the potential for abuse of that power, officers must ensure that the public has no reason to perceive their behavior as unethical or improper.<sup>423</sup> Arbitrary arrests and prosecutions ultimately undercut the public's perception of law enforcement authority. When citizens perceive that police wield their authority unfairly and begin to view law enforcement as an exercise of unchecked executive power, they come to resent the entire machinery of law enforcement.<sup>424</sup> The New York Police Department's *Police Student's Guide* cautions that officers must be careful to use their discretionary powers in a way that promotes public trust and upholds the Department's ethical standards, and notes that discretion "does not entail using police authority . . . to punish individuals who are discourteous or who give officers a bad time."<sup>425</sup>

On the other hand, some have argued that allowing police officers to arrest individuals who use the middle finger gesture enables them to nip a potentially more serious situation in the bud. For example, a Texas police officer stated that his department recently cracked down on use of the middle finger gesture because the gesture often leads to violence. According to the officer, "Words [or gestures] lead to fists, fists lead to some type of weapon."<sup>426</sup> New York City's former mayor

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<sup>422</sup> *Id.* at 135-36. Justice Powell went on to state that a breach-of-peace conviction could be based on nothing more than the court's acceptance of the officer's testimony. *Id.* Similarly, the drafters of the Model Penal Code acknowledged that "even the most carefully drafted disorderly conduct statute leaves considerable room for interpretation," and that a judge is more likely to sympathize with the officer's version of the story. MODEL PENAL CODE § 250.1 cmt. 4(a) (Tentative Draft No. 13, 1961).

<sup>423</sup> NEW YORK POLICE DEPARTMENT, *supra* note 362, ch. 17, at 5; *see also* MODEL PENAL CODE § 250.2 cmt. 7(i) (1962) (suggesting that some groups perceive that arrests often occur because police officer's personal sensibilities are affronted and not because officer is striving to protect public interest, and that "[i]t would therefore improve police prestige if the law and police administration took a conservative approach to penalizing petty wounds to policeman's sensibilities"); *cf.* Peter Hirschfeld, *Animal Cruelty Case Yields 'Doggone' Dismissal*, TIMES ARGUS (Montpelier, Vt.), June 6, 2007, available at <http://www.timesargus.com/apps/pbcs.dll/article?AID=/20070606/NEWS01/706060362/1002/NEWS01> (stating that charges were dropped against woman for "staring" at police dog in "taunting/harassing manner," and noting that public defender in case "likened the act to giving a police officer the finger — a form of expression protected by rights accorded under the First Amendment").

<sup>424</sup> *See* KADISH, *supra* note 48, at 30-33.

<sup>425</sup> NEW YORK POLICE DEPARTMENT, *supra* note 362, ch. 6, at 2.

<sup>426</sup> Nicole Murray, *Teen Arrested for Making Obscene Gesture* (NBC-6 KCEN television broadcast Mar. 31, 2005), available at <http://web.archive.org/web/>

Rudolph Giuliani believed that minor offenses such as disorderly conduct and loitering should be punishable because they often lead to serious crime; accordingly, he embarked on a campaign to enforce laws against “public drinking, public urination, illegal peddling, squeegee solicitation, panhandling, prostitution, loitering, graffiti spraying, and turnstile jumping.”<sup>427</sup> He argued:

[I]f you concentrate on the little things, and send the clear message that this City cares about maintaining a sense of law and order, which is another way of saying people respecting the rights of other people, then the City as a whole will begin to become safer. The very reason laws exist in the first place is so that people’s rights can be protected, and that includes the right not to be disturbed, agitated, and abused by others.<sup>428</sup>

When it comes to mere use of the middle finger gesture, however, law enforcement officers should not have authority to make arrests for speech or conduct that rises only to the level of a minor offense or annoyance, because the First Amendment protects offensive, vulgar, or unpleasant speech.<sup>429</sup> In the case of speech and gestures directed toward a police officer, the Supreme Court has stated that officers should expect to tolerate some offensive speech, and that their training and experience should prepare them to exercise a higher level of restraint than an ordinary citizen.<sup>430</sup> Arrests for use of the middle

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<sup>427</sup> Harcourt, *supra* note 49, at 110 (discussing Mayor Giuliani’s quality-of-life initiatives); *see also* Rudolph W. Giuliani, *The Next Phase of Quality of Life: Creating a More Civil City*, Address at The Lincoln Center for the Performing Arts (Feb. 24, 1998), available at <http://www.nyc.gov/html/rwg/html/98a/quality.html>.

<sup>428</sup> Giuliani, *supra* note 427.

<sup>429</sup> *See City of Houston v. Hill*, 482 U.S. 451, 465 (1987) (noting that Supreme Court has “repeatedly invalidated laws that provide the police with unfettered discretion to arrest individuals for words or conduct that annoy or offend them”); *Cohen v. California*, 403 U.S. 15, 25 (1971) (emphasizing that “the state has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us”); *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949) (affirming that “[s]peech is . . . protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest”). While the outer limits of First Amendment protection are not clearly defined, the Court has carved out exceptions where speech rises to the level of obscenity, libel, or fighting words. *See Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942) (noting that punishment of these categories of speech has never raised problem under First Amendment); *see also supra* Part II.C.

<sup>430</sup> *See supra* notes 381-91 and accompanying text.



finger in the presence of a police officer undermine the Supreme Court's steadfast recognition that the right to criticize the government lies at the core of the First Amendment.<sup>431</sup> Commentator Mark Rutzick argues that speech intended for police officers, even if particularly abusive, contains an intellectual and political element,<sup>432</sup> and that when an individual directs speech at a police officer, the government — not the officer as an individual — is the “real target.”<sup>433</sup> Therefore, as long as the form of protest does not rise to the level of clearly proscribed conduct, such as fighting words, obscenity, or assault, a citizen should not lose First Amendment protection simply because the citizen used the middle finger in the presence of a law enforcement officer.<sup>434</sup>

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<sup>431</sup> See *Kerman v. City of New York*, 261 F.3d 229, 242 (2d Cir. 2001) (upholding individual's right to “criticize the police without reprisal”); *Webster v. City of New York*, 333 F. Supp. 2d 184, 202 (S.D.N.Y. 2004) (holding that individual's questioning of police officers' actions and authority to issue citation for drinking on private property constituted “criticism of the police officers' actions,” which is protected speech).

<sup>432</sup> Rutzick, *supra* note 236, at 10.

<sup>433</sup> *Id.* (“Even the most outrageous abuse in that context is an expression of some opinion concerning governmental policies or practices. To close the door on the most vigorous political protest would seem to do far more harm in the long run than the likelihood in the short run of violent reactive conduct or harm to the ‘sensibilities.’”).

<sup>434</sup> See MODEL PENAL CODE § 250.2 cmt. 7(iii) (1962) (suggesting that state legislatures expressly remove from scope of disorderly conduct statutes cases involving “insults that merely disturb the policeman's feelings”); Dawn Christine Egan, Note, *Fighting Words Doctrine: Are Police Officers Held to a Higher Standard, or Per Bailey v. State, Do We Expect No More from Our Law Enforcement Officers than We Do from the Average Arkansan?*, 52 ARK. L. REV. 591, 608 (1999) (proposing that standard for determining whether particular utterance constitutes fighting words should be heightened when dealing with words directed at police officers); see also *Spier v. Elaesser*, 267 F. Supp. 2d 806, 811 (S.D. Ohio 2003) (holding that officers violated Spier's First Amendment rights when they arrested him for chanting, “two, four, six, eight, fuck the police state,” in response to being told that he had to undergo patdown search before entering rally); *Sweatt v. Bailey*, 876 F. Supp. 1571, 1580 (M.D. Ala. 1995) (concluding that calling police officer “an ass” does not amount to fighting words); *H.N.P. v. State*, 854 So. 2d 630, 632 (Ala. Crim. App. 2003) (finding that flipping the bird to officer in restaurant does not amount to fighting words and therefore is not sufficient to support disorderly conduct conviction); *Ware v. City & County of Denver*, 511 P.2d 475, 475 (Colo. 1973) (deciding that defendant's utterance of “Fuck you” to law enforcement officer did not amount to fighting words); *City of Oak Park v. Smith*, 262 N.W.2d. 900, 903 (Mich. 1977) (reversing disorderly conduct conviction because defendant's spontaneous use of the middle finger toward another driver did not amount to fighting words); *People v. Stephen*, 581 N.Y.S.2d 981, 985-86 (N.Y. Crim. Ct. 1992) (finding that use of offensive language toward police officer and continued groping of one's genitals were protected speech under First Amendment); *State v. Creasy*, 885 S.W.2d 829, 831 (Tenn. Crim. App. 1994)

### B. *The Middle Finger at School*

Although the First Amendment ensures broad protection of adults' public speech,<sup>435</sup> the U.S. Supreme Court has limited the speech rights of elementary and secondary school students on school grounds.<sup>436</sup> Between 1969 and 1988, the Court handed down several significant decisions regarding student speech on campus,<sup>437</sup> but it has yet to

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(concluding that use of insulting words and profanities toward officer does not amount to fighting words).

<sup>435</sup> *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986).

<sup>436</sup> *See id.* (citing *New Jersey v. T.L.O.*, 469 U.S. 325, 340-42 (1985)) (confirming that students' constitutional rights in school are not necessarily same as those of adults in public); *see also Pangle v. Bend-Lapine Sch. Dist.*, 10 P.3d 275, 286 (Or. Ct. App. 2000) (noting that protection of students' speech is not automatically same as that of adults in "non-school setting"); Adam A. Milani, *Harassing Speech in the Public Schools: The Validity of Schools' Regulation of Fighting Words and the Consequences if They Do Not*, 28 AKRON L. REV. 187, 202 (1995) (stating that public elementary and high schools indisputably have more power to regulate student speech than society has to regulate speech in general). The Supreme Court also has recognized the First Amendment rights of teachers. In *Pickering v. Bd. of Educ.*, 391 U.S. 563, 574 (1968), the Court held that a teacher's ability to speak about a matter of public importance concerning the school could not be infringed absent a showing that the teacher knowingly or recklessly made false statements about the school. Courts also have upheld the First Amendment rights of teachers in the classroom. *See, e.g., Keefe v. Geanakos*, 418 F.2d 359, 361-63 (1st Cir. 1969) (suggesting that teacher likely would prevail on his claim that employer, high school, violated his First Amendment rights when it dismissed him for assigning article from *Atlantic Monthly* magazine to senior English class; article contained "a vulgar term for an incestuous son," and teacher discussed term and reason for its use in article with class); *Mailloux v. Kiley*, 323 F. Supp. 1387, 1392-93 (D. Mass. 1971) (holding that school board violated First Amendment rights of teacher when it fired him for leading discussion about role of taboo words in modern society; during discussion, teacher wrote "fuck" on blackboard and asked class to define word). In affirming the *Mailloux* decision, the U.S. Court of Appeals for the First Circuit noted that the constitutionality of regulations on teachers' speech should depend on several factors, including the "age and sophistication of students," the nexus between the use of the word and a valid educational purpose, and the context in which the speech occurs. *Mailloux v. Kiley*, 448 F.2d 1242, 1243 (1st Cir. 1971). *But see Lacks v. Ferguson Reorganized Sch. Dist. R-2*, 147 F.3d 718, 719, 724 (8th Cir. 1998) (upholding school district rule prohibiting use of profanity in classroom, where teacher allowed performance of student-written plays that included words "fuck," "shit," "ass," and "bitch" in her classroom, on ground that prohibition on profanity was "reasonably related to the legitimate pedagogical concern" of teaching students to comply with generally acceptable social norms); *Adams v. Campbell County Sch. Dist.*, 511 F.2d 1242, 1247 (10th Cir. 1975) (stating that high school teachers do not have unlimited freedom to discuss controversial topics or use controversial materials in class, and that school board and school administrators have right to require teachers to adopt more traditional approach in classroom).

<sup>437</sup> *See Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) (holding that

decide whether a school's authority to punish student speech extends beyond school grounds.<sup>438</sup> Based on these decisions, it appears settled that, when a student uses the D.I. on campus, school officials may either punish the student administratively, usually through suspension or expulsion,<sup>439</sup> or seek to sanction the conduct through the state's police power. While school officials likely will have the authority to punish use of the D.I. by a student in an academic setting, a student who uses the D.I. off campus, even when directing it toward a school official, should receive full First Amendment protection.<sup>440</sup>

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educators may exercise editorial control over student speech when speech is part of school-sponsored activity and regulation is "reasonably related to legitimate pedagogical concerns"; *Fraser*, 478 U.S. at 685 (holding that school district could censor student speech that it found to be vulgar, offensive, and inconsistent with school's educational mission); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969) (allowing school district to regulate student speech only where school could show that speech would cause material and substantial disruption to discipline and operation of school).

<sup>438</sup> Because the Court has not provided clear guidance, lower courts have come to different conclusions on the issue of whether student speech on the Internet, including student-created websites and Internet chat rooms, constitutes on- or off-campus speech. See also Clay Calvert, *Off-Campus Speech, On-Campus Punishment: Censorship of the Emerging Internet Underground*, 7 B.U. J. SCI. & TECH. L. 243, 285 (2001) (examining cases involving student speech on Internet and noting that Court has not provided clear standard for determining whether and when school authorities can regulate off-campus speech); Aaron H. Caplan, *Public School Discipline for Creating Uncensored Anonymous Internet Forums*, 39 WILLAMETTE L. REV. 93, 140-93 (2003) (discussing student speech on Internet and concluding that public high schools do not have authority to censor Internet speech); Bill Rankin & D. Aileen Dodd, *Students Sue Over Speech Rights; Online Chat Threatened Teacher, School Says*, ATLANTA J. & CONST., Oct. 29, 2003, at B1 (discussing lawsuit filed by two Atlanta high school students who were suspended for making allegedly threatening comments about language arts teacher on website); David Shepardson, *Teen's Suspension Overruled; Judge: Web Site Critical of Other Students Protected*, DETROIT NEWS, Dec. 2, 2002, at 1C (reporting that federal district court judge overturned suspension of student who had published critical remarks about other students on private website). Compare *Beussink v. Woodland R-IV Sch. Dist.*, 30 F. Supp. 2d 1175, 1177 (E.D. Mo. 1998) (upholding student's First Amendment rights where student created webpage critical of his high school at home and on his own computer), with *J.S. ex rel. H.S. v. Bethlehem Area Sch. Dist.*, 757 A.2d 412, 415 (Pa. Commw. Ct. 2000) (upholding permanent expulsion of student who created a website entitled "Teacher Sux" on his own computer outside of regular school hours).

<sup>439</sup> Cf. *In re Julio L.*, 3 P.3d 383, 384-85 (Ariz. 2000) (overturning conviction under state disorderly conduct statute where student said "F--- you" and kicked chair in presence of school principal).

<sup>440</sup> Cf. *Thomas v. Bd. of Educ., Granville Cent. Sch. Dist.*, 607 F.2d 1043, 1052 (2d Cir. 1979) (noting that court's willingness to give school officials autonomy in regulating student speech and conduct on campus depends on "confinement of that power within the metes and bounds of the school itself"). Of course, a student's off-

Considered the most important decision protecting students' speech rights at school,<sup>441</sup> *Tinker v. Des Moines Independent School District*<sup>442</sup> upheld the rights of three public school students to protest the Vietnam War by wearing black armbands to school.<sup>443</sup> Writing for a seven-member majority, Justice Abe Fortas wrote that school officials may not exercise absolute authority over student speech, because students retain constitutional rights even when they are on school grounds.<sup>444</sup> He emphasized that students are free to express their views, absent a constitutionally sufficient reason for limiting their speech, and that schools cannot limit students' speech to an officially sanctioned message.<sup>445</sup> Drawing upon the "marketplace of ideas" theory of speech,<sup>446</sup> Justice Fortas emphasized the importance of allowing our nation's future leaders to gain "wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues.'"<sup>447</sup>

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campus conduct is subject to prosecution for disorderly conduct if it rises to the level of fighting words. See *supra* Part II.A (discussing fighting words doctrine).

<sup>441</sup> See Erwin Chemerinsky, *Students Do Leave Their First Amendment Rights at the Schoolhouse Gates: What's Left of Tinker?*, 48 *DRAKE L. REV.* 527, 527-28 (2000) (surveying Supreme Court and lower court decisions after *Tinker* and contrasting *Tinker*'s broad protection of student speech rights with later decisions that limited scope of those rights). For additional analysis of *Tinker*, see generally Caplan, *supra* note 438, at 120-32 (providing a detailed examination of the impact of *Tinker* on free speech rights of students at public schools); Andrew D.M. Miller, *Balancing School Authority and Student Expression*, 54 *BAYLOR L. REV.* 623, 628-37 (2002) (summarizing the holdings of *Tinker* and subsequent Supreme Court cases on student speech).

<sup>442</sup> 393 U.S. 503 (1969).

<sup>443</sup> *Id.* at 504.

<sup>444</sup> *Id.* at 506 (stating that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate").

<sup>445</sup> *Id.* at 511; see also *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (noting that First Amendment "does not tolerate laws that cast a pall of orthodoxy over the classroom").

<sup>446</sup> See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (arguing that "the best test of truth is the power of the thought to get itself accepted in the competition of the market"). Holmes's theory is predicated on the belief that uninhibited and vigorous debate ultimately will uncover the truth and lead to the overall evolution of society. See Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 *DUKE L.J.* 1, 4-6 (critiquing role of marketplace-of-ideas theory in First Amendment jurisprudence).

<sup>447</sup> *Tinker*, 393 U.S. at 512. The majority also argued that personal communication among students is an inevitable and important aspect of public education. *Id.*; see also *Keyishian*, 385 U.S. at 603 (noting that classroom is particularly important embodiment of marketplace of ideas); Lisa M. Pisciotto, Comment, *Beyond Sticks & Stones: A First Amendment Framework for Educators Who Seek to Punish Student Threats*, 30 *SETON HALL L. REV.* 635, 638-39 (2000) (explaining that ACLU frequently

Despite its broad grant of free speech rights to public school students, the *Tinker* Court ultimately did not ensure full First Amendment protection for students, at least when they are on school grounds. Instead, the majority in *Tinker* concluded that, to regulate student speech, a school must show that the speech or conduct it seeks to punish would “materially and substantially” disrupt the educational process in the school.<sup>448</sup> When punishing or limiting student speech, a school must prove that its regulation was motivated by something more than a desire to prevent the “discomfort and unpleasantness” that often accompany expression of a controversial viewpoint, because “undifferentiated fear or apprehension of disturbance” is not sufficient to overcome students’ speech rights.<sup>449</sup> Thus, under *Tinker*, a student may express his or her opinions at school as long as the speech does not materially and substantially interfere with the educational process.<sup>450</sup>

In subsequent decisions, the Supreme Court has broadened the ability of school officials to regulate student speech and conduct that occur on school grounds.<sup>451</sup> In *Bethel School District No. 403 v. Fraser*,<sup>452</sup> the Court approved a school’s decision to suspend a student who delivered a speech replete with sexual references and innuendos at a high school assembly attended by 600 students.<sup>453</sup> The Court held

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argues that, if school officials do not respect students’ speech rights, students will grow up to be “disillusioned adults” who do not tolerate diverse thoughts and opinions).

<sup>448</sup> *Tinker*, 393 U.S. at 513 (stressing that student conduct that “materially disrupts classwork or involves substantial disorder or invasion of the rights of others” is not protected by First Amendment).

<sup>449</sup> *Id.* at 508-09.

<sup>450</sup> *Id.* at 513. For examples of lower courts applying the *Tinker* standard, see *Beussink v. Woodland R-IV Sch. Dist.*, 30 F. Supp. 2d 1175, 1177, 1181 (E.D. Mo. 1998) (holding that student’s speech did not materially and substantially disrupt educational process where student created webpage that used vulgar language to criticize his teachers and school administration); *Pangle v. Bend-Lapine Sch. Dist.*, 10 P.3d 275, 286-87 (Or. Ct. App. 2000) (upholding school’s expulsion of student for distributing on school campus newsletter that advocated activities including bomb threats, interference with school’s public address system, and harming school personnel, because school officials reasonably found that newsletter materially and substantially interfered with school’s basic educational mission).

<sup>451</sup> See generally Chemerinsky, *supra* note 441, at 528-30 (noting that courts have sided with schools and against students in nearly all student speech cases after *Tinker*).

<sup>452</sup> 478 U.S. 675 (1986).

<sup>453</sup> *Id.* at 685. For a thorough examination of *Fraser*, see Robert Block, Note, *Students’ Shrinking First Amendment Rights in the Public Schools: Bethel School District No. 403 v. Fraser*, 35 DEPAUL L. REV. 739, 751-60 (1986).

that school officials can prevent students from using vulgar, offensive, or lewd speech without violating the First Amendment when the officials determine that the speech would interfere with the school's educational mission.<sup>454</sup>

In *Fraser*, the Court offered several justifications for limiting students' First Amendment rights in schools. First, the Court discussed the school's role in preparing young citizens to participate in a democratic society.<sup>455</sup> A central role of the public school system is to teach young people the "habits and manners of civility" and the boundaries of socially acceptable behavior as fledgling members of our democratic community.<sup>456</sup> Next, the Court noted that school boards should have authority to determine when the duty to teach civic manners and responsibilities to our youth is undermined by the use of inappropriate or offensive speech in school.<sup>457</sup> Finally, the Court

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<sup>454</sup> *Fraser*, 478 U.S. at 685. The Bethel High School disciplinary rule at issue provided: "Conduct which materially and substantially interferes with the educational process is prohibited, including the use of obscene, profane language or gestures." *Id.* at 678 (internal quotation marks omitted).

<sup>455</sup> *Id.* at 683 (stating that "[t]he process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order").

<sup>456</sup> *Id.* at 681. The Court acknowledged that public schools also should strive to teach students to tolerate divergent viewpoints, and noted that schools must teach students to respect the social sensibilities of other members of society. *Id.*; see also *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 864 (1982) (stressing importance of public school education in preparing young people for participation in democratic society and inculcating them with values necessary for continuation of our democratic system); cf. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943) ("That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes."). *But see Klein v. Smith*, 635 F. Supp. 1440, 1442 (D. Me. 1986) (enjoining school from suspending student for giving the finger to teacher in restaurant parking lot, and stating that "First Amendment protection of freedom of expression may not be made a casualty of the effort to force-feed good manners to the ruffians among us").

<sup>457</sup> *Fraser*, 478 U.S. at 683; see also *Thomas v. Bd. of Educ., Granville Cent. Sch. Dist.*, 607 F.2d 1043, 1057 (2d Cir. 1979) (Newman, J., concurring) (noting that school officials should have authority to regulate some student speech because use of indecent or profane language on school grounds undermines school's responsibility to encourage decency and civility among students, and concluding that school's authority to punish indecent or offensive language can be reconciled with right of students to express their views and opinions); *Fenton v. Stear*, 423 F. Supp. 767, 772 (W.D. Pa. 1976) (arguing that schools should have discretion in deciding whether to punish student speech because allowing lewd or obscene student speech to remain unpunished could lead to serious consequences in school); *J.S. ex rel. H.S. v. Bethlehem Area Sch. Dist.*, 757 A.2d 412, 417 (Pa. Commw. Ct. 2000) (noting that

acknowledged the importance of shielding minors from sexually explicit or vulgar language.<sup>458</sup> The Court distinguished *Tinker* on the ground that the speech in *Fraser* did not express a political viewpoint.<sup>459</sup> In sum, *Fraser* expanded *Tinker*'s limitations on student speech, because in order to regulate student speech under *Fraser*, a school merely must show that the offensive or vulgar speech would interfere with the school's educational mission, and not that it threatened to cause a substantial and material disruption to the educational process.<sup>460</sup>

*Tinker* and *Fraser* gave school officials wide latitude to regulate student speech on school grounds.<sup>461</sup> Under *Tinker*, a school can punish a student for using the middle finger gesture in a school setting if the school can show that the student's actions would substantially and materially disrupt the educational process, while under *Fraser*, the school can regulate offensive or vulgar speech, likely including the middle finger gesture, as long as school officials make a determination that allowing students to use the gesture in the school would, in some way, interfere with its "basic educational mission."<sup>462</sup> Based on these

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local school boards have broad discretion to discipline students on campus, and that courts will not second guess school's policies absent "gross abuse of discretion").

<sup>458</sup> *Fraser*, 478 U.S. at 684; see also *Thomas*, 607 F.2d at 1057 (Newman, J., concurring) (declaring that, "[i]f the F.C.C. can act to keep indecent language off the afternoon airwaves, a school can act to keep indecent language from circulating on high school grounds"); cf. *Pangle v. Bend-Lapine Sch. Dist.*, 10 P.3d 275, 286 (Or. Ct. App. 2000) (noting that school authorities act in "surrogate parent role" when children are at school, and that parents depend on schools to maintain safe and effective learning environment for their children).

<sup>459</sup> *Fraser*, 478 U.S. at 685. The Court has emphasized that political speech and criticism of public officials lie at the core of the First Amendment and generally deserve stringent protection. See, e.g., *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270-72 (1964) (emphasizing our "profound national commitment" to protection of debate about public issues, including criticism of government and public officials).

<sup>460</sup> Milani, *supra* note 436, at 189, 206 (analyzing student speech cases and concluding that schools should target regulation of student speech at fighting words generally, rather than at content of speech).

<sup>461</sup> See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) (stating that "the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges"); *Pico*, 457 U.S. at 863-64 (emphasizing that "school boards have broad discretion in the management of school affairs"); *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) (suggesting that courts should refrain from interfering with conflicts that arise as part of school's ordinary, day-to-day operations).

<sup>462</sup> *Fraser*, 478 U.S. at 685; see also *Boroff v. Van Wert City Bd. of Educ.*, 220 F.3d 465, 468-71 (6th Cir. 2000) (upholding school's policy of prohibiting students from wearing T-shirts bearing name of musician Marilyn Manson where school found that lyrics of Marilyn Manson songs were offensive and contrary to school's educational

standards, one court approved punishment of a student who published a newsletter calling for students to make bomb threats, poison and harass school personnel, or cause explosions on school grounds.<sup>463</sup> Another court upheld the First Amendment rights of a student who used vulgar language in a website that he had created to criticize the school.<sup>464</sup> In addition, if a student's on-campus speech rises to the level of fighting words<sup>465</sup> or a true threat,<sup>466</sup> then school officials may turn to the state's police power to sanction the speech.<sup>467</sup>

Without any doubt, the Columbine High School tragedy shapes the way that teachers, administrators, judges, and parents respond to

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mission). In *Boroff*, the court cited Marilyn Manson lyrics, including: "Let's just kill everyone and let your god sort them out/Fuck it/Everybody's someone else's nigger/I know you are so am I/I wasn't born with enough middle fingers," in support of the school's determination that any Marilyn Manson T-shirt was offensive and, therefore, subject to regulation under *Fraser*. *Id.* at 470.

<sup>463</sup> *Pangle*, 10 P.3d at 287 (concluding that school reasonably believed that student's newsletter would substantially interfere with school's operations and that school's action against student was not result of "undifferentiated fear").

<sup>464</sup> *Beussink v. Woodland R-IV Sch. Dist.*, 30 F. Supp. 2d 1175, 1181 (E.D. Mo. 1998) (holding that website did not materially and substantially interfere with school's operations and that "there was no evidence to support a particularized reasonable fear of such interference").

<sup>465</sup> *See supra* Part II.A.

<sup>466</sup> States may ban "true threats" of violence without violating the First Amendment. *See, e.g., Virginia v. Black*, 538 U.S. 343, 359 (2003). In *Black*, the Court defined a true threat as a statement through which a 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." *Id.* Whether the speaker actually intends to commit the act is irrelevant. *Id.* at 359-60. The prohibition on true threats "protects individuals from the fear of violence and from the disruption that fear engenders, in addition to protecting people from the possibility that the threatened violence will occur." *Id.* at 360 (internal quotation marks omitted). *See generally* Pisciotta, *supra* note 447, at 635-60, 666-70 (analyzing true threat doctrine as applied to student speech); Robert D. Richards & Clay Calvert, *Columbine Fallout: The Long-Term Effects on Free Expression Take Hold in Public Schools*, 83 B.U. L. REV. 1089, 1095-1112 (2003) (discussing effects of Columbine High School tragedy on cases in which courts have considered whether student speech constituted true threat of violence).

<sup>467</sup> *See, e.g., In re Julio L.*, 3 P.3d 383, 384-86 (Ariz. 2000) (reversing disorderly conduct conviction where 15-year-old student said "F--- you" and kicked chair, because his actions did not constitute "seriously disruptive behavior"); *In re Louise C.*, 3 P.3d 1004, 1005 (Ariz. Ct. App. 1999) (reversing disorderly conduct conviction of student who said "Fuck this," "I don't have to take this shit," and "Fuck you" to assistant principal); *Estes v. State*, 660 S.W.2d 873, 874-75 (Tex. App. 1983) (upholding student's disorderly conduct conviction where student used the D.I. against his high school principal at school's graduation ceremony).



student speech today.<sup>468</sup> Two commentators have lamented that Columbine gave school administrators “all the reasons — legitimate or illegitimate — they needed to trounce the First Amendment rights of public school students in the name of preventing violence.”<sup>469</sup> Another commentator illustrated the dilemma facing today’s teachers and administrators by asking: “How do you distinguish between idle words and legitimate threat? Lean one way and you might be chased one day by a kid with a gun. Lean the other and you might find a lawyer with a subpoena coming after you.”<sup>470</sup> Balancing students’ on-campus speech rights with the need for order and discipline in schools never has been, nor ever will be, an easy task; the recent incidents of gun-related violence in schools have made the undertaking no less difficult.<sup>471</sup> If the cases discussed above accurately reflect judicial

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<sup>468</sup> See, e.g., Richards & Calvert, *supra* note 466, at 1094 (surveying student speech cases in wake of shootings at Columbine High School in Colorado, and noting that tragedy factors heavily into judicial decisions about whether student speech constitutes threat or disruption to educational environment).

<sup>469</sup> *Id.* at 1091. See generally Clay Calvert, *Free Speech and Public Schools in a Post-Columbine World: Check Your Speech Rights at the Schoolhouse Metal Detector*, 77 DENV. U. L. REV. 739 (2000) (analyzing student speech cases in first 12 months after Columbine shootings and concluding that culture of fear led courts to take overly restrictive stance toward student expression).

<sup>470</sup> See Tim Swarens, Editorial, *Seeking Security at School*, INDIANAPOLIS STAR, Aug. 27, 1999, at A18, cited in Pisciotta, *supra* note 447, at 640; see also John Loesing, *Bad Student Behavior Irks Parents at Sumac School*, ACORN (Agoura Hills, Cal.), May 17, 2001, available at [http://www.theacorn.com/News/2001/0517/Front\\_Page/01.html](http://www.theacorn.com/News/2001/0517/Front_Page/01.html) (noting that parents were upset at behavior of elementary school student who repeatedly gave the finger to other students and pointed his finger as if it were gun, and quoting president of teachers’ union, who observed: “If you discipline the student, the parent threatens litigation against the district [and if you don’t discipline the student, the parent of the child that has been victimized threatens to sue the district”).

<sup>471</sup> See *J.S. v. Bethlehem Area Sch. Dist.*, 757 A.2d 412, 422 (Pa. Commw. Ct. 2000) (emphasizing that, where school violence has become more common, school officials should take threats against teachers and students seriously); see also Pisciotta, *supra* note 447, at 635-38 (discussing incidents of school violence and noting that, in response to these events, school officials throughout country began to establish zero-tolerance policies regarding threats of violence by students); James Brooke, *Terror in Littleton: The Overview; 2 Students in Colorado School Said to Gun Down as Many as 23 and Kill Themselves in a Siege*, N.Y. TIMES, Apr. 21, 1999, at A1 (noting that six major incidents of gun violence in schools occurred in 1998 and discussing deadly massacre at Columbine High School, which left 12 students and one teacher dead); Sandy Davis & Oliver Uyttebrouck, *Boys Held Over in Killings; 2 Toted 13 Guns, Had Survival Gear in Van*, ARK. DEMOCRAT-GAZETTE (Little Rock, Ark.), Mar. 26, 1998, at A1 (reporting that two middle school students pulled fire alarm and opened fire on classmates and teachers as they exited building, killing four students and one teacher); cf. *J.S.*, 757 A.2d at 428 (Friedman, J., dissenting) (arguing that schools must find balance between

attitudes toward students' on-campus speech, they suggest that courts, either explicitly or implicitly, will be more likely to punish speech that threatens violence than speech that is merely vulgar or offensive.

On the other hand, school officials should not have the authority to regulate speech — including the use of the D.I. — that occurs entirely off school grounds in nonschool-related activities, even when the speech is directed toward school officials.<sup>472</sup> When they are not at school, students are subject to the same criminal and civil laws and civic responsibilities as private adult citizens.<sup>473</sup> Thus, a student's use of the D.I. off campus should receive full First Amendment protection and should be subject to punishment only when it rises to the level of fighting words under a disorderly conduct statute.<sup>474</sup>

For example, in *Klein v. Smith*, the U.S. District Court for the District of Maine enjoined a high school from suspending a student

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keeping schools safe and respecting fact that children, “no matter how sophisticated their knowledge may be, are nevertheless children, immature and naïve”).

<sup>472</sup> Lower courts have reached different results in cases involving off-campus speech. *Compare* *Klein v. Smith*, 635 F. Supp. 1440, 1442 (D. Me. 1986) (enjoining school from suspending student for giving the finger to teacher in restaurant parking lot where conduct occurred away from school at time when teacher and student were not engaged in school activities), *with* *Fenton v. Stear*, 423 F. Supp. 767, 769, 772 (W.D. Pa. 1976) (upholding school disciplinary action against student where teacher overheard student call him “prick” in shopping mall parking lot on Sunday evening). In *Fenton*, the court stated that allowing the student's speech to remain unpunished “could lead to devastating consequences in the school.” *Id.* See generally Calvert, *supra* note 438, at 284 (noting that off-campus speech should receive full First Amendment protection unless it rises to level of obscenity or fighting words). *But see* *Morse v. Frederick*, 127 S. Ct. 2618, 2622 (2007) (suggesting that school officials can regulate nonpolitical speech contrary to school's educational mission that occurs off campus at school-sponsored events). In *Morse*, the Court upheld a student's suspension for refusing to take down a banner reading “BONG HiTS 4 JESUS.” *Id.* at 2622, 2629. The students held the banner across the street from the students' school during an Olympic torch relay. *Id.* at 2622.

<sup>473</sup> See *Sullivan v. Houston Indep. Sch. Dist.*, 307 F. Supp. 1328, 1340-41 (S.D. Tex. 1969) (arguing that student speech occurring off campus is subject to same duties, obligations, and legal regulations as speech of ordinary citizens, and concluding that school officials should not have authority to regulate student speech or conduct occurring at home or on public street); Caplan, *supra* note 438, at 142 (arguing that “[s]tudents may extend their middle fingers to teachers off-campus and answer only to the civil law (and the social consequences)”).

<sup>474</sup> See *In re S.J.N-K.*, 647 N.W.2d 707, 709, 712 (S.D. 2002) (upholding disorderly conduct conviction of student who repeatedly gave the finger, mouthed words “Fuck you,” and tailgated principal of his former middle school through public parking lot). Over the dissent of two justices, the South Dakota Supreme Court noted that S.J.N-K.'s speech was not political, and found that his speech and conduct were undertaken for the sole purpose of inciting a violent reaction from the principal. *Id.* at 712; see also *supra* Part II.A (discussing fighting words doctrine).

who gave the finger to a teacher from his school in a restaurant parking lot.<sup>475</sup> The school suspended the student for ten days, pursuant to a school regulation preventing “vulgar or extremely inappropriate language or conduct directed to a staff member.”<sup>476</sup> The court rejected the school’s argument that the D.I. constituted fighting words, noting that, when the D.I. is used against a teacher, it is unlikely to provoke a violent response.<sup>477</sup> After bemoaning the fact that teachers should have to tolerate such offensive speech, the court concluded that the school’s desire to inculcate good manners among its students was not sufficient to overcome the First Amendment’s protection of freedom of speech, including student speech directed toward a teacher off school grounds and after school hours.<sup>478</sup> The court correctly concluded that, in these circumstances, the school’s interest in preserving order and authority must succumb to a student’s constitutional rights.<sup>479</sup>

Although the Supreme Court has given schools wide latitude to regulate student speech, teachers should assiduously protect students’ First Amendment rights. Because teachers occupy a role of authority over children and young adults who are learning the boundaries of

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<sup>475</sup> *Klein*, 635 F. Supp. at 1440-42.

<sup>476</sup> *Id.* at 1441.

<sup>477</sup> *Id.* at 1441 n.3.

<sup>478</sup> *Id.* at 1442.

<sup>479</sup> Most scholars agree that the Supreme Court’s student speech cases do not apply to speech that occurs entirely off campus. See, e.g., Calvert, *supra* note 438, at 245-46 (pointing out that adequate systems are in place to redress improper off-campus speech through civil remedies and criminal justice system, making school censorship of off-campus speech unnecessary); Caplan, *supra* note 438, at 140-53 (stating that *Tinker* does not apply to off-campus speech for several reasons, including: enforcement of school rules outside of school exceeds school’s jurisdiction and subjects students to liability under civil or criminal law in addition to school sanctions; parents, rather than schools, should have authority to discipline their own children for behavior that occurs outside of school’s jurisdiction; allowing schools to punish speech would create undesirable “chilling effect” on student speech that takes place in public places; and it is highly unlikely that off-campus speech will cause disruption of school’s operations sufficient to satisfy *Tinker* standard). *But see* Fenton v. Stear, 423 F. Supp. 767, 772 (W.D. Pa. 1976) (holding that school may discipline student speech where student made insulting remark about teacher in public parking lot on weekend afternoon in loud voice that others could hear, because allowing student’s speech to remain unpunished by school could undermine school’s authority in eyes of other students and community); Donna Halvorsen, *Student Can’t Be Disciplined for an Off-Campus Gesture*, NAT’L L.J., June 23, 1986, at 14 (noting that school district in *Klein* argued that the middle finger gesture is “the universal symbol of disrespect” and that school’s operation and ability to impose discipline on students would suffer if court prevented school from imposing punishment on Klein).

socially acceptable conduct, they should expect to encounter offensive speech.<sup>480</sup> As with police officers,<sup>481</sup> society does not expect teachers to tolerate severely abusive language or conduct, but proper training and their experience with young adults should prepare them to endure distasteful language or behavior.<sup>482</sup> School officials have been given broad discretion in deciding whether and how to regulate student speech. With this power comes an obligation to safeguard the First Amendment rights of young people, because the “vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.”<sup>483</sup>

### C. *The Middle Finger in Court*

*[F]ree speech and fair trials are two of the most cherished policies of our civilization, and it would be a trying task to choose between them.*<sup>484</sup>

Using the middle finger gesture in a public place almost always constitutes a valid exercise of free speech and, as a general matter, should not be a punishable offense. This Article has argued that

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<sup>480</sup> See, e.g., *Klein*, 635 F. Supp. at 1441 n.3 (acknowledging that several teachers testified that they had been given the middle finger many times, and concluding that, when used against teachers, the finger is unlikely to incite violent response); *In re Julio L.*, 3 P.3d 383, 385 (Ariz. 2000) (noting that school administrator with 18 years of experience with children had been trained to respond to outbursts by students in “non-confrontational manner” and to “depersonalize comments” made by students); Calvert, *supra* note 348, at 284 (noting that teachers and students perceive speech differently, and that “one teacher’s threat is another student’s parody”). But see *Estes v. State*, 660 S.W.2d 873, 874-76 (Tex. App. 1983) (upholding disorderly conduct conviction where student gave the finger to high school principal during graduation ceremony, reasoning that, even though principal was trained to exercise emotional self-control when interacting with students, average addressee would respond violently). For a provocative articulation of the argument that judges and school administrators should consider the context in which student speech occurs, see Richards & Calvert, *supra* note 466, at 1109-12. Professors Richards and Calvert discuss the prevalence of violent and profane language and imagery in teen pop culture, and argue that judges should not ignore this social reality by removing violent or offensive language from the context of modern teen culture. *Id.*

<sup>481</sup> See *supra* Part III.A.

<sup>482</sup> See, e.g., *Klein*, 635 F. Supp. at 1441-42 n.4 (noting that it is unlikely that professional integrity or personal resolve of teachers will “dissolve . . . in the face of the digital posturing of [a] splenetic, bad-mannered little boy”).

<sup>483</sup> *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 512 (1969) (quoting *Shelton v. Tucker*, 364 U.S. 479, 487 (1960)); see also *Chemerinsky*, *supra* note 441, at 545 (arguing that “[s]chools cannot teach the importance of the First Amendment and simultaneously not follow it”).

<sup>484</sup> *Bridges v. California*, 314 U.S. 252, 260 (1941) (Black, J.).

police officers should be held to a higher standard than average citizens when faced with offensive language or gestures and should not use their law enforcement authority to punish individuals solely for using the middle finger gesture.<sup>485</sup> However, just as public schools have greater discretion to punish individuals who use the middle finger gesture on school grounds,<sup>486</sup> judges should have the ability to prohibit use of the middle finger gesture during legal proceedings. As previously discussed, speech in public schools receives special consideration under the First Amendment based on the school's educational mission and its role as guardian of young people.<sup>487</sup> Similarly, courts perform an essential public function — the administration of justice — the integrity of which can be threatened when an individual behaves in a disruptive and disrespectful manner in a courtroom.<sup>488</sup> Using the middle finger in court, especially when the gesture is directed toward a judge or an officer of the court, threatens to inhibit the fair and efficient administration of justice, erode the authority and legitimacy of the judicial system, and jeopardize the constitutional rights of litigants. In order to prevent these harms from occurring, judges should have the authority to punish individuals who intentionally disrupt judicial proceedings by giving the middle finger to a judge, jury, or an officer of the court. This authority is most often exercised through the power to hold individuals in contempt of court.<sup>489</sup>

The contempt power is as old as our legal system and is considered to be an inherent aspect of judicial authority.<sup>490</sup> Although it can be

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<sup>485</sup> See *supra* Part III.A.

<sup>486</sup> See *supra* Part III.B.

<sup>487</sup> See *supra* Part III.B.

<sup>488</sup> See, e.g., *Commonwealth v. Williams*, 753 A.2d 856, 863 (Pa. Super. Ct. 2000) (deciding that defendant's use of the middle finger gesture in court "was not merely personally attacking the [t]rial [j]udge . . . but rather he was belittling the entire process of the administration of justice").

<sup>489</sup> See, e.g., *infra* notes 500-13 and accompanying text (discussing cases in which individuals were held in contempt for using the middle finger gesture or offensive language in court).

<sup>490</sup> See, e.g., *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987):

That the power to punish for contempts is inherent in all courts, has been many times decided and may be regarded as settled law. It is essential to the administration of justice. The courts of the United States, when called into existence and vested with jurisdiction over any subject, at once became possessed of the power.

*Id.* at 795 (citation and internal quotation marks omitted), cited in Ronald J. Rychlak, *Direct Criminal Contempt and the Trial Attorney: Constitutional Limitations on the*

exercised to punish individuals who use offensive language or the middle finger gesture in court,<sup>491</sup> not all use of the gesture in court constitutes contempt. It is difficult to make generalizations about the precise scope of the contempt power. Not only do contempt statutes, local court rules, and the case law interpreting them vary from jurisdiction to jurisdiction, from court to court, and from judge to judge, but also contempt often is decided summarily and without a written opinion.<sup>492</sup> With these limitations in mind, this section examines the contours of the contempt power, discusses the circumstances in which a judge may lawfully exercise the contempt power to punish use of the middle finger gesture in court, and briefly considers policy justifications that support a judge's ability to eclipse the First Amendment rights of individuals who use the gesture in court.

In a case involving a defendant who referred to his alleged assailant as a "chicken shit" during cross-examination, the U.S. Supreme Court held that a "single isolated usage of street vernacular, not directed at the judge or any officer of the court, cannot constitutionally support [a] conviction of criminal contempt."<sup>493</sup> The Court held that the defendant's use of the phrase "chicken shit" — the sole basis for his contempt conviction — did not "constitute an imminent . . . threat to the administration of justice," because the defendant did not disobey a court order, talk loudly, behave boisterously, or attempt to obstruct the judge or an officer of the court from performing judicial tasks.<sup>494</sup>

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*Contempt Power*, 14 AM. J. TRIAL ADVOC. 243, 248 n.16 (1990) (describing history of contempt power); *Cooke v. United States*, 267 U.S. 517, 539 (1925) ("The power of contempt which a judge must have and exercise in protecting the due and orderly administration of justice and in maintaining the authority and dignity of the court is most important and indispensable."); *Ex parte Robinson*, 86 U.S. 505 (1873).

The power to punish for contempts is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders, and writs of the courts, and consequently to the due administration of justice. The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power.

*Id.* at 510.

<sup>491</sup> See *infra* notes 500-13 and accompanying text.

<sup>492</sup> Rychlak, *supra* note 490, at 264; see also *Illinois v. Allen*, 397 U.S. 337, 343 (1970) (noting that "trial judges confronted with disruptive, contumacious, stubbornly defiant defendants must be given sufficient discretion to meet the circumstances of each case. No one formula for maintaining the appropriate courtroom atmosphere will be best in all situations").

<sup>493</sup> *Eaton v. City of Tulsa*, 415 U.S. 697, 698 (1974).

<sup>494</sup> *Id.* (quoting *Craig v. Harney*, 331 U.S. 367, 376 (1947)) (internal quotation

In a concurring opinion, Justice Powell emphasized that the defendant had not directed the phrase toward the judge or a court officer; he also noted that the judge had not warned the defendant that his language was inappropriate before issuing the contempt citation.<sup>495</sup> Implicit in these opinions is the suggestion that the result may have been different had the defendant specifically directed his remark (or, presumably, the middle finger gesture) to the trial judge.

Similarly, a Massachusetts appellate court overturned a contempt conviction where a woman gave the finger to her alleged abuser as he exited the courtroom after a judicial proceeding.<sup>496</sup> The court found that the gesture was a “single, isolated event” that was “not directed at the judge but rather at the person who the defendant claimed had beaten and threatened her,” and held that, in these circumstances, her use of the gesture was not sufficient to warrant a contempt conviction.<sup>497</sup> An Ohio appellate court overturned a contempt sanction where a juvenile gave the finger to his mother after the conclusion of a delinquency hearing.<sup>498</sup> Reasoning that the administration of justice was not obstructed because the proceeding had ended and the judge had left the courtroom, the court concluded that the trial court erred in holding the juvenile in contempt.<sup>499</sup>

Although jurisdictions have different statutory provisions, local court rules, and interpretive case law regarding contempt, most require the presence of four factors in order to hold an individual in contempt: (1) misconduct, (2) committed in the presence of or toward the court (including the judge and other officers of the court), (3) with the intent to obstruct judicial proceedings, and (4) with the effect of actual disruption of judicial proceedings.<sup>500</sup> These elements

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marks omitted).

<sup>495</sup> *Id.* at 700 (Powell, J., concurring).

<sup>496</sup> *Commonwealth v. Contach*, 712 N.E.2d 100, 100-04 (Mass. App. Ct. 1999).

<sup>497</sup> *Id.* at 103.

<sup>498</sup> See *In re Philip G.*, No. 20020009, 2000 Ohio App. LEXIS 2884, at \*3-4 (Ohio Ct. App. June 30, 2000).

<sup>499</sup> *Id.* But see *Woody v. State*, 572 P.2d 241, 242-43 (Okla. Crim. App. 1977) (upholding contempt conviction where contemnor gave the middle finger to two police officers who had testified against him during disorderly conduct trial, despite contemnor's argument that judge did not see the gesture and proceeding had ended).

<sup>500</sup> See *Commonwealth v. Williams*, 753 A.2d 856, 861 (Pa. Super. Ct. 2000); see also *State v. Sheahan*, 502 N.E.2d 48, 50 (Ill. App. Ct. 1986) (defining contempt as “conduct which is calculated to embarrass, hinder, or obstruct the court in its administration of justice or derogate from its authority or dignity, thereby bringing the administration of law into disrepute”); *State v. Friel*, 497 A.2d 475, 477 (Me. 1985) (defining contempt as “actual and willful obstruction of the administration of justice committed in the actual presence of the court”).

make it virtually inevitable that an individual will be held in contempt for giving the finger to a judge or other judicial officer in a courtroom during a legal proceeding. For example, a judge of the Court of Common Pleas of Philadelphia ordered Walter Williams to prison at the conclusion of a probation revocation hearing.<sup>501</sup> Williams registered his displeasure by saying “Fuck you!” to the judge, punctuating his statement with his middle finger.<sup>502</sup> Much to Williams’s further dismay, the judge found him guilty of two counts of direct criminal contempt and imposed two additional consecutive sentences of five months and twenty-nine days, one for the language and one for the gesture.<sup>503</sup> On appeal, the Superior Court of Pennsylvania found that Williams’s behavior satisfied each of the elements of contempt, but because the gesture and accompanying offensive word have the same meaning and were used simultaneously, the court concluded that Williams could only be found guilty of a single count of criminal contempt.<sup>504</sup>

Walter Williams is not the only person who has used a middle finger to express an opinion about a legal proceeding. A Wisconsin court held Paul Van Laarhoven in contempt after he said, “[a]ll of you, you guys are stupid. I don’t know how you can live with yourselves,” and gave the finger to a jury that had just returned a guilty verdict against his brother.<sup>505</sup> A Wisconsin appellate court upheld his conviction in order to vindicate the court’s “dignity and authority,” noting that the trial judge’s contempt sanction was especially appropriate because the jury had been exposed to disrespectful words and gestures in the courtroom.<sup>506</sup> During the trial of Steve Allen West for criminal damage to property, West used profane language, kicked a computer monitor, and “made obscene gestures toward the deputy in the courtroom.”<sup>507</sup> After West’s outburst, three jurors indicated to the judge that they could not consider the case without being influenced

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<sup>501</sup> *Williams*, 753 A.2d at 859.

<sup>502</sup> *Id.*

<sup>503</sup> *Id.*

<sup>504</sup> *Id.* at 864-65.

<sup>505</sup> *State v. Van Laarhoven*, 279 N.W.2d 488, 489 (Wis. Ct. App. 1979). After the judge sentenced Van Laarhoven to 10 days in the county jail, Van Laarhoven and the judge engaged in a discussion about when the jail sentence was to begin. *Id.* During the discussion, Van Laarhoven told the judge, “[Y]ou’re the biggest asshole I’ve ever seen,” whereupon the judge increased his sentence to 30 days in jail. *Id.*

<sup>506</sup> *Id.* at 489-90.

<sup>507</sup> *West v. State*, 610 S.E.2d 159, 160 (Ga. Ct. App. 2005).



by his behavior.<sup>508</sup> The judge held West in contempt and declared a mistrial.<sup>509</sup>

In one of the most audacious examples of disruptive courtroom behavior, defendant Dennis Eugene Friel, on trial for “committing aggravated criminal mischief by damaging the property of various churches,” placed his fingers in his ears each time the judge spoke to him, referred to the judge as “crooked,” stuck out his tongue, snorted and sighed loudly, wandered around the courtroom, arrived at court forty minutes late, and made “facial grimaces” in the presence of the judge and jury.<sup>510</sup> During a bench conference, Friel stated that he “had to piss” and began to walk out of the courtroom.<sup>511</sup> The judge informed Friel’s attorney that he would not allow Friel to enter and exit the courtroom at his leisure, whereupon, “directing his actions toward the bench, Friel lifted his hand with his middle finger pointing upwards and stated, smirkingly, ‘Next time I will ask to go number one.’”<sup>512</sup> The judge held Friel in contempt and had him removed from the courtroom.<sup>513</sup>

While the middle finger gesture should be treated as protected speech in most circumstances, its use in court can disrupt and delay legal proceedings and jeopardize litigants’ constitutional rights, as the preceding cases demonstrate. Furthermore, allowing individuals to use the gesture in court undermines the authority and legitimacy of the entire judicial system, ultimately eroding the public’s confidence in the judiciary and our legal system.<sup>514</sup> The right to criticize the government — including the judiciary — is a critical aspect of our system of government and should be vigorously protected.<sup>515</sup> So, too, are the rights of litigants and criminal defendants to a fair and orderly trial. According to Justice Felix Frankfurter, “Free speech is not so absolute or irrational a conception as to imply paralysis of the means

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<sup>508</sup> *Id.* at 161.

<sup>509</sup> *Id.*

<sup>510</sup> *State v. Friel*, 497 A.2d 475, 476 (Me. 1985).

<sup>511</sup> *Id.*

<sup>512</sup> *Id.* at 477.

<sup>513</sup> *Id.*

<sup>514</sup> See Catherine Therese Clarke, *Missed Manners in Courtroom Decorum*, 50 MD. L. REV. 945, 1005-08 (1991) (linking courtroom etiquette to public confidence in judicial system).

<sup>515</sup> See, e.g., *Bridges v. California*, 314 U.S. 252, 270-71 (1941) (finding that “an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect,” in case involving out-of-court criticism of legal proceeding).

for effective protection of all the freedoms secured by the Bill of Rights.”<sup>516</sup> When a party’s conduct is so disruptive that it threatens to obstruct justice, a judge may hold the party in contempt as a way of maintaining order in the courtroom, preserving the integrity of the trial, and upholding the Constitution’s promise of a fair and speedy trial.<sup>517</sup> In the case of Steve Allen West,<sup>518</sup> for example, the defendant’s behavior was so disruptive that the jurors were not able to remain impartial, forcing the judge to declare a mistrial in order to protect West’s constitutional rights.<sup>519</sup> The judge’s ability to enforce proper courtroom behavior provides a safeguard to ensure fairness in the judicial process.<sup>520</sup>

Although it may be argued that judges should be subject to the same standards as police officers and other elected officials, Justice Frankfurter persuasively articulated the difference between judges and political figures within our constitutional scheme that enables judges to exercise the contempt power:

It will not do to argue that a state cannot permit its judges to resist coercive interference with their work in hand because other officials of government must endure such obstructions . . . . Presidents and governors and legislators are political officials traditionally subject to political influence and the rough and tumble of the hustings, who have open to them traditional means of self-defense. In a very immediate sense, legislators and executives express the popular will. But judges do not express the popular will in any ordinary meaning of the term. The limited power to punish for contempt which is here involved wholly rejects any assumption that judges are superior to other officials. They merely exercise a function historically and intrinsically different. From that difference is

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<sup>516</sup> *Id.* at 282 (Frankfurter, J., dissenting).

<sup>517</sup> See *Int’l Union v. Bagwell*, 512 U.S. 821, 831-32 (1994) (noting that court’s contempt power is “at its pinnacle . . . where contumacious conduct threatens a court’s immediate ability to conduct its proceedings, such as where a witness refuses to testify, or a party disrupts the court”); see also U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed.”).

<sup>518</sup> *West v. State*, 610 S.E.2d 159, 160 (Ga. Ct. App. 2005). For further discussion of this case, see *supra* notes 507-09 and accompanying text.

<sup>519</sup> *West*, 610 S.E.2d at 160-61.

<sup>520</sup> See *Clarke*, *supra* note 514, at 965 (arguing that courtroom etiquette rules remove impediments to proper “collection of information and discovery of the truth”).

drawn the power which has behind it the authority and the wisdom of our whole history.<sup>521</sup>

The effectiveness and legitimacy of our judicial system derives in part from the public's perception that decisions result from "solemn deliberation" and a dignified process, rather than from "arbitrary judgment calls emanating from a chaotic, undignified social institution."<sup>522</sup> Maintaining this perception is important at both an individual and an institutional level. Enabling individual judges to command respect and dignity in the courtroom helps to foster respect for the judicial system as a whole.<sup>523</sup> Permitting boisterous or disorderly conduct in the courtroom would undermine the power of courts by diminishing the public's faith in the integrity of the judicial system.<sup>524</sup> While courts undoubtedly have authority to enforce judgments and orders against citizens, "a judgment is enforceable only if people believe it is true, and not simply because a judge has power."<sup>525</sup>

#### CONCLUSION

Most reported prosecutions for use of the *digitus impudicus* involve a private citizen giving the middle finger to (or using it in the presence of) an authority figure, such as a police officer, a judge, or a school principal. The U.S. Supreme Court repeatedly has emphasized that speech critical of the government deserves stringent and steadfast First Amendment protection.<sup>526</sup> Courts have interpreted this sweeping

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<sup>521</sup> *Bridges*, 314 U.S. at 292 (Frankfurter, J., dissenting).

<sup>522</sup> *Clarke*, *supra* note 514, at 964.

<sup>523</sup> *See, e.g.*, *Mitchell v. State*, 580 A.2d 196, 200 (Md. 1990) (noting that whether misconduct in courtroom causes immediate delay or miscarriage of justice in particular proceeding is not important issue, because such misconduct creates general atmosphere of disrespect for courts and legal system, and concluding that "[d]ignity, decorum, and respect are essential ingredients in the proper conduct of a courtroom, and therefore in the proper administration of justice" (quoting *Attorney Grievance Comm'n v. Alison*, 565 A.2d 660 (Md. 1989))).

<sup>524</sup> *See Clarke*, *supra* note 514, at 962 (suggesting that talking or laughing during courtroom proceedings is breach of etiquette that negatively affects public's perception of court's power, because laypersons who observe misconduct by lawyers, parties, and witnesses likely will show same type of disrespect for judge and court).

<sup>525</sup> *See id.*

<sup>526</sup> *See N.Y. Times v. Sullivan*, 376 U.S. 254, 270-77 (1964) (discussing our nation's "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials"); *see also City of Houston v. Hill*, 482 U.S. 451, 462-63 (1987) (stating that

statement to include direct verbal criticism and challenges to most government officials,<sup>527</sup> as long as the speech does not rise to the level of fighting words, obscenity, or defamation. The *digitus impudicus* does not fall under any of these exceptions.<sup>528</sup> Thus, the government cannot constitutionally prohibit its use, except in the limited circumstances in which such a prohibition is essential to serving the missions of our educational and judicial systems. While targets of the gesture may find it impolite, insulting, offensive, vulgar, rude, or crude, the Supreme Court in *Houston v. Hill* eloquently stated that “the First Amendment recognizes, wisely we think, that a certain amount of expressive disorder not only is inevitable in a society committed to individual freedom, but must itself be protected if that freedom would survive.”<sup>529</sup> In other words, even if “[t]hese days, ‘the bird’ is flying

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“[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”); Rutzick, *supra* note 236, at 10 (“To close the door on the most vigorous political protest would seem to do far more harm in the long run than the likelihood in the short run of violent reactive conduct [by a public authority figure] or harm to the ‘sensibilities.’”).

<sup>527</sup> Authority figures theoretically are less likely to be provoked to a violent reaction or to suffer harmed sensibilities than private citizens. See *Hill*, 482 U.S. at 453, 461 (striking down city ordinance that proscribed “interrupt[ing] a police officer in the performance of his or her duties”); see also *Webster v. City of New York*, 333 F. Supp. 2d 184, 189-92, 201-02 (S.D.N.Y. 2004) (holding that partygoers’ comments toward police constituted protected criticism of officers’ actions where one “hysterical” partygoer was “screaming [her] head off,” and several of her companions loudly questioned whether police had authority to make any arrests during hostile encounter between police and citizens). Based on the nature of their work, authority figures — especially police officers — are expected to tolerate some potentially offensive speech activity. See *Lewis v. New Orleans*, 408 U.S. 913, 913 (1972) (Powell, J., concurring) (suggesting that fighting words exception to First Amendment may apply differently when words are addressed to police officer rather than to ordinary citizen, because officers are “trained to exercise a higher degree of restraint”); see also Rutzick, *supra* note 236, at 10 (“Whatever is assumed about the reaction of the average individual to offensive words, police are employed to keep the peace rather than breach it and are assumed to be trained to remain calm in the face of citizen anger . . .”).

<sup>528</sup> See *Sullivan*, 376 U.S. at 283 (holding that states may impose liability for libelous speech in limited circumstances); *supra* Part II.A (arguing that the middle finger gesture, when used alone, does not constitute fighting words); *supra* Part II.B (arguing that the middle finger gesture does not fall within scope of legal definition of obscenity).

<sup>529</sup> *Hill*, 482 U.S. at 472.

everywhere,”<sup>530</sup> it is a small price to pay for the freedom of speech that our Constitution protects.

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<sup>530</sup> *Coggin v. Texas*, 123 S.W.3d 82, 90 n.3 (Tex. App. 2003) (quoting *Irvine*, *supra* note 4).

# **EXHIBIT C**

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An ironic old woman showing her middle finger

**NO EVIL GROUP-1.jpg**

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Katie Couric

SO INNOCENT .... wonder what made her do this 😊

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**This is Lucas he was 7 months old there**

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Lucas Middle Finger

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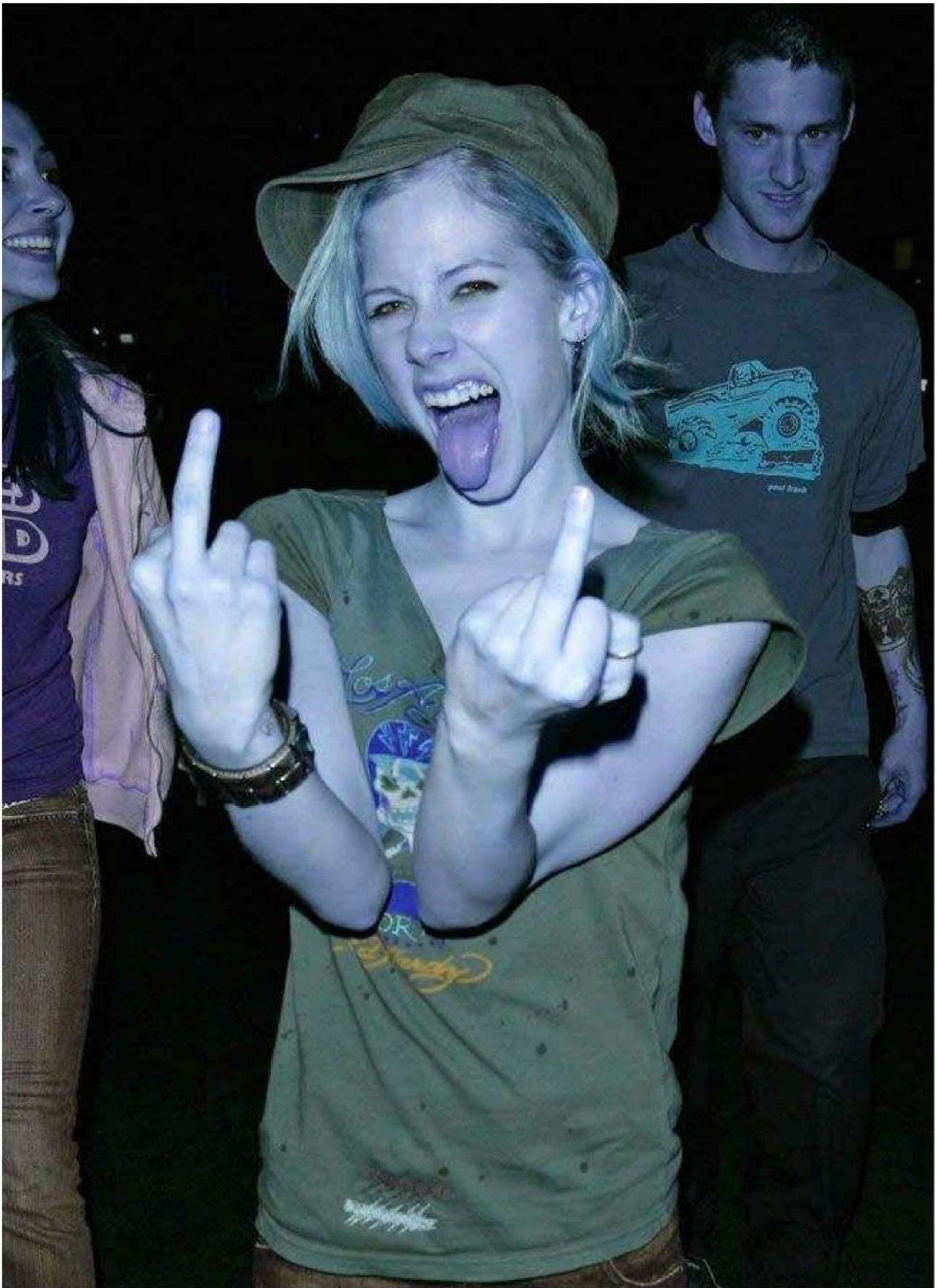




















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## Alex



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Alex

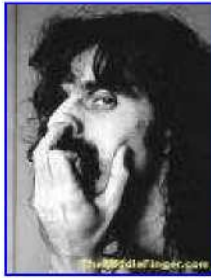
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**\*Damn she's cute\***

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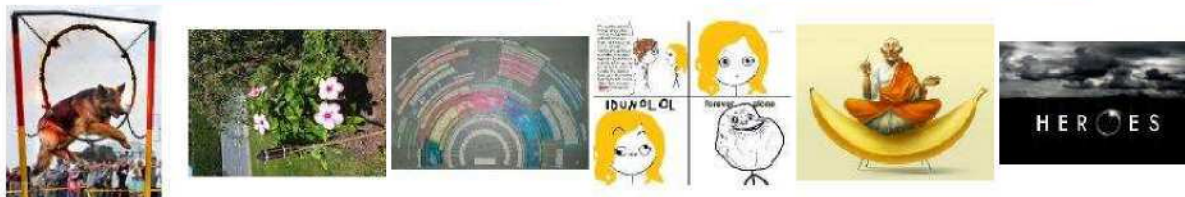
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# **EXHIBIT D**





# **EXHIBIT E**



## Darren Aronofsky's Middle Finger A 'Digit Of Interest' In FCC's Golden Globes Indecency Inquest

By Seth on January 16, 2009 at 2:28 AM

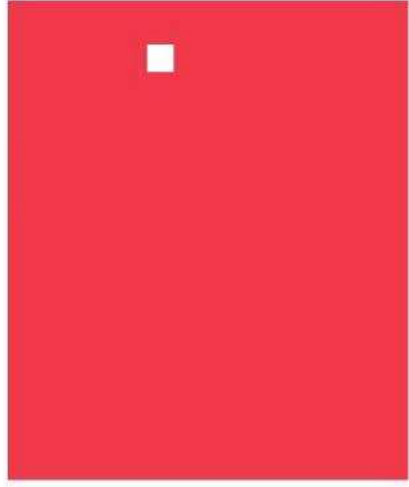
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A three-hour delay meant some of those colourful, Prosecco-fuelled Golden Globes moments of celebrity spontaneity—such as Darren Aronofsky lovingly serving Mickey Rourke some Pi during Rourke's acceptance speech—were blacked out for US audiences completely.

Much of the country did manage to witness the offending digit-extension (above), however. That in turn elicited 18 separate complaints to the FCC from outraged Americans—citizens not all that different from you or us, save for their distaste for Aronofsky's obscene (but artistically assured) hand gesture. [From the L47:](#)

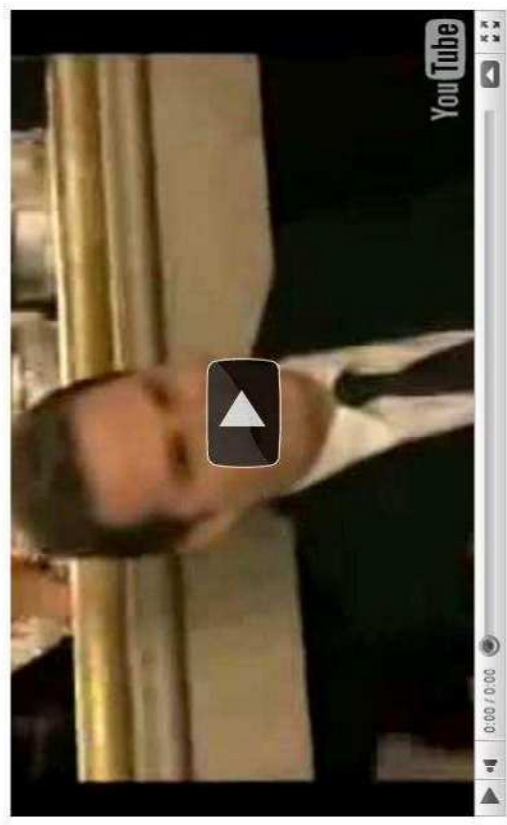
“We received 18 complaints about the Golden Globes telecast,” FCC spokeswoman Edie Herman wrote in an e-mail to The Times, “and the commission is reviewing the matter.”



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An NBC spokeswoman confirmed that it aired the Aronofsky gesture on the live telecast. "On the West Coast, it went to black for two seconds," the spokeswoman e-mailed. "Beyond that, we have no further comment."

We're in a very different climate from the post-NippleGate days, when the FCC could strike terror in the hearts of network-heads by affixing ludicrous penalty sums to exposed parts (somewhere in the vicinity of \$250k per mammilla) of Janet Jackson's anatomy. Of course, that would be overturned four years later, and it's going to take something a lot worse than a middle finger to shock more than 18 Americans these days—especially when the airwaves have run amok with vulgarities like [Rosie Live!](#)



Breaking: FCC reviewing NBC's Golden Globes telecast [LAT]

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