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Personalizing First Amendment Jurisprudence: Shifting Audiences & Imagined Communities to Determine Message Protection in Obscenity, Fighting Words, and Defamation

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PERSONALIZING FIRST AMENDMENT JURISPRUDENCE: SHIFTING AUDIENCES & IMAGINED COMMUNITIES TO DETERMINE MESSAGE PROTECTION IN OBSCENITY, FIGHTING WORDS, AND DEFAMATION

Clay Calvert[*]

I. INTRODUCTION

It is, at first glance, a seemingly odd anomaly of modern First Amendment[1] free-speech jurisprudence. Under obscenity law,[2] the

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1. The First Amendment to the U.S. Constitution provides, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ." U.S. CONST. amend. I. The Free Speech and Free Press Clauses were incorporated eighty-five years ago through the Fourteenth Amendment Due Process Clause to apply to state and local

scope of protection for sexually explicit expression varies from state to state, dependent upon the perspective of those in the local[3] community.[4]

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government entities and officials. *See* Gitlow v. New York, 268 U.S. 652, 666 (1925).

2. Obscenity is not protected by the First Amendment's guarantee of free speech. *See* Roth v. United States, 354 U.S. 476, 485 (1957) ("[O]bscenity is not within the area of constitutionally protected speech or press").

3. The "local" community for determining whether material is obscene may be based on a statewide standard, a more geographically specific standard, such as an area within a state, or even a non-geographic standard. *See* Jenkins v. Georgia, 418 U.S. 153, 157 (1974). As the U.S. Supreme Court has observed, "the Constitution does not require that juries be instructed in state obscenity cases to apply the standards of a hypothetical statewide community. *Miller* approved the use of such instructions; it did not mandate their use." *Jenkins*, 418 U.S. at 157. The Court in *Jenkins* added:

> *Miller* held that it was constitutionally permissible to permit juries to rely on the understanding of the community from which they came as to contemporary community standards, and the States have considerable latitude in framing statutes under this element of the *Miller* decision. A State may choose to define an obscenity offense in terms of "contemporary community standards" as defined in *Miller* without further specification, as was done here, or it may choose to define the standards in more precise geographic terms, as was done by California in *Miller*.

Id. For instance, California embraces a statewide standard under its penal code. *See* CAL. PENAL CODE § 311(a) (West 2009) ("[O]bscenity means matter, taken as a whole, that to the average person, *applying contemporary statewide standards*, appeals to the prurient interest, that, taken as a whole, depicts or describes sexual conduct in a patently offensive way, and that, taken as a whole, lacks serious literary, artistic, political, or scientific value" (emphasis added)). In stark contrast, Indiana's obscenity statute "does not indicate that either a statewide or local standard shall be employed in reference to community standards" and, instead, represents "a general standard, not a geographic one," under which "an ideal instruction under the Indiana statute would refer to neither a statewide nor local region, but would require that contemporary community standards be determined by what the community as a whole in fact finds acceptable." Richards v. Indiana, 461 N.E.2d 744, 747 (Ind. Ct. App. 1984); *see* IND. CODE ANN. § 35-49-2-1(1) (West 2009) (using the phrase "applying contemporary community standards"). *See generally* Mark Cenite, *Federalizing or Eliminating Online Obscenity Law as an Alternative to Contemporary Community Standards*, 9 COMM. L. & POL'Y 25, 35 (2004) (observing that the Supreme Court has "held that the community standards test for federal obscenity prosecutions was local, not national, and not necessarily statewide—the relevant geographic community could be smaller than an entire state").

4. In articulating the current test used for obscenity, the U.S. Supreme Court held that what is obscene must be measured by contemporary local community standards, observing that "[i]t is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City." Miller v. California, 413 U.S. 15, 32 (1973). The high court reasoned that:

> Under a National Constitution, fundamental First Amendment limitations on the powers of the States do not vary from community to community, but this does not mean that there are, or should or can be, fixed, uniform national standards of precisely what appeals to the "prurient interest" or is "patently

Why, after all, should the exact same sexually provocative movie or issue of a "girlie"[5] magazine be protected by a supposedly national constitutional guarantee in one part of the country but not in another?[6] As Alan Isaacman, former attorney for adult periodical publisher Larry Flynt[7] and the man who successfully argued the case of *Hustler Magazine, Inc. v. Falwell*[8] to the nation's high court, once stated:

> offensive." These are essentially questions of fact, and our Nation is simply too big and too diverse for this Court to reasonably expect that such standards could be articulated for all 50 States in a single formulation, even assuming the prerequisite consensus exists.

Id. at 30. With this in mind, the Supreme Court in *Miller* concluded that the test for obscenity should focus on whether the material at issue: (1) appeals to a prurient interest in sex, when taken as a whole and as judged by contemporary community standards from the perspective of the average person; (2) is patently offensive, as defined by state law; and (3) lacks "serious literary, artistic, political or scientific value." *Id.* at 24. The high court later reiterated that "community standards simply provide the measure against which the jury decides the questions of appeal to prurient interest and patent offensiveness." Smith v. United States, 431 U.S. 291, 302 (1977). Community standards, on the other hand, do not apply to the third prong of the *Miller* test on the question of whether the material in question lacks serious literary, artistic, political, or scientific value. *See id.* at 301 (writing that "[l]iterary, artistic, political, or scientific value, on the other hand, is not discussed in *Miller* in terms of contemporary community standards"). On the third prong of *Miller*, the Supreme Court has observed that:

> Just as the ideas a work represents need not obtain majority approval to merit protection, neither, insofar as the First Amendment is concerned, does the value of the work vary from community to community based on the degree of local acceptance it has won. The proper inquiry is not whether an ordinary member of any given community would find serious literary, artistic, political, or scientific value in allegedly obscene material, but whether a reasonable person would find such value in the material, taken as a whole.

Pope v. Illinois, 481 U.S. 497, 500-01 (1987).

5. *See* Ginsberg v. New York, 390 U.S. 629, 634 (1968) (using the phrase "'girlie' picture magazines" to describe non-obscene yet sexually explicit magazines at issue in the case).

6. In the view of some scholars, "[n]onuniformity is antithetical to the very concept of constitutionalism. . . ." Mark D. Rosen, *Our Nonuniform Constitution: Geographical Variations of Constitutional Requirements in the Aid of Community*, 77 TEX. L. REV. 1129, 1137 (1999). In general, "[l]ittle judicial or scholarly attention has been directed to geographical constitutional nonuniformity as such." *Id.* at 1135.

7. Flynt and his flagship magazine, *Hustler*, have been described by one leading constitutional scholar as "notorious for their dedication to a vivid and perverse pornography." Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and* Hustler Magazine v. Falwell, 103 HARV. L. REV. 603, 605 (1990). In somewhat stark contrast, First Amendment scholar and former University of Virginia President Robert O'Neil has called Flynt a "fascinatingly complex maverick" who reflects a "paradox of realism and idealism" when it comes to the First Amendment and his business interests. Robert M. O'Neil, *Preface*, 9 COMMLAW CONSPECTUS 141, 142-43 (2001).

8. 485 U.S. 46 (1988).

> Something may be protected in Des Moines or in New York City and not in Salt Lake City or Mobile, Alabama. It doesn't make sense to me that we're all citizens of the same United States and that a citizen in one place is able to say something and have the protection of the national constitution while a citizen in another place in the country can be thrown in jail for saying the same thing.[9]

Obscenity thus functions under what constitutional scholar Mark D. Rosen dubs "a regime of multiple authoritative interpreters,"[10] with each local community interpreting for itself what is and is not obscene.[11] This situation seems to contradict the notion that, as Professor John Fee recently observed, "[c]ore First Amendment rights are the same for all citizens of the United States, wherever they reside."[12]

This Article demonstrates, however, that it is not only geographic communities that disrupt the notion of a uniform or generally applicable First Amendment jurisprudence. In particular, it explores three areas of law where specific, non-geographic characteristics of the audience—the viewers or listeners, as it were—at which a message is directed, conveyed or targeted affects the extent of First Amendment protection that speech receives.

This Article contends that courts often employ what might be considered a personalized or customized approach to the evaluation of message protection—an approach in which there are dueling assumptions of both:

- generalized norms of message protection that apply when the audience or target of speech is the mythical average person; and
- niche norms of message protection for specific audiences or for what Cornell University Professor Benedict Anderson might call micro "imagined communities."[13]

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9. Clay Calvert & Robert D. Richards, *Alan Isaacman and the First Amendment: A Candid Interview With Larry Flynt's Attorney*, 19 CARDOZO ARTS & ENT. L.J. 313, 323 (2001).

10. Mark D. Rosen, *The Radical Possibility of Limited Community-Based Interpretation of the Constitution*, 43 WM. & MARY L. REV. 927, 995 (2002).

11. *See* Yuval Karniel & Haim Wismonsky, *Pornography, Community and the Internet – Freedom of Speech and Obscenity on the Internet*, 30 RUTGERS COMPUTER & TECH. L.J. 105, 107 (2004) ("Contrary to regular criminal offenses, which are evaluated against a state or international standard, American obscenity laws are community-contingent offenses where it is the standard of the relevant community that determines if a specific distributed pornographic material is obscene").

12. John Fee, *Obscenity and the World Wide Web*, 2007 BYU L. REV. 1691, 1706 (2007).

13. *See generally* BENEDICT ANDERSON, IMAGINED COMMUNITIES: REFLECTIONS ON THE

These latter micro-communities, unlike those local ones affecting obscenity law described at the start of this Article, are not defined in terms of geography (i.e., state-centric standards versus national standards), but instead by other characteristics such as occupation, interests and ethnicity. As this Article illustrates, the First Amendment jurisprudence actually embraces non-geographic nonuniformity in the areas of obscenity, fighting words, and defamation.

The use of such an audience-shifting approach to measure the variable, uneven extent of speech protection, this Article asserts, obliterates the notion of equality in First Amendment application and, instead, leads to a fractured jurisprudence of what could be considered "particularist rights"[14] in which social or occupational identity plays a pivotal, defining role. Ultimately, what this Article attempts to demonstrate is a struggle by courts to create, enforce, and reconcile what purports to be a relatively objective or generalized First Amendment jurisprudence with uniform rules and "average-person"[15] standards with a jurisprudence that is flexible and subjective enough to accommodate and to adapt to particular and unique audiences and identities.

Part II of this Article explores the judicial use of non-geographic, identity-specific communities in obscenity law to determine whether sexually explicit expression warrants First Amendment protection.[16] Part III then examines the same issue in the area of fighting words,[17] while Part IV illustrates a problematic use of non-geographic communities in defamation law that goes far beyond the current, well-established distinctions made between whether the target of the libelous language is a public or private person.[18] What unites these three areas is that in each one, the law employs an average-person perspective to establish an imagined benchmark or baseline for the scope of message protection, but then it carves out caveats and exceptions that take into account imagined community-specific perspectives.

Finally, Part V argues that courts muddle the law when they employ the types of customized, non-geographic communities examined here to determine the scope of First Amendment protection that speech receives.[19] Yet Part V also raises an important question created by this

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ORIGIN AND SPREAD OF NATIONALISM (rev. ed. 2006).

14. *Cf.* F.H. Buckley, *Liberal Nationalism*, 48 UCLA L. REV. 221, 247 (2000) ("[A] particularist theory of rights need not claim that its stock of rights is appropriate in every state or society and might defend a conception of rights for a particular polity only").

15. *See infra* text accompanying notes 23-35 (discussing the "average person" perspective in the law of obscenity).

16. *See infra* text accompanying notes 23–57.

17. *See infra* notes 58–196 and accompanying text.

18. *See infra* text accompanying notes 197–228.

19. *See infra* text accompanying notes 229–38.

situation that both courts and legal scholars must address:

Is it better or worse for the law (in particular, U.S. constitutional law) to engage in and to embrace a fictional, imagined community of one—the hypothetical average viewer and reader—when determining the scope of message protection, than it is for it to engage in a fractured, fissured First Amendment jurisprudence, one replete with multiple imagined communities of interpreters?[20]

This Article standing alone cannot, of course, answer this question. The current state of the law, as this Article demonstrates, employs both types of communities when it seems appropriate or the interests of justice, in judges' minds, apparently require it. But the question's importance, in areas that stretch beyond the well-trod realm of critical race theory and hate speech[21] in which the ethnicity of the audience impacts the harm of words,[22] is important for consideration, as courts attempt to reconcile and balance the delicate dance of objectivity suggested by a national constitutional standard with the subjectivity inherent in a country that, by its very make-up (think an African-American president and Latina Supreme Court Justice) cannot truly capture all viewpoints in any one "average" person. Importantly, a review of the legal literature drawn from law journal articles is incorporated into each section, for purposes of flow and context, rather than being set forth separately.

II. OF OBSCENITY LAW, AVERAGE VIEWERS, AND DEVIANT COMMUNITIES: WHEN THE GENERALIZED, AVERAGE AUDIENCE IS IRRELEVANT

Under the U.S. Supreme Court's current test for obscenity, the sexual content in question in any given case is supposed to be considered from the perspective of a hypothetical "average person"[23] situated in the local community.[24] What would, in other words, an

20. Under Anderson's analysis, a community is imagined to the extent that its members "will never know most of their fellow-members, meet them, or even hear of them, yet in the minds of each lives the image of their communion." ANDERSON, *supra* note 13, at 6.

21. *See generally* J. Angelo Corlett & Robert Francescotti, *Foundations of a Theory of Hate Speech*, 48 WAYNE L. REV. 1071 (2002) (attempting to explicate the concept of hate speech and theory centering on its protection censorship).

22. *See generally* Richard Delgado, *About Your Masthead: A Preliminary Inquiry into the Compatibility of Civil Rights and Civil Liberties*, 39 HARV. C.R.-C.L. L. REV. 1 (2004) (discussing hate speech, critical race theory and civil rights/civil liberties).

23. Miller v. California, 413 U.S. 15, 24 (1973).

24. *See supra* text accompanying notes 2–12 (discussing the concept of "community" in obscenity law in the United States).

average person think if he or she were the audience member viewing the content?

The material at issue is not to be judged, as the high court has unequivocally made clear, from the perspective of "the most prudish or the most tolerant."[25] Such individuals, however, are to be included within the community.[26] Jurors thus must "consider *the entire community* and not simply their own subjective reactions, or the reactions of a sensitive or of a callous minority."[27] Children, however, are not to be included by jurors when considering the members of the community.[28] In summary, the average person represents an imagined amalgam or somewhat surreal "synthesis of the entire adult community."[29]

A review of the official, standardized jury instructions from several states illustrates just how all of this confusion is framed by judges for layperson jurors. For example, California jury instruction CALJIC 16.184 provides:

> The term "average adult person," as used in these instructions, is a hypothetical composite person who typifies the entire community including persons of both sexes; persons religious and irreligious; persons of all nationalities, all adult ages and all economic, educational and social standings; neither libertines nor prudes, but persons with normal, healthy, average contemporary attitudes, instincts and interests concerning sex.[30]

As the question framed in the Introduction of this Article suggests,[31] is this deployment or operationalization of a supposedly objective standard of an average person really any clearer than would be another imagined standard of a smaller imagined community? Imagine, for a moment, the average juror from your hometown considering what is "libertine" and what is "prude" in an era in which people think of

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25. Smith v. United States, 431 U.S. 291, 304 (1977).

26. *See* Pinkus v. United States, 436 U.S. 293, 300 (1978) ("The vice is in focusing upon the most susceptible or sensitive members when judging the obscenity of materials, not in including them along with all others in the community").

27. *Smith*, 431 U.S. at 305 (emphasis added).

28. *Pinkus*, 436 U.S. at 298; *see* Cenite, *supra* note 3, at 35-36 (observing that "[t]he Court has ruled children are not to be included in the community, though especially sensitive adults could be considered, since a 'community includes all adults who constitute it, and a jury can consider them all in determining relevant community standards,' as long as they were not 'focused upon'").

29. Bruce A. Taylor, *Hard-Core Pornography: A Proposal for a Per Se Rule*, 21 U. MICH. J.L. REFORM 255, 263 (1987-88).

30. CALIFORNIA JURY INSTRUCTIONS—CRIMINAL § 16.184 (2009).

31. *See supra* text accompanying note 20.

others' sexuality in terms like slutty and skanky.

In Massachusetts, Model Jury Instruction 7.180, which is used in district courts in that state, governs the possession and distribution of obscene matter.[32] It provides that jurors must consider the material in question from the perspective of "an average adult person in this county"[33] and admonishes them that:

> your test is the attitudes and standards of an average adult citizen of this county on the date of the alleged offense. You are not to use the standards of a particularly sensitive or insensitive person. Nor may you use your own personal attitudes and standards as your test. You should use your knowledge of the views of average citizens of this county in order to decide whether this material appeals to the prurient interest of average adult citizens of this county.[34]

The average person perspective, however, is more easily stated than it is applied. As Judge Joseph T. Clark, of an Ohio state court, wrote in a law review article, "how can the typical juror know what the average person believes regarding obscene material, when the average person is really a mythical person? The average person is one who possesses all the demographic characteristics of the community."[35]

But the law of obscenity actually includes a perspective-shifting framework that is flexible and subjective enough to account for and adapt to particular audiences and identities when determining message protection. Specifically, the body of case law that has developed around the *Miller* test includes a dichotomy between average adults and sexual deviants.

In particular, if the sexual material under prosecution is designed or targeted for a specific deviant group in society, then the jury must judge it by whether it would appeal to the prurient interest of the average member of that deviant group.[36] As the U.S. Supreme Court stated in a

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32. CRIMINAL MODEL JURY INSTRUCTIONS FOR USE IN THE DISTRICT COURTS vol. 2, no. 7.180 (2009).

33. *Id.*

34. *Id.*

35. Joseph T. Clark, *The "Community Standard" in the Trial of Obscenity Cases—A Mandate for Empirical Evidence in Search of the Truth*, 20 OHIO N.U. L. REV. 13, 17 (1993).

36. In *Mishkin v. New York*, 383 U.S. 502 (1966), the U.S. Supreme Court held that:

> [w]here the material is designed for and primarily disseminated to a clearly defined deviant sexual group, rather than the public at large, the prurient-appeal requirement of the *Roth* test is satisfied if the dominant theme of the material taken as a whole appeals to the prurient interest in sex of the members of that group.

pre-*Miller* case that has not been overruled,[37] *Mishkin v. New York*,[38] "we adjust the prurient-appeal requirement to social realities by permitting the appeal of this type of material to be assessed in terms of the sexual interests of its intended and probable recipient group."[39]

The high court in *Miller* acknowledged the validity of this *Mishkin* distinction, observing that:

> the primary concern with requiring a jury to apply the standard of "the average person, applying contemporary community standards" is to be certain that, *so far as material is not aimed at a deviant group, it will be judged by its impact on an average person*, rather than a particularly susceptible or sensitive person—or indeed a totally insensitive one.[40]

Why make this distinction? Because certain fetishes that the average person simply would find revolting and repulsive (rather than appealing to a prurient interest in sex, as is required by the first prong of *Miller*) may actually be pruriently appealing and sexually arousing to a member of the particular deviant group it targets. As Professor Mathias Reimann concisely encapsulates it, "such material appeals to the *prurient interest of a few* and is *repulsive to the rest*."[41]

The ramification, Reimann observes, is that "material can be, or cannot be, obscene depending on who looks at it."[42] *Mishkin* muddles *Miller* via its efforts to create and reconcile a relatively objective obscenity jurisprudence—one that employs an average-person standard—with the sexual interests of a non-geographic community of so-called deviants. Reimann explains this judicial sleight of hand about how to treat deviant-centric content under the first prong of *Miller*:

> To condemn it under the prurient interest test, the test must be cut in two halves. The appeal must be measured with reference to one group, the few who experience it; the community standards are determined in respect to the general populace that is left cold by the material. The difficulties with this approach, having one

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Id. at 508.

37. *See* James Peterson, Comment, *Behind the Curtain of Privacy: How Obscenity Law Inhibits the Expression of Ideas About Sex and Gender*, 1998 WIS. L. REV. 625, 647 (1998) (observing that "the Supreme Court has not overruled *Mishkin*").

38. 383 U.S. 502 (1966).

39. *Id.* at 509.

40. Miller v. California, 413 U.S. 15, 33 (1973) (emphasis added).

41. Mathias Reimann, *Prurient Interest and Human Dignity: Pornography Regulation in West Germany and the United States*, 21 U. MICH. J.L. REFORM 201, 243 n.186 (1987-1988) (emphasis added).

42. *Id.* at 228 n.125.

> sort of people determine what a quite different sort of people find appealing, are obvious. The use of expert testimony at trial represents an attempt to glue the two inconsistent pieces of the test back together again.[43]

In a 2008 law journal article devoted to obscenity law and community standards, Professor Bret Boyce neatly summarizes both the *Mishkin* rule and the problems it creates for those who engage in sexual practices that are shunned by the average—read, the majority—of society: "it is obscene if it 'turns on' a 'deviant,' but 'grosses out' a 'normal' person. Obviously, such a test is a recipe for the repression of sexual minorities."[44]

How is this *Mishkin* determination implemented in practice? In obscenity cases in California, standard jury instruction CALJIC 16.182 provides in relevant part:

> The predominant appeal to prurient interest of the matter is determined by reference to average adult persons *unless it appears from the nature of the matter or the circumstances of its dissemination, distribution or exhibition, that it is designed for clearly defined deviant sexual groups, in which cases the predominant appeal of the matter shall be determined by reference to its intended recipient group.*[45]

Similarly, the pattern obscenity instruction for Massachusetts explains to jurors that when the material "was designed for and primarily disseminated to a clearly-defined deviant sexual group, rather than the public at large, you are to consider whether the material as a whole *appealed to the prurient interest of members of that intended group, rather than the average citizen of this county.*"[46]

Without a *Mishkin* instruction, then, some sexual content aimed at deviant groups would never be deemed obscene under *Miller* because it simply repulses the average person rather than appealing to his or her prurient interests in sex. A real-life example is illustrative here. Attorney James Peterson observed in a 1998 law journal article that "[i]n one notorious case, a charge of obscenity was successfully defended on the grounds that a film showing oral sex performed on a dog was too disgusting to appeal to the prurient interest of the average

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43. *Id.* at 243 n.186.

44. Bret Boyce, *Obscenity and Community Standards*, 33 YALE J. INT'L L. 299, 359 (2008).

45. CALIFORNIA JURY INSTRUCTIONS—CRIMINAL § 16.182 (2009) (emphasis added).

46. CRIMINAL MODEL JURY INSTRUCTIONS FOR USE IN THE DISTRICT COURTS vol. 2, no. 7.180 (2009).

adult."[47] Similarly, a federal judge in Georgia held that the movie *Caligula*[48] was not obscene because its "overwhelming depictions of violence, cruelty and sexual behavior would inhibit rather than appeal to a prurient interest in sex."[49]

The *Mishkin* instruction may receive increasing use in coming years, as more niches of adult content are developed,[50] along with changing mores and sexual values that may or may not hold some types of content "deviant." For instance, in the 2008 trial in *United States v. Little*,[51] a *Mishkin* instruction was given by U.S. District Judge Susan Bucklew after an expert witness, psychologist Michael P. Brannon,[52] testified that the content at issue was directed at atypical deviant groups, including "dominants/submissives and fans of urination,"[53] "fisting"[54]

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47. James Peterson, Comment, *Behind the Curtain of Privacy: How Obscenity Law Inhibits the Expression of Ideas About Sex and Gender*, 1998 WIS. L. REV. 625, 647 (1998).

48. This is "a 1980 XXX-rated movie written and produced by *Penthouse* owner Bob Guccione. . . ." FREDERICK S. LANE, III, OBSCENE PROFITS: THE ENTREPRENEURS OF PORNOGRAPHY IN THE DIGITAL AGE 36 n.14 (2000).

49. Penthouse Int'l, Ltd. v. Webb, 594 F. Supp. 1186, 1191 (N.D. Ga. 1984).

50. A review of the winners at the 2009 AVN Awards, the adult industry's equivalent of the Academy Awards, reveals dozens of different categories of adult sexual content, with awards given for things such as Best Spanking Release, Best Orgy/Gang Bang Release, Best Transsexual Release, Best Foot/Leg Fetish Release, Best BD/SM Release and Best Squirting Release. AVN, Awards Show, Past Winners from 2009, http://avnawards.avn.com/winners/2009/ (last visited June 9, 2010).

51. No. 8:07-cr-00170-T-24-M55, 2008 U.S. Dist. LEXIS 45639 (M.D. Fla. June 10, 2009). *See generally* Robert D. Richards & Clay Calvert, *The 2008 Federal Obscenity Conviction of Paul Little and What It Reveals About Obscenity Law and Prosecutions*, 11 VAND. J. ENT. & TECH. L. 543 (2009) (providing an analysis of the trial in *United States v. Little*).

52. Brannon "is co-director of the Institute for Behavioral Sciences and the Law in Fort Lauderdale, Florida. He is a Florida licensed psychologist with specializations in clinical and forensic psychology." Michael P. Brannon, Psy.D., Psychology Information Resource Center website, http://psyris.com/michaelpbrannon (last visited June 9, 2010). Brannon "has handled thousands of cases in a forensic capacity and has testified as an expert over 1000 times in Federal and State Court Criminal and Civil Divisions throughout Florida. He regularly is appointed as an expert by the judiciary and is often called upon as an expert witness or forensic consultant to attorneys." *Id.*

53. *See* United States v. Ragsdale, 426 F.3d 765, 772 (5th Cir. 2005) (using the term "urolagnia" to describe "the use of urine in sexual activities"); Richard A. Collacott & Sally-Ann Cooper, *Urine Fetish in a Man with Learning Disabilities*, 39 J. INTELL. DISABILITY RES. 145, 145-47 (1995) (describing urine fetishes as uncommon).

54. *See generally* Tristan Taormino, *The Art of Anal Fisting*, VILLAGE VOICE, Sept. 21, 2005, at 147 (providing that "[a]nal fisting, also known as handballing, is the gradual process of putting your hand (and for very experienced players, sometimes your forearm) inside someone's ass," contending that "[f]isting as a term is misleading since you don't go inside all at once like a punch; usually your hand is not in a clenched fist once it is in there," and adding that "gay men popularized fisting in the late '60s and '70s during the sexual revolution and founded private fisting clubs in major urban areas"); Tristan Taormino, *The Five-Finger Club*, VILLAGE VOICE, Apr. 18, 2000, at 172 (describing vaginal fisting as "penetration with your entire hand[,]" and

and "vomiting."[55] Similarly, there may be categories of content that are tailored to the appetites of people with particular paraphilias.[56]

In summary, the law of obscenity engages in the process of shifting audiences to determine message protection in two ways. The first, as described in the Introduction, shifts the audience geographically, from one local community to another, with each geographic community holding its own perspective on whether or not sexual content is obscene. The second, a decidedly non-geographic shift, moves the focus from how an average person would view the material to how a deviant person—in particular, one holding the same sexually deviant interests as someone at which the content is aimed—would consider it. As the Introduction contends, this fractured-audience approach removes any notion of a uniform application of First Amendment standards in obscenity cases. Uniform, at least to the extent that an average-person viewpoint is used, akin to an objective, reasonable-person standard used in negligence,[57] but certainly not uniform geographically. It creates the type of particularist rights[58] that fragment the law and lead jurors to guess whether or not something would, as it were, sexually arouse a sexual deviant.

The next part of this Article illustrates another area, fighting words—where the law employs a customized First Amendment jurisprudence that tailors the scope of message protection, based upon dueling assumptions of generalized norms that apply when the audience or target of the speech is a hypothetical average person, and niche norms used when the audience or target for speech holds unique characteristics.

III. WHEN THE TARGET MAKES A DIFFERENCE IN FIGHTING WORDS: THICK-SKINNED COPS, THIN-SKINNED TEACHERS & THE AVERAGE PERSON

With apologies to Professor Alex B. Long, who recently wrote an entire law journal article about what he contended were "the many uses

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adding that "[w]hen one woman fists another, it is a defiant act—bold, outrageous, boundary-busting. Oh, and it feels great, too").

55. Mark Kernes, *Closing Arguments In Max Trial Reveal Prosecution's True Agenda*, AVN, June 5, 2008, http://business.avn.com/articles/30592.html (last visited June 9, 2010).

56. *See generally* Bernard Gert, *A Sex Caused Inconsistency in DSM-III-R: The Definition of Mental Disorder and the Definition of Paraphilias*, 17 J. MED. & PHIL. 155 (1992) (providing an excellent overview of the meaning of paraphilias).

57. *See* DOMINICK VETRI ET AL., TORT LAW AND PRACTICE 44 (2d ed. 2003) ("Generally, in negligence law we employ an objective standard of care and use the hypothetical reasonable person to breathe life into the concept for juries").

58. *See* Buckley, *supra* note 14, at 247 (describing particularist rights).

and misuses of popular music lyrics in legal writing,"[59] Tom Petty once sang that "you need rhino skin if you're gonna pretend you're not hurt by this world."[60] The aging singer-songwriter's lyrical message about people needing metaphorically thick skin to endure and survive the verbal aspersions and abuse that may be heaped upon them actually plays out rather inconsistently in the area of fighting words. In particular, as this part demonstrates, the law of fighting words provides varying standards in terms of just how many verbal slings and arrows a person or category of person must suffer before First Amendment protection for the speech in question evaporates.[61]

A. *Overview of the Fighting Words Doctrine*

The U.S. Supreme Court gave birth to the fighting words doctrine more than sixty-five years ago in *Chaplinsky v. New Hampshire*,[62] when it unanimously opined that:

> there are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or *"fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.*[63]

To the extent that, as Dean Rodney Smolla of the Washington and Lee University School of Law recently observed, this language from "*Chaplinsky* is understood as standing for the proposition that speech tending to incite an immediate breach of peace is not protected by the First Amendment, it was and is an unremarkable opinion."[64] Indeed, fighting words constitute one of the narrow categories of speech today

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59. Alex B. Long, *[Insert Song Lyrics Here]: The Uses and Misuses of Popular Music Lyrics in Legal Writing*, 64 WASH. & LEE L. REV. 531, 535 (2007).

60. TOM PETTY, *Rhino Skin*, *on* ECHO (Warner Brothers 1999). The lyrics are available at http://www.mp3lyrics.org/t/tom-petty/rhino-skin (last visited June 9, 2010).

61. This is a paraphrase of Hamlet's famed "to be, nor not to be" soliloquy, drawn from the work of William Shakespeare, who, unlike Tom Petty, "has been cited or quoted by American courts more often than any other literary figure." Steven M. Oxenhandler, *The Lady Doth Protest Too Much Methinks: The Use of Figurative Language from Shakespeare's Hamlet in American Case Law*, 23 HAMLINE L. REV. 370, 371 (2000).

62. 315 U.S. 568 (1942); *see* Michael J. Mannheimer, *The Fighting Words Doctrine*, 93 COLUM. L. REV. 1527, 1530 (1993) (writing that "the fighting words doctrine was first formulated" in *Chaplinsky*).

63. *Chaplinsky*, 315 U.S. at 571-72 (emphasis added).

64. Rodney A. Smolla, *Words "Which By Their Very Utterance Inflict Injury": The Evolving Treatment of Inherently Dangerous Speech in Free Speech Law and Theory*, 36 PEPP. L. REV. 317, 318 (2009).

that, like obscenity addressed in Part II, are not safeguarded by the First Amendment.[65] The Supreme Court reinforced this point in 2003 in the cross-burning case of *Virginia v. Black*,[66] when it wrote that fighting words "are generally proscribable under the First Amendment."[67]

The *Black* Court fleshed out the definition of fighting words from *Chaplinsky* by quoting from its 1971 opinion in *Cohen v. California*,[68] in which it 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."[69] *Cohen*, as Professor Donald Lively and his colleagues observe, thus "narrowed the category of unprotected 'fighting words' to foreclose"[70] a much more expansive interpretation of *Chaplinsky* that could possibly punish "any words which others find provocative or offensive."[71] In fact, the Court since *Chaplinsky* has made it clear that the government cannot generally suppress words simply because they might offend.[72]

The fighting words doctrine today, criticized by many legal scholars for multiple reasons,[73] applies only "where both speaker and listener are in close physical proximity. The speaker's words are so inappropriate and offensive that they will likely prompt the hearer to retaliate by committing an act of physical violence. . . ."[74] To constitute fighting words, the speech must be, as constitutional scholar Erwin Chemerinsky observed, "directed at a particular person."[75]

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65. *See* Ashcroft v. Free Speech Coalition, 535 U.S. 234, 245-46 (2002) ("As a general principle, the First Amendment bars the government from dictating what we see or read or speak or hear. The freedom of speech has its limits; it does not embrace certain categories of speech, including defamation, incitement, obscenity, and pornography produced with real children.").

66. 538 U.S. 343 (2003).

67. *Id.* at 359.

68. 403 U.S. 15 (1971).

69. *Id.* at 20 (emphasis added); *see also Black*, 538 U.S. at 359 (quoting Cohen's language).

70. DONALD E. LIVELY ET AL., FIRST AMENDMENT LAW: CASES, COMPARATIVE PERSPECTIVES, AND DIALOGUES 105 (2003).

71. *Id.*

72. *See* Texas v. Johnson, 491 U.S. 397, 414 (1989) ("[I]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.").

73. *See, e.g.*, Burton Caine, *The Trouble with "Fighting Words": Chaplinsky v. New Hampshire is a Threat to First Amendment Values and Should be Overruled*, 88 MARQ. L. REV. 441, 443-44 (2004) (blasting *Chaplinksy* as "a tragedy for the jurisprudence of Freedom of Speech" because it "carve[d] out, in wholesale fashion, vast categories of exceptions to the First Amendment's otherwise unqualified protection of speech" and because it created a category of unprotected speech "so ill-conceived that not once in the ensuing sixty-two years has the United States Supreme Court upheld a conviction based on it").

74. Jennifer Elrod, *Expressive Activity, True Threats, and the First Amendment*, 36 CONN. L. REV. 541, 575 (2004).

75. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 817 (1st ed.

The doctrine thus is premised, as Professor Charles Lawrence writes, on the anticipation "that the verbal 'slap in the face' of insulting words will provoke a violent response with a resulting breach of the peace."[76] Put more bluntly by Kathleen Sullivan, former dean of Stanford Law School, fighting words constitute "a face-to-face provocation to a brawl. . . ."[77]

For instance, when the U.S. Supreme Court protected Gregory Lee Johnson's act of burning the American flag as a form of political expression, it found that his symbolic speech[78] did not amount to fighting words.[79] Writing the majority opinion in *Texas v. Johnson*, the late Justice William Brennan reasoned that "no reasonable onlooker would have regarded Johnson's generalized expression of dissatisfaction with the policies of the Federal Government as *a direct personal insult or an invitation to exchange fisticuffs*."[80]

B. *Confronting Cops: A Thick-Skinned Community of Message Recipients*

Despite the *Cohen* Court's use of the phrase "ordinary citizen"[81] when defining fighting words, the reality of this doctrine is that some people—namely, police officers—must roll with the verbal punches and not enter into the fisticuffs referred to by Justice Brennan in *Johnson*. Several recent cases illustrate this point when it comes to heated words directed at police officers, rather than at average citizens.

Consider, for example, the 2008 case of *South Dakota v. Suhn*.[82] The Supreme Court of South Dakota protected the speech of Marcus J. Suhn, who had been "convicted of disorderly conduct for yelling profanities at a passing police car in Brookings, South Dakota."[83] As the local bars closed down in Brookings in the early morning hours of September 2, 2007, and with about 100 people gathered along the

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1997). Chemerinksy currently serves as founding dean of the University of California, Irvine School of Law. *See* Rachel Zahorsky, *Irvine by Erwin: Can a Top Legal Academic Create a New Law School that is Both Innovative and Elite?*, A.B.A. J., Aug. 2009, at 46, 47 (describing Chemerinsky's efforts to create "one of the most innovative law schools in the nation").

76. Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 452 (1990).

77. Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 40 (1992).

78. *See generally* James M. McGoldrick, Jr., *Symbolic Speech: A Message from Mind to Mind*, 61 OKLA. L. REV. 1 (2008) (providing a current and comprehensive review and analysis of the symbolic speech doctrine).

79. Texas v. Johnson, 491 U.S. 397, 409 (1989).

80. *Id.* (emphasis added).

81. Cohen v. California, 403 U.S. 15, 20 (1971).

82. 759 N.W.2d 546 (S.D. 2008).

83. *Id.* at 547.

sidewalk on Main Avenue,[84] Suhn let loose a string of profanities that would have made the late comedian Lenny Bruce proud.[85] Just like police in comedy clubs in places like Los Angeles, Chicago, San Francisco and New York arrested Bruce for his words,[86] the police in Brookings arrested Suhn after he yelled obscenities[87] at two officers in a patrol car with its windows rolled down.[88]

On appeal to the high court of South Dakota, Suhn asked it to consider one issue: "whether the circuit court's application of the disorderly conduct statute to Suhn's utterances amounted to an abridgement of speech in violation of the First Amendment."[89] To analyze that issue, the *Suhn* court applied the fighting words doctrine.[90] A four-judge majority concluded that Suhn's vituperations were protected, reasoning that "as offensive or abusive as Suhn's invective to the police may have been, 'when addressed to the ordinary citizen,' Suhn's words were not 'inherently likely to provoke violent reaction.'"[91] In fact, however, a police officer is not treated as "the ordinary citizen"[92] when it comes to fighting words. She is treated, as Tom Petty might put it, as having rhino skin.[93]

The U.S. Supreme Court observed more than two decades ago in *City of Houston v. Hill*[94] that the fighting words exception to First Amendment speech protection "might require a narrower application in cases involving words addressed to a police officer."[95] Writing the opinion of the Court, Justice Brennan boldly reasoned that "the 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."[96] He concluded the opinion by enunciating what he called a "constitutional requirement"[97]—that "in the face of verbal challenges to police action, officers and municipalities must respond with restraint."[98] The First

84. *Id.*

85. *See generally* EDWARD DE GRAZIA, GIRLS LEAN BACK EVERYWHERE 444-79 (First Vintage Books 1993) (1992) (providing a description of the multiple obscenity cases brought against Lenny Bruce for his profanity-laced comedic routines).

86. *Id.*

87. *Suhn*, 759 N.W.2d at 547.

88. *Id.*

89. *Id.*

90. *Id.* at 548-50.

91. *Id.* at 550 (quoting Cohen v. California, 403 U.S. 15, 20 (1971)).

92. *Id.*

93. *See* PETTY, *supra* note 60.

94. 482 U.S. 451 (1987).

95. *Id.* at 462.

96. *Id.* at 462-63.

97. *Id.* at 471.

98. *Id.*

Amendment, Brennan opined, requires "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."[99]

Close observers of First Amendment jurisprudence will note that this last statement tracks Justice Brennan's language two decades before in the seminal libel case of *New York Times, Co. v. Sullivan*.[100] In *Sullivan*, Brennan described "a 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."[101] *Sullivan* created a dichotomized libel jurisprudence—one in which speech targeting public officials receives more protection, via application of the actual malice fault standard,[102] than speech targeting private people,[103] a topic addressed in Part IV.

It is thus not surprising that Brennan would also agree that police officers, as government officials, must take words like those of Marcus Suhn even when they are not part of some lofty debate on public issues. The other striking similarity here with *Sullivan* is Justice Brennan's somewhat fatalistic feeling that certain types of offensive speech are simply unavoidable and cannot—and should not—be stopped. For example, contrast Brennan in *Sullivan*: "erroneous statement is inevitable in free debate,"[104] with Brennan in *Hill*: "a certain amount of

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99. *Id.* at 472.

100. 376 U.S. 254 (1964).

101. *Id.* at 270.

102. The Court in *Sullivan* concluded that:

> The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with *"actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.*

Id. at 279-80 (emphasis added). *See generally* KENT R. MIDDLETON & WILLIAM E. LEE, THE LAW OF PUBLIC COMMUNICATION: 2009 UPDATE 119-39 (7th ed. 2008) (providing an overview of *Sullivan*, actual malice and public officials in defamation law).

103. The U.S. Supreme Court held in 1974 that "so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual." Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974). *See generally* ROBERT TRAGER ET AL., THE LAW OF JOURNALISM AND MASS COMMUNICATION 124 (2d ed. 2009) (observing that "private figures usually do not have to prove actual malice as the level of fault in their cases. Instead, they need to show the libel defendant acted with negligence").

104. *Sullivan*, 376 U.S. at 271.

expressive disorder . . . is inevitable in a society committed to individual freedom."[105]

The roots of Justice Brennan's 1987 opinion in *Hill* are planted in a concurring opinion in the Supreme Court's ruling thirteen years before in *Lewis v. City of New Orleans*.[106] In that case, the Court declared unconstitutional, on overbreadth[107] grounds, a New Orleans's ordinance that made it "unlawful and a breach of the peace for any person 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."[108] The Louisiana Supreme Court had narrowly construed the meaning of the statute, holding that it applied only "to 'fighting words' uttered to specific persons at a specific time."[109] The majority of the Supreme Court, however, found that the statute still applied too broadly, sweeping up speech that is merely "vulgar or offensive"[110]—speech previously found by the Court to be protected in cases like *Cohen v. California*.[111]

In his concurring opinion in *Lewis*, Justice Lewis Powell argued that "a properly trained officer may reasonably be expected"[112] to tolerate more abusive language directed at him. In turn, society should expect a police officer to be "less likely to respond belligerently to 'fighting words.'"[113] Drawing from both *Hill* and *Lewis*, the fighting words doctrine does not apply equally or uniformly to all targets of speech. Instead, it carves out a caveat or exception for police officers—at least those who are "properly trained"[114]—who must endure more abusive and offensive speech before making an arrest.

Courts today continue to apply this police officer exception to the fighting words doctrine.[115] For instance, in September 2008 in *People v.*

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105. City of Houston v. Hill, 482 U.S. 451, 472 (1987).

106. 415 U.S. 130 (1974).

107. *See* Ashcroft v. Free Speech Coalition, 535 U.S. 234, 255 (2002) ("The overbreadth doctrine prohibits the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process").

108. *Lewis*, 415 U.S. at 132 (quotation omitted).

109. *Id.* at 132 (quotation omitted); *see* City of New Orleans v. Lewis, 269 So. 2d 450, 456 (La. 1972) (holding that the statute in question "is narrowed to 'fighting words' uttered to specific persons at a specific time; it is not overbroad and is therefore not unconstitutional"), *rev'd*, 415 U.S. 130 (1974).

110. *Lewis*, 415 U.S. at 134.

111. 403 U.S. 15, 25-26 (1971) (protecting the right of a person to wear a jacket emblazoned with the words "Fuck the Draft" in a public courthouse, and famously noting that "while the particular four-letter word being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man's vulgarity is another's lyric").

112. *Lewis*, 415 U.S. at 135 (Powell, J., concurring).

113. *Id.* (Powell, J., concurring).

114. *Id.* (Powell, J., concurring).

115. *See, e.g.*, Payne v. Pauley, 337 F.3d 767, 776 (7th Cir. 2003) (observing that "the First

Brown,[116] Judge Sandra A. Forster of the Supreme Court of New York, Westchester County, held that the following speech, directed face-to-face at a police officer, was protected speech under the First Amendment: "*Do you have a problem? You wouldn't be that tough without a uniform and those guns, man you are lucky you're working.*"[117] In reaching her pro-speech conclusion in dismissing the defendant's conviction on the charge of disorderly conduct,[118] Judge Forster reasoned that:

> police officers are trained to deal with provocation from ordinary people. The court must balance the freedom of speech with the need to suppress aggressive behavior. The Supreme Court of the United States reasoned the [sic] when an officer is properly trained, he might reasonably be expected to constrain himself more than the average citizen and that he would be less likely to respond belligerently to "fighting words."[119]

The protection of speech directed at police in 2008 in *Brown* mirrors the ruling in a 1992 decision by the Criminal Court of the City of New York in *People v. Stephen*.[120] In *Stephen*, the defendant was arrested and charged with disorderly conducted after "clutching his genital area with his hands"[121] while yelling phrases such as "fuck you;"[122] "if you were in jail, I'd fuck you, you'd be my bitch;"[123] "if you didn't have that gun and badge, I'd kick your ass, I'd kill you;"[124] and "yeah, fuck the police."[125]

Citing the Supreme Court's opinion in *Hill*, the court observed that "the fighting words' doctrine applies more narrowly to police officers, as police officers are trained and expected to exercise more restraint in response to provocation than do other citizens."[126] Applying that rule to the facts in *Stephen*, the New York court held that the abusive language

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Amendment protects even profanity-laden speech directed at police officers[,]" and noting that "[p]olice officers reasonably may be expected to exercise a higher degree of restraint than the average citizen and should be less likely to be provoked into misbehavior by such speech"); Corey v. Nassan, No. 05-114, 2006 U.S. Dist. LEXIS 68521, at **38-39 (W.D. Pa. Sept. 25, 2006) (describing "[t]he enhanced protection of verbal criticism directed toward the police").

116. No. 07070449, 2008 N.Y. Misc. LEXIS 6160 (N.Y. Sup. Ct. Sept. 23, 2008).
117. *Id.* at *2 (quotation omitted).
118. *Id.* at *5.
119. *Id.* at *3-4.
120. 581 N.Y.S.2d 981 (N.Y. Crim. Ct. 1992).
121. *Id.* at 982.
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.* at 983.
126. *Id.* at 985.

set forth above in bullet points—cursing an NYPD blue streak[127] along with the crotch-grabbing antics, did not amount to fighting words,

> [I]n the context within which these words were uttered, defendant's remarks, even with the accompanying gestures, could not be said to have a direct tendency to provoke the police officer to retaliate with acts of violence or other breach of the peace. No reasonable person witnessing the situation would have thought it likely that the police officer would have been driven to attack defendant as a direct consequence of his comments.[128]

The *Stephen* court thus concluded that "even if reasonable civilians might have been provoked into retaliatory action by defendant's comments, one could expect that a trained police officer would remain calm."[129]

Other courts in recent years are in accord, noting, as a Pennsylvania court did, that "[t]he police must expect that, as part of their jobs, they will be exposed to daily contact with distraught individuals in emotionally charged situations."[130] For instance, a federal court in New Mexico held in 2006 that "the phrase 'fuck you' by itself does not rise to fighting words when directed at a police officer, even in a crowded mall."[131] The district court noted that "a police officer is expected to exercise a higher degree of restraint than an average citizen whether the speaker is aware that the speech is directed to a police officer or not."[132] A federal court in Kansas similarly protected the right of a person to give the middle finger[133] to a police officer, reasoning that "the First Amendment protects a significant amount of verbal criticism and challenge directed at police officers, and this freedom is one of the principal characteristics by which we distinguish a free nation from a police state."[134]

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127. Steven L. Winter, *Re-Embodying Law*, 58 MERCER L. REV. 869, 892 (2007) (describing the colloquialism "he talks a blue streak").

128. *Stephen*, 581 N.Y.S.2d at 985.

129. *Id.* at 986. It should be understood that the use of the word "fuck," standing alone and "without more—isn't fighting words." Christopher M. Fairman, *Fuck*, 28 CARDOZO L. REV. 1711, 1736 (2007).

130. Commonwealth v. Hock, 728 A.2d 943, 947 (Pa. 1999).

131. Stone v. Juarez, No. CIV 05-508 JB/RLP, 2006 U.S. Dist. LEXIS 27272, at *35 (D.N.M. Apr. 23, 2006).

132. *Id.* at *36.

133. *See generally* Ira P. Robbins, *Digitus Impudicus: The Middle Finger and the Law*, 41 U.C. DAVIS L. REV. 1403 (2008) (providing a current and comprehensive analysis of the law relating to the symbolic-speech gesture of raising the middle finger to convey a message).

134. Cook v. Bd. County Comm'rs, 966 F. Supp. 1049, 1051 (D. Kan. 1997). The right to give the middle finger to police is generally protected by courts. *See* Corey v. Nassan, No. 05-114, 2006 U.S. Dist. LEXIS 68521, at *23, *36 (W.D. Pa. Sept. 25, 2006) (noting that "[s]everal

As the title of this Article suggests, a shift in the intended audience of speech—in other words, a shift in the target at whom speech is directed—will affect the extent of protection that speech receives, at least within the framework of the fighting words doctrine as it has evolved since *Chaplinsky*. Placed in the context of a simple "if-then" formula: *If the audience or target of the speech is the average citizen, then the speech receives less protection than if the target is the police.*

Parsed more bluntly, one can get away with more invective and vitriolic speech if it is directed at a cop rather than the average person. Of course, in reality, all cops are not alike; some police officers are more sensitive than others to criticism that might arise in a fighting words scenario. Nonetheless, courts engage in a legal fiction—just like they engage in a legal fiction when they ask jurors to conjure up an average-person standard when they treat all police officers alike in this area of First Amendment jurisprudence because of their occupation.

There are, of course, limits on how much an officer must take, with some speech, indeed, crossing the line from protected offensiveness into unprotected fighting words.[135] For example, the Supreme Court of Montana drew the line in *State v. Robinson*[136] when a man, while in a crosswalk with other pedestrians, "glared"[137] and used a "loud voice"[138] to call a police officer in a patrol car stopped at the traffic light a

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courts have found that the use of the middle finger toward a police officer is protected speech," and adding that "[t]he weight of federal authority establishes that directing the middle finger at a police officer is protected expression under the First Amendment absent some particularized showing that the gesture in the specific factual context constitutes 'fighting words' or is otherwise illegal").

135. *See, e.g.*, United States v. Flowers, No. 2:06CR30, 2007 U.S. Dist. LEXIS 83211, at **18-24 (W.D. N.C. Nov. 8, 2007) (considering whether there is "a First Amendment right to confront police officers in the routine performance of their duties with epithets such as 'f*** dickhead' and 'f***ing assholes' in an attempt to incite an intoxicated crowd to retaliation," and holding there was no First Amendment violation when the speaker was arrested for such speech under a statute prohibiting the use of profane or indecent language on a public highway that the court had narrowly construed to reach only those words used in a fighting words situation); Davis v. Township of Paulsboro, 421 F. Supp. 2d 835, 841, 849 (D.N.J. 2006) (finding "no First Amendment violation" in the arrest of man who yelled at a police officer, who was asking him questions, that "he was going to fuck somebody up"); L.J.M. v. State, 541 So. 2d 1321, 1322-23 (Fla. Dist. Ct. App. 1989) (holding that shouting at a police officer in a loud voice, the phrase "[m]an, you pussy-assed mother fucker" was not protected speech, as these "were words that by their utterance tended to incite an immediate breach of peace and were 'fighting words.'" The Florida court seemed particularly disturbed by the moral offense of yelling at the police officer, opining 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 simply cannot be construed to condone this type of conduct").

136. 82 P.3d 27 (Mont. 2003).

137. *Id.* at 28.

138. *Id.*

"fucking pig."[139] The officer then pulled over, parked his car and reportedly asked the man, Malachi Cody Robinson, "if there was anything he wanted to talk about."[140] Robinson retorted "fuck off, asshole,"[141] at which time he was arrested for disorderly conduct.[142] In holding that Robinson's speech constituted fighting words not protected by the First Amendment, the Montana high court reasoned that "it is one thing to expect peace officers to exercise more restraint than the average citizen. However, it is quite another to allow the likes of Malachi Robinson to gratuitously test that restraint without fear of being charged with disorderly conduct."[143]

Importantly, and in stark contrast to the approach taken by the U.S. Supreme Court and the other courts described in this section, the Montana Supreme Court questioned the very notion that there should be two different standards for fighting words—one when the target of the speech is the average citizen and one when the target is a police officer. The court wrote:

> We fail to see the logic in concluding that words (such as "f****** pig") may or may not be deemed "fighting words" depending upon the intended recipient. If the object is a fellow citizen, they are considered fighting words. If, on the other hand, the object is a police officer, who, if well-trained to exercise restraint, will be less likely to respond belligerently, the words are somehow less provocative.[144]

A review of the legal literature reveals criticism of the *Robinson* opinion by attorney Thomas W. Korver,[145] who points out that it "fails to recognize inherent distinctions between the effect derogatory remarks will have when spoken to the general public versus those same words when spoken to a police officer."[146] In brief, Korver points out that the Montana Supreme Court failed to apply U.S. Supreme Court precedent, as it "ignored the principle holding in *Hill*."[147]

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139. *Id.*

140. *Id.* at 28-29.

141. *Id.* at 29.

142. *Id.*

143. *Id.* at 31.

144. *Id.*

145. Korver, the former editor-in-chief of the *Montana Law Review*, is an associate with Porzak Browning & Bushong LLP in Boulder, Colorado. *See* Thomas W. Korver, Porzak Browning & Bushong LLP website, http://www.pbblaw.com/thomas_korver.html (last visited June 9, 2010).

146. Thomas W. Korver, Note, State v. Robinson*: Free Speech, or Itchin' for a Fight?*, 65 MONT. L. REV. 385, 403 (2004).

147. *Id.* at 404.

Suggesting that the skin of police officers must be even thicker now then when the fighting words doctrine was created in *Chaplinsky*, the U.S. Court of Appeals for the Sixth Circuit in 2002 noted in *Greene v. Barber*[148] that "standards of decorum have changed dramatically since 1942, moreover, and indelicacy no longer places speech beyond the protection of the First Amendment."[149] In *Greene*, an attorney called a police officer an "asshole"[150] during a face-to-face argument in the lobby of the hall of justice building in Grand Rapids, Michigan.[151] The attorney's voice reportedly "was loud enough to attract the attention of other people in the lobby,"[152] or, as the appellate court put it rather wryly, "it is fair to conclude that Mr. Greene was not speaking *sotto voce*."[153] In holding that Greene was within his First Amendment rights to utter the aspersion, the Sixth Circuit reasoned that "it is hard to imagine Mr. Greene's words inciting a breach of the peace by a police officer whose sworn duty it was to uphold the law."[154]

There is, however, an important caveat here to the two-level fighting words approach that requires police to tolerate more speech than the average citizen. In particular, it is clear that an officer can squelch the speech of a person who repeatedly interrupts the officer so as to impede his or her ability to carry out an investigation and job duties, even if that speech does not rise to the level of fighting words. This is illustrated in a July 2008 ruling by U.S. District Judge John W. Lungstrum in *McCormick v. City of Lawrence*.[155] The case involved the speech of "a self-proclaimed civil rights activist"[156] that interfered with the work of two officers who were at a crime scene investigating a carjacking.[157] As described by Judge Lungstrum, Dale McCormick:

> [B]egan badgering the officers in a constant, loud, and disruptive manner that clearly was intended to disrupt their efforts to investigate the crime at hand. In fact, plaintiff's conduct was so distracting that one officer at the scene—defendant Harvey—had to devote his time solely to keeping plaintiff away from Officer

148. 310 F.3d 889 (6th Cir. 2002).

149. *Id.* at 896.

150. *Id.* at 892.

151. *Id.*

152. *Id.* at 893 (quotation omitted).

153. *Id.* "Sotto voce" means to speak "under the breath" or "in a private manner." MERRIAM-WEBSTER'S ONLINE DICTIONARY, *available at* http://www.merriam-webster.com/dictionary/sotto+voce (last visited June 9, 2010).

154. *Greene*, 310 F.3d at 896.

155. No. 02-2135, 2008 U.S. Dist. LEXIS 60367 (D. Kan. July 18, 2008).

156. *Id.* at *1.

157. *See id.* at *12-14 (describing the verbal altercation with the officers).

> Stegall so that Officer Stegall could investigate the carjacking incident.[158]

Judge Lungstrum thus concluded that McCormick's "speech during this encounter, by virtue of its time and manner, plainly obstructed ongoing police activity involving a third party. As such, it is not constitutionally protected."[159] McCormick actually seems to be a pivotal player in creating this body of police-targeted, fighting words jurisprudence, as he previously had run afoul of the law in several other incidents when he yelled at police.[160]

The exception identified by Judge Lungstrum is rooted in the concurring opinion of Justice Powell in *Hill*,[161] where Powell wrote—perhaps in a move to temper his concurring position in *Lewis* thirteen years before that police must tolerate more speech than average citizens in fighting words scenarios[162]—that:

> I have no doubt that a municipality constitutionally may punish an individual who chooses to stand near a police officer and persistently attempt to engage the officer in conversation while the officer is directing traffic at a busy intersection. Similarly, an individual, by contentious and abusive speech, could interrupt an officer's investigation of possible criminal conduct. A person observing an officer pursuing a person suspected of a felony could run beside him in a public street shouting at the officer. Similar tactics could interrupt a policeman lawfully attempting to interrogate persons believed to be witnesses to a crime.[163]

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158. *Id.* at *12-13.

159. *Id.* at *14.

160. *See, e.g.*, McCormick v. City of Lawrence, No. 03-2418-KHV, 2006 U.S. Dist. LEXIS 5725, at *2 (D. Kan. Feb. 13, 2006) (involving an August 2001 incident at a sobriety checkpoint in which McCormick "protest[ed] the checkpoint. Plaintiff's protest took the form [sic] a verbal tirade which was primarily directed at the officers, calling them 'gestapo' and 'jack booted thugs.' As plaintiff protested, many of the bystanders laughed at the spectacle"); McCormick v. City of Lawrence, 325 F. Supp. 2d 1191, 1197, 1200 (D. Kan. 2004) (involving two incidents from 2002, including one deemed by the court to have crossed the line into unprotected fighting words, as McCormick allegedly yelled at an officer, who was engaged in the traffic stop of a third party, "'Mother F *** ers,' 'F*** heads,' 'F *** ing pigs,' 'Why don't you run around the track, chubby?,' 'Hey chubby, what's your name?,' 'Hey fatty,' 'Hey fat a**,' and 'Leave her the f*** alone'"), *aff'd*, 130 Fed. Appx. 987 (10th Cir. 2005).

161. *See supra* text accompanying notes 94–99 (describing *Hill*).

162. *See supra* text accompanying notes 110–14 (describing Justice Powell's concurrence in *Lewis*).

163. City of Houston v. Hill, 482 U.S. 451, 479 (1987) (Powell, J., concurring).

C. *Confronting Public School Teachers and Principals: Thin-Skin Censorship*

While an on-duty officer must have thicker skin than the "average person"[164] under the fighting words doctrine, other government employees in positions of power and authority who also are on duty are treated as if they were eggshells ready to crack at any derogatory comment directed to them. Who are they? Public school teachers. Speech by minors directed at them, at least while on campus, can be squelched before it ever even escalates to the cusp of a true fighting words scenario that an average person might face.[165]

In a 1986 article in the *Yale Law Journal*, Professor Betsy Levin observed that the enforcement of "institutional rules and regulations may be as important to the socialization of students as the formal curriculum."[166] In particular, she contended that school rules that prohibit "talking back to teachers"[167] and others like it that are "concerned with certain patterns of behavior on the part of both students and teachers"[168] are important because they "clearly inculcate particular values, as do the procedures for determining whether those rules have been violated and what sanctions should be imposed."[169]

The same year that Levin published her article, the U.S. Supreme Court handed down its student-speech ruling in *Bethel School District v. Fraser*.[170] The *Fraser* court upheld the punishment of a high school student for engaging in "offensively lewd and indecent speech"[171] that was, in the majority's opinion, "unrelated to any political viewpoint,"[172] despite the fact that it took the form of "a speech nominating a fellow student for student elective office."[173]

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164. *See* Knight Riders of the Ku Klux Klan v. City of Cincinnati, 72 F.3d 43, 46 (6th Cir. 1995) ("Fighting words is a small class of expressive conduct that is likely to provoke the *average person* to retaliate, and thereby cause a breach of the peace." (emphasis added)).

165. Indeed, the U.S. Supreme Court has never even needed to consider the fighting words doctrine in the context of censoring student speech in public schools. *See* Christi Cassel, Note, *Keep Out of Myspace!: Protecting Students from Unconstitutional Suspensions and Expulsions*, 49 WM. & MARY L. REV. 643, 657 (2007) (writing that "the Supreme Court has not evaluated the applicability of the 'true threat' and 'fighting words' doctrines in the realm of school discipline").

166. Betsy Levin, *Educating Youth for Citizenship: The Conflict Between Authority and Individual Rights in the Public School*, 95 YALE L.J. 1647, 1668 (1986).

167. *Id.*

168. *Id.*

169. *Id.*

170. 478 U.S. 675 (1986).

171. *Id.* at 685.

172. *Id.*

173. *Id.* at 677.

In reaching this pro-censorship conclusion, the *Fraser* Court began by asserting that "[t]he role and purpose of the American public school system"[174] encompasses "inculcat[ing] the habits and manners of civility as values in themselves."[175]

It emphasized that:

> The 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. Consciously or otherwise, teachers—and indeed the older students—demonstrate the appropriate form of civil discourse and political expression by their conduct and deportment[176] in and out of class.[177]

Writing for the majority, Chief Justice Warren Burger emphasized the power of schools to teach "essential lessons of civil, mature conduct"[178] as part of their educational mission. He added that "[t]he undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior."[179] Burger also noted that schools have the power to restrict the "manner of speech."[180]

Thus, if a student, using a loud voice, tells a teacher to "fuck off" while walking through a school hallway, the school could punish the student before the speech escalated to the level of fighting words simply because: 1) the speech is sexually lewd and offensive; 2) the manner of speech is not a form of "civil, mature conduct" or "socially appropriate behavior"; and 3) to punish such speech is to illustrate and to teach that it contradicts the "habits and manners of civility" that schools must teach. Conversely, a failure to punish the student's speech in this example conveys the message to students that it is appropriate (or at least tolerated) as a mode of expression in a civilized society. Tolerance of rude and confrontational speech, in other words, undermines the

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174. *Id.* at 681.

175. *Id.*

176. Talking back to teachers and principals would fall under what the U.S. Supreme Court in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), also called "deportment." *Id.* at 508. This was something the *Tinker* court made clear it did not have to address in that seminal decision. *See id.* at 507-08 ("The problem posed by the present case does not relate to regulation of the length of skirts or the type of clothing, to hair style, or deportment.").

177. *Bethel*, 478 U.S. at 683.

178. *Id.*

179. *Id.* at 681.

180. *Id.* at 683.

authority of teachers to convey the messages and lessons of civility that are part of the pedagogical process privileged in *Fraser*.

Note that reasons two and three above still hold true even if the language used by the student is not sexually offensive, but involves calling the teacher a "fat, ugly, stupid moron." In both cases, it is the uncivil manner of expression—an affront to authority—that is so discordant with the educational mission of teaching socially appropriate behavior.

All of this makes complete sense, given the majority's big-picture observations in *Fraser* that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings."[181] This point was reinforced in 2007 in the high court's latest student-speech case of *Morse v. Frederick*.[182] In the opinion, *Fraser* was quoted approvingly by Chief Justice John Roberts[183] to make the point that if the student in *Fraser* had "delivered the same speech in a public forum outside the school context, it would have been protected."[184]

In summary, then, an on-campus teacher does not have to tolerate "fuck you" and otherwise defiant speech before it becomes fighting words, but an on-beat police officer often does have to tolerate it, even beyond the usual fighting words.[185] The speech directed at the teacher can be stopped before it ever rises to the level of unprotected fighting words, while the speech directed at the police officer actually can exceed the level of fighting words that an average person must endure. Put more bluntly, you cannot disrespect a teacher[186] but you can disrespect a cop.[187]

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181. *Id.* at 682.

182. 551 U.S. 393 (2007).

183. *Id.* at 404-05.

184. *Id.* at 405.

185. *See* Houston v. Hill, 482 U.S. 451, 462 (1987) ("The freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principle characteristics by which we distinguish a free nation from a police state."); W.L. v. State, 769 So. 2d 1132, 1133 (Fla. Dist. Ct. App. 2000) (holding that hurling profane and offensive language at a police officer is protected by the First Amendment); City of West Monroe v. Cox, 511 So. 2d 1200, 1203 (La. Cir. Ct. App. 1987) (holding that defendants' obscenities did not amount to disturbing the peace because trained police officers are held to higher degrees of restraint than average citizens).

186. A minor can, of course, disrespect the teacher if the minor is off campus. *See* Klein v. Smith, 635 F. Supp. 1440, 1141-42 (D. Me. 1986) (protecting the right of a student to give the middle-finger salute to a teacher while off campus).

187. The former part of this statement now makes its way into schools' codes of conduct. For instance, the code of conduct of the Ozark City School System in southeast Alabama makes it clear that the school system can suspend a student for "[d]efiance and/or disrespect of school Board employee's authority." Ozark City Schools K-12 Code Of Student Conduct, *available at* http://www.ozarkcityschools.net/public/ParentsStudents/CodeofConduct/tabid/66/Default.aspx

What emerges, then, is not simply a two-tiered approach to fighting words, but a tri-level one in which the shift in the audience or target of the speech leads to different levels of speech protection.

Audience/Target of Speech	Level of Speech Protection in Confrontations
1. COPS	Heightened
2. AVERAGE CITIZENS	Average
3. TEACHERS	Reduced

However, there are two particular problems with this approach. The first is that some high school principals and teachers probably *do* have thick enough skin to take some of the same abuse heaped on police officers. As one federal judge wrote, in an off-campus speech case involving a minor who gave the middle-finger gesture to one of his teachers, giving "'the finger,' at least when used against a universe of teachers, is not likely to provoke a violent response."[188] Referring to the other teachers and administrators in the same school, the judge added that "the court cannot do these sixty-two mature and responsible professionals the disservice of believing that collectively their professional integrity, personal mental resolve, and individual character are going to dissolve, willy-nilly, in the face of the digital posturing of this splenetic, bad-mannered little boy."[189]

As holds true with the discussion of police officers,[190] all teachers are not actually alike, and some probably would brush off the speech in question without either fighting back or even punishing the student-speaker. It is a judicial fiction, then, to treat all principals and teachers alike. It is simply the nature of their jobs—in this case, as government employees taught to instill in today's youth certain values, manners and a sense of civility in discourse and conduct—that mandates their treatment as thin-skinned individuals who can censor speech before it rises to the level of fighting words. When it comes to the police, it too is the nature of their jobs—as government employees trained to exercise

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(last visited June 9, 2010); *see also* Virginia Beach City Public Schools Code of Student Conduct 2009-2010 School Year, *available at* http://www.vbschools.com/students/conduct/code.asp (last visited Sept. 12, 2009) ("A student will behave in a respectful manner toward teachers/staff and other students. Examples of *disrespectful behavior* are: walking away, *talking back*, refusing to identify self properly, rude behavior, spitting, and *challenging authority*." (emphasis added)).

188. *Klein*, 635 F. Supp. at 1441 n.3.

189. *Id.* at 1441 n.4.

190. *See supra* text accompanying notes 81–163.

restraint and to keep the peace, rather than disturb it—that requires they be treated as having far thicker skin than the average person.

The second problem is that in being able to quickly squelch any verbal challenge to their authority or show of verbal disrespect, teachers and principals are presenting students with an inaccurate view about the ability of citizens to verbally challenge government authorities in the real world, be it police on the beat or members of Congress at town hall meetings, as transpired in August 2009.[191] Unless teachers take the time to explain to their students that it is, in fact, permissible to talk back to police and politicians, the lesson some students may learn is that they never can challenge, via the spoken word and in a face-to-face situation, certain government officials.

Finally, a close review of the case law reveals there is one seemingly exceptional case when it comes to teachers. It is found in an Arizona appellate court ruling called *In re Louise*.[192] The appellate court held that the speech of a high school student, directed in a face-to-face setting at her assistant principal, did not amount to fighting words.[193] The student, who was "visibly distraught,"[194] used the phrases "[f]uck this. I don't have to take this shit"[195] and "[f]uck you. I don't have to do what you tell me."[196] The appellate court held that the student's "speech cannot reasonably be said to amount to 'fighting words.' The speech was not likely to provoke an ordinary citizen to a violent reaction, and *it was less likely to provoke such a response from a school official*, the alleged victim in this case."[197] The italicized part above indicates that the court believed school officials are similar to police officers, in that they are expected to bear the burden of more invectives than the average citizen.

In summary, fighting words jurisprudence, just like that of obscenity, employs an audience-shifting perspective in order to determine the scope of message protection. Like obscenity, it too uses a fictional average-person standard to bring a certain sense of uniformity, but then carves out exceptions when the speech is intended for or directed at niche audiences (cops and teachers in fighting words, and sexual deviants in obscenity). The next part of this Article turns to another area

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191. *See generally* Roger Simon, *Calling All Crazies—Obama Needs You*, CHI. SUN TIMES, Aug. 16, 2009, at A26 (describing "what is happening at the town hall meetings being held by members of Congress this summer: yelling, screaming, the waving of arms and the gnashing of teeth").

192. 3 P.3d 1004 (Ariz. Ct. App. 1999).

193. *Id.* at 1005 (concluding that the student's "outburst involved neither 'fighting words' nor 'seriously disruptive behavior'").

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.* at 1006 (emphasis added).

of law—defamation—where the same audience-shifting principles apply.

IV. SHIFTING THE AUDIENCE TO DETERMINE MESSAGE PROTECTION IN DEFAMATION: AVERAGE READERS V. NICHE AUDIENCES

Since its 1964 decision in *New York Times Co. v. Sullivan*,[198] the U.S. Supreme Court has taken libel law down a road of constitutionalization that makes fundamental distinctions between, on the one hand, public-official and public-figure plaintiffs and, on the other, private plaintiffs. Depending upon characteristics such as the plaintiff's occupation, level of celebrity or involvement on a particular issue, different fault standards are employed to make it harder for public plaintiffs to prevail than for private individuals. All of this is, as a review of the literature reveals, well-covered territory in both media law textbooks[199] and law journals.[200]

This Article, however, explores the very different and under-addressed issue of how shifting audiences in libel law determine whether the message in question actually is defamatory. As with both obscenity and fighting words, the law of libel generally attempts to use

198. 376 U.S. 254 (1964).

199. *See, e.g.*, MIDDLETON & LEE, *supra* note 102, at 119-45 (addressing *Sullivan*, the actual malice and negligence fault standards and the different categories of plaintiffs in defamation law); WAYNE OVERBECK, MAJOR PRINCIPLES OF MEDIA LAW 137-51 (rev. ed. 2008) (addressing *Sullivan*, the actual malice and negligence fault standards and the different categories of plaintiffs in defamation law); PAUL SIEGEL, COMMUNICATION LAW IN AMERICA 114-32, 148-54 (1st ed. 2002) (discussing *Sullivan*, the actual malice and negligence fault standards and the different categories of plaintiffs in defamation law); JOHN D. ZELEZNY, COMMUNICATIONS LAW: LIBERTIES, RESTRAINTS, AND THE MODERN MEDIA 130-44 (5th ed. 2007) (providing an overview of both shifting fault standards and categorizing plaintiffs in defamation law).

200. *See, e.g.*, Catherine Hancock, *Origins of the Public Figure Doctrine in First Amendment Defamation Law*, 50 N.Y.L. SCH. L. REV. 81 (2005-2006) (analyzing the public-figure versus private-figure dichotomy in defamation law); W. Wat Hopkins, *The Involuntary Public Figure: Not So Dead After All*, 21 CARDOZO ARTS & ENT. L.J. 1 (2003) (providing an excellent overview and analysis of the various categories of "public" plaintiffs in defamation Law); Arlen W. Langvardt, *Media Defendants, Public Concerns, and Public Plaintiffs: Toward Fashioning Order From Confusion in Defamation Law*, 49 U. PITT. L. REV. 91 (1987) (addressing the concepts of actual malice, public figures and private figures in defamation law); Todd F. Simon, *Libel as Malpractice: News Media Ethics and the Standard of Care*, 53 FORDHAM L. REV. 449 (1984) (addressing the critical differences between the fault standards of negligence and actual malice in defamation law); Rodney A. Smolla, Dun & Bradstreet, Hepps, *and* Liberty Lobby*: A New Analytic Primer on the Future Course of Defamation*, 75 GEO. L.J. 1519 (1987) (providing an excellent analysis of the public-figure and private-figure distinctions in defamation law).

an average-person standard when considering the meaning of a message,[201] but it too switches audience perspectives in some situations. Just as certain fetishes can take on a different meaning for a sexual deviant under *Mishkin* in obscenity,[202] so too can words take on different meanings for particular imagined communities of people in defamation law. In brief, shifting the audience can shift the meaning, thereby affecting whether the speech at issue can be civilly punished via libel law.

Professor C. Thomas Dienes and media defense attorney Lee Levine point out "the ambiguity of meaning and the differing perceptions of readers, viewers and listeners. Words can have different meanings in distinct contexts, and the perceived meaning can vary for different people."[203] These meanings are influenced by a community's values, with those values sometimes shared by members of the community. As Stanford University Professor Marc Franklin observed some twenty-five years ago:

> The determination of the type of statements that lower an individual's reputation or expose him to hatred, contempt, and ridicule raise important questions about *societal values*. Thus, although it was unclear in the 1930s and late 1940s whether attacking someone as a communist damaged his reputation, such a statement was clearly defamatory during the Soviet Union's alliance with Nazi Germany and later during the Cold War years.[204]

A case on point is *MacLeod v. Tribune Publishing Co., Inc.*,[205] in which the Supreme Court of California in 1959 observed that "it is now settled that a charge of membership in the Communist Party or communist affiliation or sympathy is libelous on its face."[206] Today, however, courts have held that falsely labeling someone a communist

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201. *See, e.g.*, James v. Gannett Co., 353 N.E.2d 834, 837-38 (N.Y. 1976) (observing that the meaning of allegedly defamatory statements must be determined by "the sense in which the words were likely to be understood by the *ordinary and average reader*" (emphasis added) (quotation omitted)).

202. *See supra* text accompanying notes 36–56 (describing the rule from *Mishkin* and how it applied via standardized jury instructions in California and Massachusetts).

203. C. Thomas Dienes & Lee Levine, *Implied Libel, Defamatory Meaning, and State of Mind: The Promise of* New York Times Co. v. Sullivan, 78 IOWA L. REV. 237, 237 (1993).

204. Marc A. Franklin & Daniel J. Bussel, *The Plaintiff's Burden in Defamation: Awareness and Falsity*, 25 WM. & MARY L. REV. 825, 828 n.14 (1983-84) (emphasis added).

205. 343 P.2d 36 (Cal. 1959).

206. *Id.* at 41.

just doesn't carry with it the same sting or harm, and thus it is not necessarily defamatory.[207]

One century ago, the U.S. Supreme Court held in *Peck v. Tribune Co.*[208] that the question of reputational harm in libel law centers on whether the speech "would hurt the plaintiff in the estimation of *an important and respectable part of the community.*"[209] This language assumes that there is a single community—"the community."[210] Indeed, as another court noted, "it is *not* one's reputation in a *limited community* in which attitudes and social values may depart substantially from those prevailing generally which an action for defamation is designed to protect."[211] The law of libel thus typically considers how "the average reader"[212] would feel about a statement.

But what if the allegedly defamatory statement is only communicated to a limited or micro-community—one united by ethnicity or other characteristics such as interests or beliefs or, to borrow Anderson's phrase, an "imagined community"[213] in the eyes of the law? The question is pivotal because, as Professor Robert Post observed, the central questions of meaning and reputational harm focus on "which communities the law will assist in the maintenance of their cultural identity."[214] Should there then be different communities of interpreters—social deviants for instance, to draw a parallel with micro-

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207. *See* Lasky v. Am. Broad. Co., Inc., 606 F. Supp. 934, 940 (S.D.N.Y. 1985) (reasoning that "accusing another of being a communist is *not* libel when it occurs in the midst of public debate in which voices are expected to be raised in sloganeering invective[,]" and finding that "[s]uch name calling, in the context of public debate, is protected speech" (emphasis added); Lam v. Ngo, 91 Cal. App. 4th 832, 849 (Ct. App. 2001) (concluding that "[c]harges of communism are part of the heat of the political kitchen"); Jaliman v. Selendy, No. 12820/04, slip op. at 5 (N.Y. Sup. Ct. Mar. 17, 2005) (observing that "it is not a crime to be a member of the communist party. Courts have held that accusations of communist affiliations do not constitute slander *per se* as injurious to a business, trade or profession").

208. 214 U.S. 185 (1909) (emphasis added).

209. *Id.* at 190.

210. *Id.*

211. Saunders v. Bd. Directors WHYY-TV, 382 A.2d 257, 259 (Del. Super. Ct. 1978) (emphasis added).

212. *See* Norse v. Henry Holt & Co., 991 F.2d 563, 567 (9th Cir. 1993) (reasoning that "[t]o discern whether a statement has a defamatory meaning, we interpret it from the standpoint of the *average reader*" (emphasis added)); Sarkisian v. Rooke, No. 06-CV-00170, 2007 U.S. Dist. LEXIS 26164, *11 (E.D. Pa. Mar. 23, 2007) ("To determine whether a statement is defamatory, a court must consider its effect *on the average reader or listener*" (emphasis added)); Seymour v. Lakeville Journal Co., No. 04 CV4532 (GBD), 2004 U.S. Dist. LEXIS 24897, at *12 (S.D.N.Y. Dec. 9, 2004) (observing that the allegedly defamatory statements "are not to be examined in isolation, but rather are to be considered in context and read as a whole as *the average reader* would peruse the article" (emphasis added)).

213. *See generally* ANDERSON, *supra* note 13.

214. Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CAL. L. REV. 691, 715 (1986).

communities of sexual deviants embraced by *Mishkin* in obscenity law[215]—when it comes to the scope of protection for a possibly defamatory message?

This, in fact, is where defamation law takes account of shifting audiences to determine the scope of message protection. Several very recent cases illustrate this notion, as it plays out in a country that is becoming increasingly diverse to the point that, within any single geographic community, there are often many micro-communities with different values that in terms of population size alone, may or may not constitute "*an important and respectable part of the community*"[216] or, similarly, "*a considerable and respectable segment of the community*."[217]

In a 2008 case, the Court of Appeals of Georgia observed that a publication that is claimed to be defamatory must be "construed in the sense in which the readers *to whom it is addressed* would ordinarily understand it."[218] This statement suggests that speech directed at a specific, targeted audience of addressees should be evaluated by that same micro-community and not by everyone in the larger geographic community. A very recent opinion illustrates this point.

In February 2009, a California appellate court ruled in the libel case of *Nguyen-Lam v. Cao*.[219] In *Cao*, the plaintiff, who had just been selected for the position of superintendent of the Westminster School District in southern California, was called a Communist by the defendant.[220] Subsequent to this statement, the school board met again, reconsidered its initial decision and then voted to terminate the plaintiff as superintendent.[221] The plaintiff, who otherwise would have "become the first Vietnamese person hired in America as a superintendent of a public school system,"[222] sued the person who called her a Communist, asserting that "calling someone a 'Communist' in Westminster's '*Little Saigon' Vietnamese community* was 'extremely harmful to [her]

215. *See id.* at 735-38 (discussing how defamation law sustains rules of civility within communities, and asserting that "[t]he essence of tolerance is the refusal to draw boundaries that shut out the deviant. But while this refusal may be justified by respect for the individuality of the deviant and by the need for different social groups to live together in a land as diverse as the United States, it can nevertheless be deeply antithetical to the constitution of community identity").

216. Peck v. Tribune Co., 214 U.S. 185, 190 (1909) (emphasis added).

217. Stanton v. Metro Corp., 438 F.3d 119, 127 (1st Cir. 2006) (quotation omitted).

218. Lucas v. Cranshaw, 659 S.E.2d 612, 615 (Ga. Ct. App. 2009) (emphasis added). This language was quoted approvingly in July 2009 in *Community Newspaper Holdings, Inc. v. King*, 682 S.E.2d 346 (Ga. Ct. App. 2009).

219. 171 Cal. App. 4th 858 (Cal. Ct. App. 2009).

220. *Id.* at 863-64.

221. *Id.* at 864.

222. *Id.* at 863.

reputation.' While the statements were not made to Vietnamese individuals, they were made to Board members necessarily attuned by demographics to the concerns of Vietnamese-American voters."[223]

Importantly, the defendant had not made the statement to the community at large, but had communicated it during a phone call to the school board president and another school board member.[224] The appellate court ruled in favor of the plaintiff and upheld the trial court's denial of the defendant's motion to strike the libel cause of action.[225]

Cao thus illustrates how libel law's use of a micro-community to determine meaning—in this case, those intimately familiar with and immersed in the 'Little Saigon' Vietnamese community[226]—affects the extent of protection the speech in question will receive. Importantly, a micro-community is not just a limited geographic community like 'Little Saigon'; geographically diffuse communities have spawned similar lawsuits.[227] While it may be defamatory to falsely call a refugee of Vietnamese origin a Communist within these micro-communities, it may not be defamatory to call the average person in the greater Los Angeles area (encompassing 'Little Saigon') a Communist (the very notion of an average-Angelino-reader perspective seems ridiculous if one recognizes the multiple enclaves of communities within its boundaries, from sexual ones like the gay community in West Hollywood, to racial ones like the black community in Compton).

Technology suggests that situations like *Cao* will arise increasingly in the future. The Internet provides social networking sites that allow smaller micro-communities to bond, connect and direct messages specifically intended for other members of those communities (and, conversely, not intended for general communities that may be reached by older media, such as general circulation newspapers and network television). Libel law's recognition, described in this part of the Article, that a message should be "construed in the sense in which the readers *to whom it is addressed* would ordinarily understand it"[228] may get quite a

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223. *Id.* at 864 (emphasis added).

224. *Id.* at 865.

225. *Id.* at 874.

226. This area has been described in the news media as a "staunchly anti-communist Vietnamese enclave in central Orange County, where the flag of fallen South Vietnam continues to wave, business owners, politicians and even pop singers know the [communist] label can spark street protests and damaging reports in the Vietnamese press." My-Thuan Tran, *Redbaiting Goes to Courts*, L.A. TIMES, Apr. 6, 2009, at 5.

227. In 2009, Duc Tan, a Vietnamese refugee living in Thurston County, Washington, also won a defamation lawsuit after being labeled a Communist sympathizer. Jeremy Pawloski, *Olympia Man Wins Lawsuit Over 'Communist' Label*, OLYMPIAN (Olympia, Wash.), Apr. 17, 2009, *available at* http://www.theolympian.com/southsound/v-print/story/822630.html (last visited June 9, 2010).

228. Lucas v. Cranshaw, 659 S.E.2d 612, 615 (Ga. Ct. App. 2009) (emphasis added). This

workout as posts on websites and social networks created specifically for niche audiences trigger defamation suits.

V. CONCLUSION

Contrary to the assertion of Fee noted in the Introduction,[229] the First Amendment, as this Article has illustrated, does not guarantee equal amounts of freedom of speech to all people in the United States. Using the areas of obscenity, fighting words and defamation, this Article has demonstrated that the nature of the audience or particular community that is the target or intended recipient of speech may affect the amount of protection that speech receives. Unlike articles that have analyzed these areas of law separately, this Article has attempted to compare and contrast them to reveal a larger picture of how courts have drawn dichotomies in free-speech jurisprudence that pivot on the nature of the targeted and intended audience.

In all three of the areas examined, the law attempts to make assumptions about how messages will be interpreted, received, and experienced by so-called average people. The average-person or ordinary-person standard is embraced as a baseline to add uniformity to the laws of obscenity, fighting words, and defamation. Yet it is merely a fiction, asking fact finders—juries and judges—to guess at what some mythical average person would think, feel, or understand.

In obscenity law, for instance, most jurors probably do not ask or poll their neighbors, querying them about their private sexual practices or what adult content they watch; instead, they guess at what the average person might think, taking into account every single adult in the community that they have *never* even met, which could number into the millions in large metropolitan areas.

The guessing game is compounded when jurors are asked to speculate about what a supposed sexual deviant might think about certain content. This can be especially difficult, when the content in question is gay pornography, which some homophobic heterosexuals might find deviant. As Stephen P. Modde, general counsel for gay-male adult film company Falcon Studios, puts it:

> I've lived all over this country and there are very few states where you can be gay and feel like you're part of the community. You're an outcast just by being who you are. And it would be hard to make jurors put themselves in the place of a gay

language was quoted approvingly in July 2009 in *Community Newspaper Holdings, Inc. v. King*, 682 S.E. 2d 346 (Ga. Ct. App. 2009).

229. Fee, *supra* note 12, at 1706.

community member.[230]

The courts thus engage in dueling fictions when they apply a supposedly singular First Amendment that applies to all citizens. First, there is the fiction of the average person—an imagined community of one, to borrow from Anderson's term[231]—derived from a crazy-quilt fusion of all members of a larger, geographic community. Second, there is the fiction that all members of an imagined, non-geographic community—sexual deviants with particular fetishes, public school teachers, police officers and Vietnamese refugees, to name a few that this Article has suggested—share the same reactions to messages targeted toward or about them.

Yet it is here that courts would be wise, in the opinion of the author of this Article, to draw from the words of U.S. District Judge Patrick J. Duggan in the student-speech case of *Barber v. Dearborn Public Schools*.[232] Judge Duggan, responding to the argument of a principal that all Arab-Americans at a public high school in Dearborn, Michigan would respond in the same way to a t-shirt worn by the student-plaintiff, opined: "As Plaintiff's counsel noted at oral argument, it is improper and most likely detrimental to our society for government officials, particularly school officials, to assume that members of a particular ethnic group will have monolithic views on a subject and will be unable to control those views."[233] Indeed, courts engage in the same, very dangerous type of group-think assumptions rejected by Judge Duggan when they force other judges (via precedent) and layperson jurors to speculate about how a member of a particular micro-community—one that they can only imagine—might think about or respond to a particular message.

The same problem holds true in defamation law.[234] As Professor Lyrissa Lidsky of the University of Florida's Levin College of Law observed:

> The substantial and respectable minority standard has a curiously modern ring to it. The standard ostensibly embodies the traditional liberal values of tolerance and respect for diversity necessary in a multi-cultural, multi-ethnic society. [C]ourts must

230. Clay Calvert & Robert D. Richards, *Gay Pornography and the First Amendment: Unique, First-Person Perspectives on Free Expression, Sexual Censorship, and Cultural Images*, 15 AM. U.J. GENDER SOC. POL'Y & L. 687, 706 (2007) (quoting Modde, based on comments he made during an interview conducted by the authors in September 2006).

231. *See generally* ANDERSON, *supra* note 13.

232. 286 F. Supp. 2d 847 (E.D. Mich. 2003).

233. *Id.* at 857.

234. *Supra* text accompanying notes 198–228.

> undertake both a quantitative inquiry to determine whether the community segment is "substantial" and a normative inquiry to determine whether it is "respectable." Yet courts rarely resort to polls, surveys or even witness testimony to determine the values held by the community segment but instead rely on their own personal knowledge and intuitive judgments which they subsequently label common knowledge and common sense. Hence, a plaintiff's recovery is contingent on neither actual harm to reputation (due to defamation's anomalous doctrine of presumed harm) nor an actual community in whose eyes the plaintiff's reputation has been harmed.[235]

Like the law of obscenity with its mythical average-person standard and imagined communities of deviants, it all truly boils down to guesswork and speculation by jurors in defamation law. As Lidsky argues:

> Deciding whether statements have defamatory "tendencies" requires judges (and sometimes juries) to envision the community in which the plaintiff's reputation was harmed. The term "envision" is appropriate, since the community segment determination is rarely based on objective evidence but is instead based on (often) unconscious decisions and beliefs about communities and their values.[236]

Although never invoking in an interdisciplinary style the notion of imagined communities explicated by Benedict Anderson, Lidsky taps into this idea, albeit in her isolated analysis of defamation law (she does not address either obscenity or fighting words), when she concludes her article:

> Some fictions are useful fictions; some myths are useful myths. At the heart of the defamation tort lies a myth of a cohesive, homogeneous community whose norms lend shape and order to modern life. However, this idealized vision of community life does not comport well with the fragmented nature of life in a complex, heterogeneous, multicultural, multiethnic society. Nonetheless, the myth has the power to shape outcomes in defamation cases.[237]

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235. Lyrissa Barnett Lidsky, *Defamation, Reputation, and the Myth of Community*, 71 WASH. L. REV. 1, 8-9 (1996).

236. *Id.* at 36.

237. *Id.* at 49.

Adding to the problems in libel law, like that in obscenity and fighting words, is the deployment of a reasonable or average-reader perspective. As Professor David McCraw observed in a 1991 law journal article, such a fictional standard is plagued by its "amorphous nature."[238]

In summary, this Article has cut across obscenity, fighting words and defamation in order to show the macro-level problems in First Amendment jurisprudence that occur when judges embrace imagined communities—both those of the fictional average person and those of micro-level, non-geographic sub-populations who supposedly are, for legal purposes, all alike. This Article concludes by raising the question of which fiction is worse—that of a speculative, mythical average person to gauge message protection or that of a micro-level imagined community that is applied by supposedly average jurors? Parsed more bluntly, which is worse, an imagined community of one (the average person) or multiple imagined communities that coalesce around characteristics, beliefs or proclivities?

In considering this question, judges and legal scholars must recognize that the deployment of multiple micro-communities serves important functions. For instance, in fighting words, these communities allow citizens to more vehemently criticize some government officials (police) in positions of power, while they also allow for lessons of civility and respect for authority to be taught in public schools (micro-communities of thin-skinned teachers and principals). In libel law, they recognize the complexity of the meaning process and that different groups of people will interpret and understand messages differently based on their shared characteristics. And in obscenity, they acknowledge that some people do have sexual proclivities that fall outside those of the supposedly average person.

In an ethnically diverse nation, then, perhaps the law's use of multiple sub-communities to determine how much protection speech receives makes sense. But the corresponding problem is a distinct lack of uniformity in First Amendment jurisprudence that threatens, if expanded further and taken to its logical extreme, to bring different standards of speech justice for different groups. For instance, when a Vietnamese refugee living in Washington State won a defamation lawsuit in 2009 after he was called a Communist, Matthew Heller observed that the decision "sends a clear message that First Amendment protections for political speech may not apply to statements accusing Vietnamese-Americans of communist sympathies."[239] In other words,

238. David McCraw, *How Do Readers Read? Social Science and the Law of Libel*, 41 CATH. U.L. REV. 81, 99 (1991).

239. Matthew Heller, *Jury Says 'Communist' Slur Defamed Vietnam Refugee*, ONPOINTNEWS.COM, Apr. 27, 2009, *available at* http://www.onpointnews.com/NEWS/Jury-

the law is not uniform and the exact same words may be treated differently, depending on the individual to whom they are directed. The average-person perspective in the three areas examined in this Article assumes a one-size-fits-all First Amendment jurisprudence, which imperfect as it may be, avoids a fractured jurisprudence of particularist rights.

Finds-Communist-Slur-Defamed-Vietnam-Refugee.html (last visited June 9, 2010).