

FREE BIRD: NO RIGHT TO QUALIFIED IMMUNITY FOR POLICE WHO RETALIATE AGAINST THE MIDDLE FINGER GESTURE

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The Supreme Court recognized that First Amendment right to freedom of speech extends to nonverbal communication. Expressive nonverbal communication sometimes occurs when an individual is confronted with police action. Protesting police action is a prototypical example of a citizen exercising the right to freedom of speech. Directing the middle finger gesture at police is a legal means of criticizing the government and presents this Article's focus. This Article argues that case law establishes directing symbolic speech at police officers, namely "shooting the bird," as a protected First Amendment right. As an established right, police officers who retaliate against citizens exercising this right should not be entitled to qualified immunity.

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Part II surveys the history of the middle finger gesture and the evolution of the meaning of the gesture. Part III describes why the middle finger gesture is not subject to the fighting words limitation on free speech. Part IV defines the qualified immunity defense for police officers, and argues that police officers improperly use the defense in freedom of speech cases to avoid repercussions for otherwise illegal actions. Part V sheds light on how qualified immunity in this context erodes First Amendment rights, and explains why the right to display the middle finger gesture is worth fighting. Additionally, Part V also argues that police training properly curbs police activity that infringes on freedom of speech. Finally, Part VI concludes that police who retaliate against citizens who exercise their right to “shoot the bird” should not be entitled to qualified immunity. To decide otherwise conveys unchecked power to the police, like a totalitarian state.