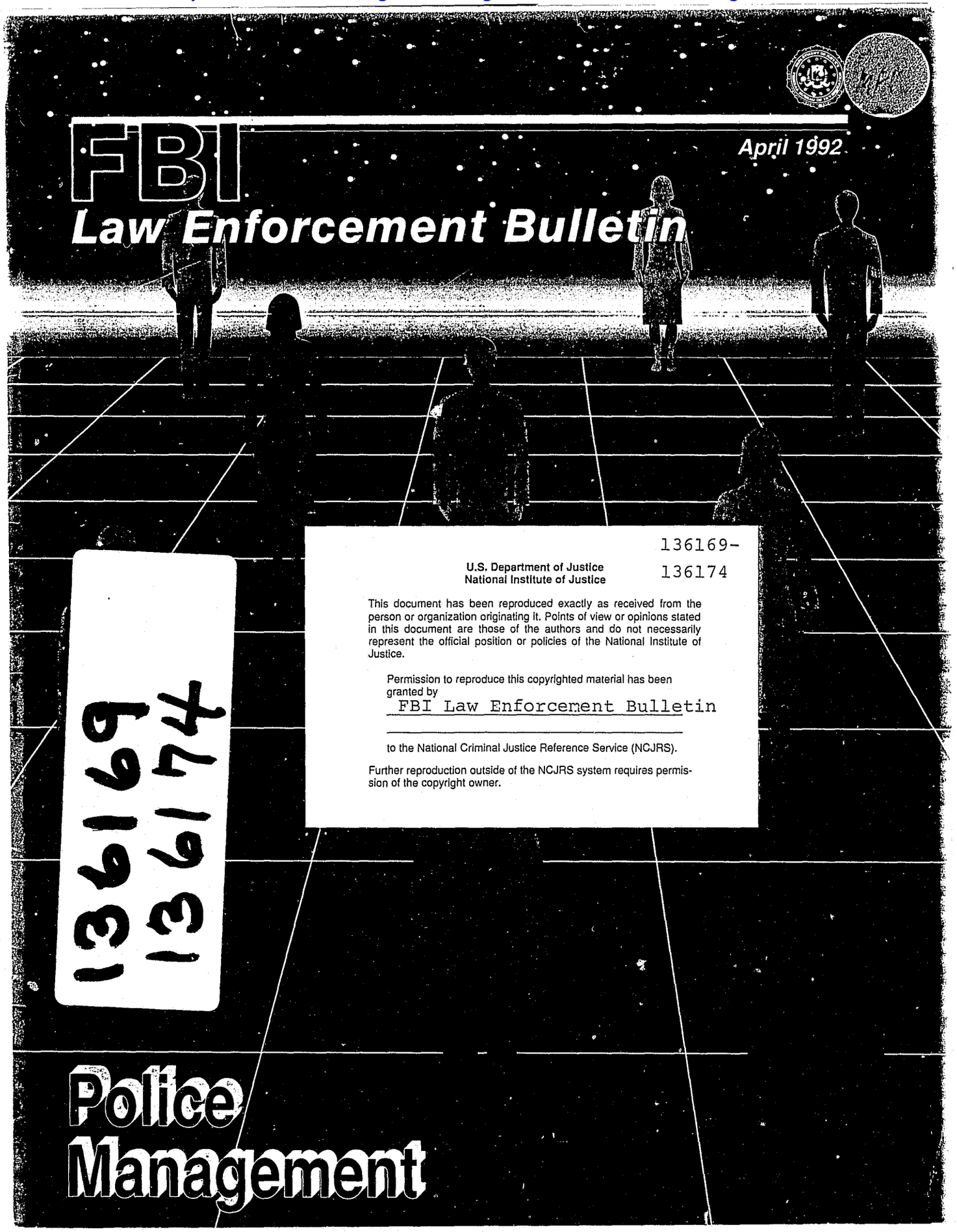

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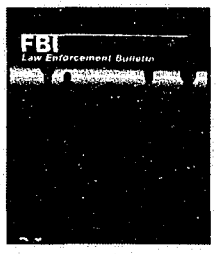

Cover: *Effective management techniques are essential to the success of any organization, including law enforcement agencies. This issue focuses on different police management issues.*

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The "Fighting Words" Doctrine

By
DANIEL L. SCHOFIELD, S.J.D.

EDITOR'S NOTE: The use of profanity in this article documents the language of suspects that led to their arrests and to subsequent court decisions.

Fifty years ago, the U.S. Supreme Court in *Chaplinsky* v. *New Hampshire*[1] defined "fighting words" as "...those words which by their very utterance inflict injury or tend to incite an immediate breach of the peace." The Court held that such words are not protected by the first amendment and can be the basis for criminal prosecution.[2]

While the "fighting words" doctrine recently became an issue in prosecutions for hate crimes and flag burning, this article focuses specifically on the scope of the "fighting words" doctrine in the context of speech directed to law enforcement officers. The article reviews recent court decisions that delineate the parameters of the "fighting words" exception to first amendment protection and offers practical guidance to officers regarding their constitutional authority to arrest for words addressed to them.

The "Fighting Words" Exception Narrowly Defined

In *Houston* v. *Hill*,[3] Raymond Hill observed his friend Charles Hill intentionally stopping traffic on a busy street, evidently to enable a vehicle to enter traffic. Two Houston police officers approached Charles Hill and began speaking with him. Raymond Hill, in an admitted attempt to divert the officers' attention from his friend Charles, began shouting at the officers, "Why don't you pick on somebody your own size?" After one of the officers responded, "Are you interrupting me in my official capacity as a Houston police officer?" Hill shouted, "Yes, why don't you pick on somebody my size?" Raymond Hill was then arrested and convicted under a city ordinance for "wilfully

> ***"The 'fighting words' doctrine requires an analysis of both the content of the words spoken and the context in which they are used...."***

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or intentionally interrupting a city policeman...by verbal challenge during an investigation." The Supreme Court ruled Hill's conviction violated the first amendment.

The Court noted that "...the First Amendment protects a significant amount of verbal criticism and challenge directed at police officers" and that an ordinance punishing spoken words directed to a police officer is constitutional only if "...limited in scope to fighting words that by their very utterance inflict injury or tend to incite an immediate breach of the peace."[4] The Court also suggested the "fighting words" exception to first amendment protection requires "...a narrower application in cases involving words addressed to a police officer, because a properly trained officer may reasonably be expected to exercise a higher degree of restraint than the average citizen, and thus be less likely to respond belligerently to "fighting words."[5]

The Court emphasized that while the freedom to challenge police action verbally without risking arrest is one of the principal characteristics by which a free nation is distinguished from a police state, that freedom is not without its limits.[6] For example, the first amendment permits narrowly tailored ordinances prohibiting disorderly conduct or "fighting words" if they do not provide police with unfettered discretion to arrest individuals for words or conduct that annoy or offend them.[7] The Houston ordinance unconstitutionally criminalized speech directed to an officer because it broadly authorized police to arrest a person who in *any* manner verbally interrupts an officer.[8]

Principles to Guide Officer Decisionmaking

The "fighting words" doctrine requires an analysis of both the content of the words spoken and the context in which they are used to determine if words addressed to law enforcement officers are protected by the first amendment. Recent Federal and State court decisions reviewed in this article reveal four generally accepted principles that can assist officers in deciding whether to arrest for speech directed to them.

First, direct threats to officer safety generally constitute "fighting words" unprotected by the first amendment. Second, speech that clearly disrupts or hinders officers in the performance of their duty is not constitutionally protected. Third, the "fighting words" exception to first amendment protection requires a higher standard for communications directed to police because professional law enforcement officers are expected to exercise greater restraint in their response to such words than the average citizen. Fourth, profanity, name calling, and obscene gestures directed at officers do not, standing alone, constitute "fighting words."

Direct Threats to Officer Safety

The Supreme Court of North Dakota recently held that direct threats to officers were unprotected "fighting words." In *City of Bismarck* v. *Nassif*,[9] three police officers were sent to Nassif's residence after he called police to complain they were not doing anything about his earlier complaint regarding vandalism to his car. He also threatened to take the law into his own hands and told police he had a gun.

When officers arrived, Nassif exited his house appearing upset, shouting loudly, and acting aggressively. After attempting to reason with him, one officer told Nassif they were leaving. Nassif then said, "You fucking son of a bitch, I'm going to go back into the house and

get my shotgun and blow you bastards away." Based on this threat to their safety, the officers arrested Nassif for disorderly conduct.

The court concluded that Nassif's statement, along with the circumstances of this encounter with police, constituted language that falls within the meaning of "fighting words" unprotected by the first amendment.[10] The court relied on language from a Supreme Court opinion in which Justice Douglas wrote that the first amendment protects a significant amount of verbal criticism and challenge directed at police officers unless that language is "...shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest."[11] The court found Nassif's threat to get his shotgun and shoot the officers sufficient to produce a clear and present danger of a serious substantive evil.

An Indiana appellate court reached a similar result in *Brown* v. *State*,[12] where an arrestee became loud and abusive and threatened to kill one of the arresting officers. After being told to quiet down, the defendant told one of the officers to take off the handcuffs so he could fight and then threatened to give the officer a "Sicilian necktie," which involves slitting the throat and pulling the victim's tongue out through the neck. The court upheld the defendant's disorderly conduct conviction finding that such threats, insults, and provocations directed solely at the arresting officers clearly fall within the "fighting words" category of unprotected speech because they "...were stated as a personal insult to the hearer in language inherently likely to provoke a violent reaction."[13]

As a general rule, provocative speech that falls short of a direct threat to officer safety is protected by the first amendment. For example, in *State* v. *Fratzke*,[14] the Supreme Court of Iowa reversed the defendant's conviction of harassment for writing a nasty letter to a State highway patrolman to protest a speeding ticket.

The letter, which accompanied payment of the fine, characterized the speeding arrest as a case of "legalized highway robbery" and a product of highway safety priorities gone askew. Because the trooper had allegedly refused to show him the radar equipment at the scene, the defendant accused the trooper of being a liar, as well as a "thief disguised as a protector." The letter revealed the defendant's contempt for the trooper in vulgar terms and closed with the expressed wish—"not to be interpreted as anything whatsoever in the way of a threat"—that the trooper "have an early and particularly painful death hopefully at the side of a road somewhere where he's robbing someone else."

The court applied three general principles to the specific facts of this case to conclude that the defendant's use of profane and otherwise objectionable language in the letter did not rise to the level of "fighting words" so as to permit conviction. First, States cannot assume that every expression of a provocative idea will incite violence; instead, the actual circumstances surrounding such expression should be carefully considered to determine whether the expression "is directed to inciting or producing imminent lawless action."[15] Second, "[t]he constitutionality of a state statute that attempts to criminalize the use of opprobrious words or abusive language...must, by its own terms or as construed by the state's courts, be limited in its application to 'fighting words' and must not be susceptible of application to speech that is protected...."[16] Third, "...the 'fighting words' doctrine logically deserves a more narrow application in the case of communications addressed to police officers, who—assuming they are properly trained—are expected to exercise greater restraint in their response."[17]

> ***"...speech that clearly disrupts or hinders officers in the performance of their duty is not constitutionally protected."***

The court concluded the defendant's message did not lend

itself to application of the "fighting words" doctrine. In so doing, the court noted the following reasons:

1) The threat was contained in a letter—a mode of expression far removed from a heated face-to-face exchange;

2) The letter was not mailed to the trooper's home but to the clerk of court, a neutral intermediary; and

3) The defendant "...was exercising his uniquely American privilege to speak one's mind, although not always with perfect good taste, on all public institutions."[18]

Speech that Disrupts Performance

The Supreme Court in *Houston* v. *Hill* suggested that speech directed to officers that actually disrupts or obstructs them in the performance of their duty is unprotected by the first amendment and can be constitutionally proscribed by a narrowly tailored criminal statute.[19] Following that precedent, a Florida appellate court upheld the prosecution of an individual whose speech disrupted an officer's performance of duty.

In *Wilkerson* v. *State*,[20] the defendant started yelling at and cursing officers who had just arrested some drug dealers. An officer told her, at least two times, to leave the area because she was interfering with their efforts to make the arrests, but she refused to leave and continued cursing and yelling at them. After other bystanders began yelling at and cursing the officers and the defendant again refused to leave the area, she was arrested on a charge of obstructing an officer in the performance of his duties.

The court concluded her arrest did not unconstitutionally interfere with her free speech rights because the underlying statute could be narrowly construed "...to proscribe only acts or conduct that operate to physically oppose an officer in the performance of lawful duties."[21] The court found that Wilkerson was not arrested for merely yelling at and cursing the officers, but rather for refusing to leave the area where the officers were attempting to make arrests because her physical presence was obstructing their performance of duty. In that regard, the court noted that "...officers may lawfully demand that citizens move on and away from the area of a crime without impermissibly infringing upon the citizen's First Amendment rights."[22]

> ***"...direct threats to officer safety generally constitute 'fighting words' unprotected by the first amendment."***

A Higher Standard Applied to Police

When courts decide whether particular words constitute "fighting words," a significant factor in the contextual analysis is whether the words were directed to a law enforcement officer. Courts generally agree with the view expressed by Justice Powell in *Lewis* v. *City of New Orleans* that "a properly trained officer may reasonably be expected to exercise a higher degree of restraint than the average citizen, and thus be less likely to respond belligerently to 'fighting words.'"[23]

In *Buffkins* v. *City of Omaha*,[24] the U.S. Court of Appeals for the Eighth Circuit found as a matter of law that officers could not have reasonably concluded they had probable cause to arrest Buffkins for disorderly conduct for using "fighting words" when she called the officers "asshole." Buffkins was suspected by the officers of being a drug courier and was detained at the airport. She protested that the officers' conduct was racist and unconstitutional and she became increasingly loud during the period of detention and questioning. The officers eventually informed Buffkins that she was free to go and told her to "have a nice day" to which she replied "asshole system" or "I will have a nice day, asshole." The officers then decided to arrest Buffkins for disorderly conduct. Buffkins subsequently filed a civil lawsuit against the officers claiming her arrest for disorderly conduct was unconstitutional.

The court described "fighting words" as words "...likely to cause an average addressee to fight." It concluded for the following reasons that Buffkins' speech was not an incitement to immediate lawless action:

1) Neither arresting officer contended that Buffkins became violent or threatened violence;

2) Both officers admitted that nobody outside the interview

room heard Buffkins' comments; and

3) Buffkins' use of the expletive in referring to the officers could not reasonably have prompted a violent response from trained officers who are expected to exercise greater restraint in their response than the average citizen.[25]

Profanity, Name Calling, and Obscene Gestures

Recent court decisions have held that profanity, name calling, and obscene gestures directed at an officer do not constitute "fighting words." In *Duran* v. *City of Douglas*,[26] the U.S. Court of Appeals for the Ninth Circuit ruled that the first amendment protected profanities and an obscene gesture directed toward a police officer and that the officer's subsequent detention and arrest of Duran for disorderly conduct was unconstitutional.

After arriving at a downtown hotel in response to a bartender's complaints about an unruly patron, officers found Duran intoxicated and threatening the bartender. One officer and Duran exchanged a few heated words, after which Duran was escorted out of the bar by the officer. Duran then left in an automobile driven by his wife.

Soon thereafter, while on patrol, the officer observed Duran directing an obscene gesture toward him through an open window, and the officer began following the car. As the officer followed the car down a rural highway, Duran began yelling profanities in Spanish and continued to make obscene gestures.

The officer followed the car to Duran's residence in a mobile home park, at which time he initiated a traffic stop by turning on his emergency lights. The officer ordered Duran to step away from the car, to which Duran replied, "I don't have to." The officer told Duran that the reason for the traffic stop was to find out why he had yelled profanities and made an obscene gesture toward him. Duran responded with further profanities in both Spanish and English and was then arrested for disorderly conduct.

The court ruled there was no legitimate, articulate reason for the officer to have detained Duran, since there was no evidence of a danger to public safety or that Duran was engaged in any illegal activities.[27] The court recognized that Duran's conduct toward the officer "...was boorish, crass and, initially at least, unjustified...[and that]...hard-working law enforcement officers surely deserve better treatment from members of the public. But disgraceful as Duran's behavior may have been, it was not illegal; criticism of the police is not a crime."[28] The court also noted there was no evidence that Duran's conduct constituted a disturbing of the peace, since the car was traveling late at night on a deserted road on the outskirts of town.

The court cautioned that the officer's stopping of the car "...at least partly in retaliation for the insult he received from Duran...would constitute a serious First Amendment violation."[29] The court acknowledged that while police officers may understandably "...resent having obscene words and gestures directed at them, they may not exercise the awesome power at their disposal to punish individuals for conduct that is not merely lawful, but protected by the First Amendment."[30] The court concluded that even though Duran's conduct was crude, it represented an expression of disapproval toward an officer with whom he had just had a run-in and "...fell squarely within the protective umbrella of the First Amendment and any action to punish or deter such speech—such as stopping or hassling the speaker—is categorically prohibited by the Constitution."[31]

A similar result was reached by the Supreme Court of North Dakota in *City of Bismarck* v. *Schoppert*,[32] where the defendant walked past a police car, gestured at the officers with his middle finger, and said, "Fucking, bitching cop." One of the officers asked the defendant what was the matter, and three times, he replied with the obscene epithet, "Fuck you."

The officer then got out of the car and stopped the defendant by grabbing his left arm. She asked him to identify himself, and he again replied with the same obscene epithet. The defendant who allegedly smelled of alcohol told the officers, "You don't know who you're [expletive] with. You just bought yourself a Federal lawsuit." The defendant then took one step toward the officer and was arrested for disorderly conduct.

The court ruled the disorderly conduct arrest unconstitutional on the grounds that a finding that "...words are vulgar or offensive is not sufficient to remove them from the protection of the first amendment and into the arena in which the state can make conduct criminal...It is thus not a crime in this country to be a boor, absent resort to fighting words."[33] The court said there was no evidence that the defendant's language or conduct tended to incite an immediate breach of the peace since officer testimony "...unequivocally rejected any suggestion that any anger Schoppert may have provoked in them would or could have incited them to a breach of the peace, immediate or otherwise."[34] Since Schoppert's words were not a clear invitation to fight, and the testimony did not demonstrate that these words, spoken to this audience, had any tendency to cause an immediate breach of the peace, the court concluded that Schoppert had been convicted for injuring the feelings of the officers, which is unconstitutional.

Conclusion

The first amendment protects a significant amount of speech directed to law enforcement officers, including some distasteful name calling and profanity. The "fighting words" exception to first amendment protection has a narrower application for words addressed to law enforcement officers because courts expect professional and well-trained officers to exercise a higher degree of restraint than the average citizen and to "...divorce themselves from any anger the words might have engendered."[35]

Words addressed to officers are not protected by the first amendment if they constitute either direct threats to officer safety or actually obstruct officers in the performance of their duty. To ensure the constitutionality of arrests, legal training for law enforcement officers should include a review of first amendment principles and the "fighting words" doctrine.

> ***"The first amendment protects a significant amount of speech directed to law enforcement officers...."***

Endnotes

[1] 315 U.S. 568 (1942).

[2] *Id.* at 572. One author notes that *Chaplinsky* is the only Supreme Court decision upholding a "fighting words" conviction. *See*, "Constitutional Law—First Amendment—North Dakota's Disorderly Conduct Statute: Is it Limited to Fighting Words, or Unconstitutionally Overbroad and Vague?" 67 N. Dakota L. Rev. 123 (1991).

[3] 482 U.S. 451 (1987).

[4] *Id.* at 461-462.

[5] *Id.* at 462.

[6] *Id.* at 464, n. 12.

[7] *Id.* at 465.

[8] *Id.* at 463, n.11.

[9] 449 N.W.2d 789 (N.D. 1989).

[10] *Id.* at 795.

[11] *See Terminiello* v. *Chicago*, 337 U.S. 1, 4 (1949).

[12] 576 N.E.2d 605 (Ind. App. 3 Dist. 1991).

[13] *Id.* at 607.

[14] 446 N.W.2d 781 (Iowa 1989).

[15] *Id.* at 784.

[16] *Id.*

[17] *Id.*

[18] *Id.* at 785.

[19] The Court offered as an example a prosecution for disorderly conduct of an individual who chooses to stand near a police officer, after being ordered to disperse, and persistently attempts to engage the officer in conversation while the officer is directing traffic at a busy intersection. 482 U.S. at 463, n. 11.

[20] 556 So.2d 453 (Fla. App. 1 Dist. 1990).

[21] *Id.* at 456.

[22] *Id.*

[23] 415 U.S. 130, 135 (1974).

[24] 922 F.2d 465 (8th Cir. 1990), *cert. denied*, 112 S.Ct. 273 (1991).

[25] *Id.* at 472.

[26] 904 F.2d 1372 (9th Cir. 1990).

[27] *Id.* at 1377.

[28] *Id.*

[29] *Id.* at 1378.

[30] *Id.*

[31] *Id.*

[32] 469 N.W.2d 808 (N.D. 1991).

[33] *Id.* at 811.

[34] *Id.* at 813.

[35] *Id.* In *Elbrader* v. *Blevins*, 757 F.Supp. 1174 (D.Kan. 1991), a civil suit was filed against police officers by an arrestee claiming he did not engage in "fighting words" when he allegedly called a police officer a "son of a bitch" prior to his arrest. The court held that there is a clearly established right against retaliation for constitutionally protected speech and that even if the officer thought the plaintiff did call him a "son of a bitch" "...not every epithet directed at a police officer constitutes disorderly conduct." *Id.* at 1182.

Law enforcement officers of other than Federal jurisdiction who are interested in this article should consult their legal advisor. Some police procedures ruled permissible under Federal constitutional law are of questionable legality under State law or are not permitted at all.