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A New York City police officer observed Carl Washington flailing his arms and raising his hands at the officer while shouting "F__k you, I'm not leaving. It's a free country!" The officer arrested Washington for disorderly conduct and resisting arrest. In a decision rendered by Judge Carol Edmead, the New York City Criminal Court dismissed the charges, finding that Washington's conduct did not constitute disorderly conduct, and without probable cause to arrest Washington for disorderly conduct, he could not be convicted of resisting arrest.[1] The court found that Washington was doing no more than "exercising his constitutional rights to express his views regarding members of the Police Department."[2]

The decision provoked a wide range of reactions. Many police officers were angry with the ruling because it could "foster open

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1. N.Y.L.J., Dec. 22, 2000, at 25.
2. *Id.*

disrespect of [police] officers."[3] A New York City detective complained that "every perp [now] has a license to pile more abuse on us."[4] A police sergeant, however, "shrugged off verbal abuse as part of the job,"[5] saying that "' Cops are supposed to have thick skins.'"[6]

New York City Mayor Rudolph Giuliani denounced the ruling as "totally absurd."[7] According to the mayor, Judge Edmead was "just wrong. She gets an F in Law."[8] But Norman Siegel, Executive Director of the New York Civil Liberties Union, claimed that the mayor's analysis was "legally incorrect."[9]

Who drew the correct legal conclusion, the mayor or Mr. Siegel? An impressive body of U.S. Supreme Court and lower court decisional law demonstrates that Mr. Siegel got it right, and that it was Mayor Giuliani who deserved the failing grade in freedom of speech. It was not the first time. The Second Circuit has judicially noticed the restrictive First Amendment stance consistently taken by the City of New York under the Giuliani administration: "We would be ostriches if we failed to take judicial notice of the heavy stream of First Amendment litigation generated by New York City."[10] The court cited numerous decisions in which the federal courts either preliminarily enjoined or found violative of free speech some action or policy of the city. The decisions encompass a broad range of free speech activities, including expressive activities at City Hall,[11] participating in a march and rally,[12] marching in police uniform in a parade,[13] public employee access to the media without prior governmental approval,[14] and

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3. D. Goldiner, *Cleared of Cursing Cop,* DAILY NEWS, Jan. 2, 2001, at 6.
4. *Id.*
5. *Id.*
6. *Id.*
7. E. Lipton, *Giuliani Deplores Ruling on Cursing an Officer,* N.Y. TIMES, Jan. 3, 2001, at 3B.
8. *Id.*
9. *Id.*
10. Tunick v. Safir, 209 F.3d 67, 85 (2d Cir. 2000).
11. Housing Works, Inc. v. Safir, 1998 WL 823614 (S.D.N.Y. Nov. 25, 1998), 1998 WL 409701 (S.D.N.Y. July 21, 1998). *See also* United Yellow Cab Drivers Ass'n v. Safir, 1998 WL 274295 (S.D.N.Y. May 27, 1998), *aff'd as modified,* No. 98-7737 (2d Cir. May 27, 1998) (unpublished disposition).
12. Million Youth March, Inc. v. Safir, 155 F.3d 124 (2d Cir. 1998).
13. Latino Offaro Ass'n v. City of New York, 966 F. Supp. 2d 238 (S.D.N.Y. 1997).
14. Harman v. City of New York, 140 F.3d 111 (2d Cir. 1998).

museum control over contents of exhibits without risking loss of municipal funding because the city found particular exhibits offensive.[15]

Make no mistake about it. The mayor is right that cursing a police officer is inappropriate behavior. Private citizens should treat the police with respect, just as the police should treat private citizens with respect. But the reality is that both private citizens and police officers at times use inappropriate language. Yes, police officers have been known to direct profanity at private citizens. In *Mackinney v. Nielsen,*[16] for example, the officer allegedly told the suspect, "I don't give a f__k about your civil rights."[17] The constitutional question is not whether cursing a police officer is appropriate, but whether it can be criminalized consistent with the First Amendment.

The decisional law reveals some fairly common factual scenarios. The "F-word," a__hole, and the use of the middle finger seem to be the curses of choice in the reported decisions.[18] Disorderly conduct is the police charge of choice when vulgarities are directed at an officer.[19] New York Penal Law § 240.20 defines disorderly conduct in part as the use of "abusive or obscene language, or . . . an obscene gesture" in a "public place" with the "intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof."[20] The New York Court of Appeals has upheld the constitutionality of this provision.[21]

When an individual is charged with disorderly conduct based on a vulgarity directed at a police officer, the first issue is whether the conduct constitutes disorderly conduct as defined in the state penal law.

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15. Brooklyn Inst. Arts & Sciences v. City of New York, 64 F. Supp. 2d 184 (E.D.N.Y. 1999). The holdings in these and the other "Giuliani Administration" free speech decisions are described in Tunick v. Safir, 209 F.3d 67, 85–86 (2d Cir. 2000).
16. 69 F.3d 1002 (9th Cir. 1995).
17. *See also* Lewis v. New Orleans, 415 U.S. 130 (1974) (officer told arrestee "Get your black ass in the god damned car. . . .").
18. *See, e.g.,* Lewis v. New Orleans, 415 U.S. 130 (1974); Buffkins v. Omaha, 922 F.2d 465 (8th Cir. 1990), *cert. denied,* 502 U.S. 898 (1991); Duran v. City of Douglas, 904 F.2d 1372 (9th Cir. 1990); Russoli v. Salisbury Township, 126 F. Supp. 2d 821 (E.D. Pa. 2000); Nichols v. Chacon, 110 F. Supp. 2d 1099 (W.D. Ark. 2000); Cook v. Board County Commr's, 966 F. Supp. 1049 (D. Kan. 1997); Brockway v. Shepherd, 942 F. Supp 1012 (M.D. Pa. 1996).
19. *See, e.g., Buffkins v. Omaha,* 922 F.2d 465; *Russoli v. Salisbury Township,* 126 F. Supp. 2d 821; *Nichols v. Chacon,* 110 F. Supp. 2d 1099; *Cook v. Board County Comm'rs,* 966 F. Supp. 1049; *Brockway v. Shepherd,* 942 F. Supp 1012; People v. Washington, N.Y.L.J., Dec. 22, 2000, at 25.
20. N.Y. PENAL LAW § 240.20(3).
21. People v. Tichenor, 89 N.Y.2d 769, *cert. denied,* 522 U.S. 918 (1997).

That is a question of state law. If defendant's conduct constitutes disorderly conduct, it is necessary to determine whether the conduct is protected by the free speech clause of the First Amendment.[22] Although these two questions are analytically distinct, an important relationship exists between them. This is because a state disorderly conduct statute, like any other legislative enactment concerning expressive activities, must be interpreted and applied in a manner consistent with the First Amendment.[23]

The right to protest government policies and actions is the essence of free speech. In *New York Times Co. v. Sullivan,*[24] Justice Brennan stated that the First Amendment reflects the national commitment "that debate on public issues should be uninhibited, robust, wide-open, and that it may well include vehement, caustic, and sometimes sharp attacks on government and public officials."[25]

But not all speech is protected by the First Amendment. Two categories of unprotected speech are "obscenity" and "fighting words." Obscenity is defined by the three-part test formulated in *Miller v. California.*[26] Under this test, material is obscene if it appeals to a prurient interest, describes or depicts sexual conduct in a patently offensive way, and lacks serious artistic, political, or scientific value. The *Miller* test, however, does not pertain to obscene language, only to expression that is "in some significant way, erotic."[27] Therefore, the mere fact that an individual used obscene language does not bring the case within the "obscenity" category of unprotected speech. In *Cohen v. California,*[28] the Supreme Court held that Cohen's conviction for wearing a jacket bearing the words "F__k the Draft" inside a Los Angeles courthouse to protest the Vietnam war violated his free speech rights. However vulgar or distasteful, the message on Cohen's jacket

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22. A related question might arise as to whether the defendant's conduct is protected by the free speech clause of the state constitution. Some states give greater free speech protection under their state constitutions than is afforded under the federal Constitution. J. FRIESEN, STATE CONSTITUTIONAL LAW § 5.1 (3d ed. 2000).
23. *See, e.g.,* State v. Huffman, 228 Kan. 186, 612 P.2d 630 (1980) (construing disorderly conduct statute as limited to "fighting words").
24. 376 U.S. 254 (1964).
25. *Id.* at 270.
26. 413 U.S. 15 (1973).
27. Cohen v. California, 403 U.S. 15, 20 (1971). *See* Brockway v. Shepherd, 942 F. Supp. 1012 (M.D. Pa. 1996) (discussing difficulty of applying *Miller* test to obscene gestures directed at police officers).
28. 403 U.S. 15 (1971).

was protected by the First Amendment. The Court recognized that speech has an "emotive function" which sometimes is more important than the content of the message sought to be communicated. Because "one man's vulgarity is another's lyric,"[29] the Constitution leaves matters of taste to the individual, not to the government. Those who found Cohen's jacket offensive "could effectively avoid further bombardment of their sensibilities simply by averting their eyes."[30]

Cohen, however, does not resolve whether vulgarities directed at a police officer are protected by the First Amendment.[31] Unlike those present in the Los Angeles courthouse while Cohen was wearing his jacket, a police officer at whom vulgarities are directed might not have the self-help remedy of simply looking the other way. The pertinent free speech issue is whether vulgarities directed at the officer fall within the other category of unprotected speech: "fighting words."

The genesis of the fighting words doctrine is the Supreme Court's 1942 decision in *Chaplinsky v. New Hampshire.*[32] Chaplinsky had been distributing literature on the streets denouncing all religion as a "racket." After the crowd became restless and a disturbance occurred, a police officer escorted Chaplinsky away. On the way they encountered the city marshall. Chaplinsky told the marshall, "You are a God damned racketeer" and a "damned Fascist and the whole government of Rochester are Fascists. . . ."[33]

Chaplinsky was convicted under a New Hampshire statute providing that "no person shall address any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name. . . ."[34] The state supreme court had interpreted the statute to prohibit the use of language that "men of common intelligence would understand would be words likely to cause an average addressee to fight,"[35] that is, "face-to-face words plainly likely to cause a breach of the peace by the addressee,

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29. *Id.* at 25.
30. *Id.* at 21.
31. Not all vulgarities are protected by the First Amendment. *See, e.g.,* Bethel School District No. 403 v. Fraser, 478 U.S. 675 (1986) (high school student's lewd speech not protected by First Amendment); FCC v. Pacifica Fountain, 438 U.S. 726 (1978) (mid-day radio broadcast of George Carlin's "filthy words" monologue not protected by First Amendment).
32. 315 U.S. 568 (1942).
33. *Id.* at 569.
34. *Id.* (quoting state statute).
35. *Id.* at 573 (quoting state court decision).

likely to cause a breach of the peace by the addressee, words whose speaking constitute a breach of the peace by the speaker. . . ."[36]

The U.S. Supreme Court held that neither the statute, as construed, nor Chaplinsky's conviction under it violated the First Amendment. The decision has come to stand for the proposition that "fighting words," face-to-face epithets "likely to provoke the average person to retaliation, and thereby cause a breach of the peace," are not protected by the First Amendment.[37]

Read in isolation, *Chaplinsky* lends some support to the conclusion that cursing at a police officer is not protected by the First Amendment. Subsequent Supreme Court decisions, however, have given *Chaplinsky* a narrow interpretation. Although the Supreme Court has not overruled the *Chaplinsky* holding that "fighting words" are not protected speech, "it has not sustained a conviction on the basis of the fighting words doctrine since *Chaplinsky*."[38]

The fighting words doctrine appears to be limited to the face-to-face epithets and not applicable to speech directed at an audience, even an angry audience. In *Terminello v. City of Chicago,*[39] an abrasive speaker, addressing a hostile audience, denounced various political and racial groups, and condemned the crowed as "snakes," "scum," and "slimy scum."[40] In holding that Terminello's conviction violated the First Amendment, Justice Douglas said that free speech may "best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger."[41]

In *R.A.V. v City of St. Paul,*[42] the Court rejected the argument that fighting words have at most de minimis expressive value and are not deserving of any constitutional protection. Justice Scalia, writing for the Court, stressed that the Court had stated, not that fighting words are no part of expressive ideas, but only that they constitute " ' no *essential*

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36. *Id.*
37. *Id.* at 574.
38. G. GUNTHER & K. SULLIVAN, CONSTITUTIONAL LAW 1078 (13th ed. 1997).
39. 337 U.S. 1 (1949).
40. *Id.* at 17 (Jackson, J., dissenting).
41. *Terminiello,* 337 U.S. at 5. The jury had been instructed that Terminiello could be convicted if his speech included expression that "stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance." *Id.* at 3. The Court held that this instruction violated the free speech clause.
42. 505 U.S. 377 (1992).

part of any exposition of ideas.' "[43] The Court in *R.A.V.* held that content discrimination within the "fighting words" category is presumptively unconstitutional.

Moreover, the Supreme Court consistently has held under the free speech clause that the mere fact that an individual directs a vulgarity at a law enforcement officer is not sufficient to sustain a conviction. In *Gooding v. Wilson,*[44] Gooding said to a police officer attempting to restore order during an antiwar demonstration, "White son of a bitch, I'll kill you" and "you son of a bitch, I'll choke you to death." He was convicted of violating a Georgia statute prohibiting the use in another's presence of "opprobrious words or abusive language, tending to cause a breach of the peace."[45] The Supreme Court overturned Gooding's conviction because the First Amendment bars the government from criminalizing the use of language because it may be offensive to the listener. Unlike *Chaplinsky,* the Georgia state courts failed to limit the statute to words that "'have a direct tendency to cause acts of violence by the person to whom individually, the remark is addressed.'"[46] The state courts had interpreted the statute as authorizing conviction even if, under the particular circumstances, the addressee was unable to retaliate with force, so long as the epithets "might still tend to cause a breach of the peace at some future time."[47] The state law interpretation made it a crime "merely to speak words offensive to some who hear them, and so sweeps too broadly."[48] The fighting words doctrine is limited to utterances likely "'to incite an immediate breach of the peace.'"[49]

In *Lewis v. New Orleans,*[50] Ms. Lewis, during an encounter with a police officer, told the officer, "you god damn m.f. policeman—I am going to [the superintendent of police] about this."[51] She was convicted of violating a Louisiana statute making it unlawful for a person

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43. *Id.* at 385 (quoting *Chaplinsky,* 315 U.S. at 572 (emphasis added in *R.A.V.*)).
44. 405 U.S. 518 (1972).
45. *Id.* at 519 (quoting state statute).
46. *Id.* at 523.
47. *Id.* at 526 (quoting state court decision).
48. *Id.* at 527.
49. *Id.* at 525 (quoting *Chaplinsky,* 315 U.S. at 572). *See* GEOFFREY STONE ET AL., THE FIRST AMENDMENT 82 (1999). The use of vulgarities in earshot of a police officer that amounts to "nothing more than advocacy of illegal action at some indefinite future time . . . is not a sufficient basis to punish [the] speech." Hess. v. Indiana, 414 U.S. 105, 108–09 (1973).
50. 415 U.S. 130 (1974).
51. The Supreme Court used the abbreviation "m.f." *Id.* at 132 n.1.

"wantonly to curse or revile or to use obscene or opprobrious language toward or with reference to any member of the city police while in the actual performance of his duty."[52] The Louisiana Supreme Court sustained the conviction on the ground that cursing a police officer is incompatible with the performance of the officer's duties. The U.S. Supreme Court, however, overturned the conviction on free speech grounds. The Court held that the Louisiana statute violated the First Amendment because it "punishes only spoken words,"[53] and the state supreme court had not limited the statute to fighting words. Relying upon *Cohen* and *Gooding,* the Court held that because the statute as construed by the state supreme court "is susceptible of application to protected speech, [it] is constitutionally overbroad and therefore is facially invalid."[54]

Justice Powell, concurring, stressed that whether words are "'fighting words' depends upon the circumstances of their utterance."[55] He thought it unlikely that the epithets uttered by Ms. Lewis, a middle-aged woman, would precipitate a physical confrontation with a police officer. Justice Powell suggested that a properly trained police officer may reasonably be expected to exercise a "higher degree" of restraint to "fighting words" than the average citizen.[56]

In *City of Houston v. Hill,*[57] the Supreme Court held that an ordinance making it a crime to oppose "in any manner" a "policeman in the execution of his duty" violated the First Amendment, because it prohibited a significant amount of protected "verbal criticism and challenge directed at police officers."[58] As in *Gooding* and *Lewis,* the ordinance was not limited to fighting words. Significantly, the Court agreed with Justice Powell's suggestion in his *Lewis* concurrence that the "fighting words" exception recognized in *Chaplinsky* "might require a narrower application in cases involving words addressed to a police officer"[59] because police officers should reasonably be expected to exercise a higher level of restraint than the average citizen.[60] The Court said: "The freedom of

52. *Lewis,* 415 U.S. at 132 (quoting state statute).
53. *Id.* at 134.
54. *Id.*
55. *Id.* at 135 (Powell, J. concurring).
56. *Id.*
57. 482 U.S. 451 (1987).
58. *Id.* at 461.
59. *Id.* at 462.
60. *Id.*

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."[61]

Based on Supreme Court precedent, the lower federal courts have consistently held that arresting an individual based solely on vulgarities directed at a police officer gives rise to a section 1983 free speech damages claim.[62] For example, in *Buffkins v. City of Omaha,*[63] the plaintiff called the police officer an "asshole" and was arrested for disorderly conduct. Although the state supreme court had construed the disorderly conduct statute as prohibiting "fighting words," the Eighth Circuit held that the arrest violated the First Amendment because the police did not have probable cause to arrest the section 1983 claimant for using fighting words. The court cited decisions specifically holding that calling a police officer an "asshole" does not constitute fighting words.[64]

In *Durran v. City of Douglas,*[65] the plaintiff directed an obscene gesture and profanities at a police officer, and was arrested for disorderly conduct. The Ninth Circuit held that the arrest violated the First Amendment freedom of speech. The circuit court made clear that it was not condoning plaintiff's "boorish, crass" conduct, but held that protest of police action, even rude, vulgar protest, is protected by the First Amendment. "No matter how peculiar, abrasive, unruly or distasteful a person's conduct may be, it cannot justify a police stop unless it suggests that some specific crime has been, or is about to be, committed, or that there is an imminent danger to person or property."[66]

Disorderly conduct statutes are constitutional provided that, as construed and applied, they do not criminalize protected speech. In holding that Kentucky's disorderly conduct statute does not violate the First Amendment, the U.S. Supreme Court relied on the fact that individuals could not be convicted under the statute "merely for

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61. *Id.* at 462–63.
62. *See, e.g.,* Buffkins v. Omaha, 922 F.2d 465 (8th Cir. 1990), *cert. denied,* 502 U.S. 898 (1991); Duran v. City of Douglas, 904 F.2d 1372 (9th Cir. 1990); Nichols v. Chacon, 110 F. Supp. 2d 1099 (W.D. Ark. 2000); Cook v. Board of County Comm'rs, 966 F. Supp. 1049 (D. Kan. 1997); Brockway v. Shepherd, 942 F. Supp. 1012 (M.D. Pa. 1996).
63. *Lewis,* 415 U.S. at 462–63.
64. The court cited Cavazos v. State, 455 N.E.2d 618 (Ind. 1983); People v. Gingello, 67 Misc. 2d 224 (City Ct. 1971).
65. 904 F.2d 1372 (9th Cir. 1990).
66. *Id.* at 1378. *See also* Gulliford v. Pierce County, 136 F.3d 1345 (9th Cir. 1998); Mackinney v. Nielson, 69 F.3d 1002 (9th Cir. 1995).

expressing unpopular or annoying ideas."[67] The New York Court of Appeals upheld New York's disorderly conduct statute because "it is directed at words and utterances coupled with an intent to create a risk of public disorder, which the State has the authority and responsibility to prohibit, prevent and punish."[68] On the other hand, the New York Court of Appeals held that New York's harassment statute, which made it criminal to use "abusive" language with the intent to "harass" or "annoy" another person, violated freedom of speech because "vulgar, derisive and provocative"[69] speech is protected by the First Amendment.[70] The court said that "[a]t the least, any proscription of pure speech must be sharply limited to words which, by their utterance alone, inflict injury or tend naturally to evoke *immediate* violence or other breach of the peace."[71]

The individual's right to comment on matters of public concern is at the heart of the First Amendment's freedom of expression. The Supreme Court recently reaffirmed the "general proposition that freedom of expression upon public questions is secured by the First Amendment."[72] Clearly, an individual's view of police conduct is a matter of public concern. As *Cohen v. California*[73] established, the choice of language to express these views and their intensity is a matter of individual choice, not government control, even if the individual chooses to use crude language.

In a civilized society people should strive to avoid the use of profanities. Private citizens should not direct profanities at the police, and the police should not direct profanities at private citizens. But individuals sometimes use poor judgment or simply slip up in their choice of words, and when they do, it should not result in arrest, prosecution, and conviction. In an open society, the individual's choice of crude language to protest police action should not be criminalized.

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67. Colton v. Kentucky, 407 U.S. 104, 111 (1972).
68. People v. Ticheror, 89 N.Y.2d 769, 775 (N.Y. 1997), *cert. denied*, 522 U.S. 918 (1997).
69. N.Y. PENAL LAW § 240-25(2) n.69.
70. People v. Dietze, 75 N.Y. 2d 47, 51 (1989).
71. *Id.* at 52.
72. Bartnicki v. Vopper, 121 S. Ct. 1753, 1765 (2001) (quoting *New York Times Co.*, 376 U.S. 254, 269 (1964)).
73. 403 U.S. 15 (1971).