



Do You Have the Right to Flip Off a Cop?

By SEAN SCULLY / PHILADELPHIA Tuesday, Sep. 15, 2009



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David Hackbart was mad, and he wanted to show it, but he didn't think he would end up in federal court protecting his right to a rude gesture and demanding that the city of Pittsburgh stop violating the First Amendment rights of its residents.

Hackbart, 34, was looking for a parking space on busy Murray Avenue in the Squirrel Hill neighborhood on April 10, 2006. Spotting one, he attempted to back into it, but the driver of the car behind him refused to back up and give him sufficient room. Hackbart responded in the classic way. "I stuck my hand out the window and gave him the finger to say 'Hey, jerk, thanks,'" says Hackbart. "That's all I was trying to say — 'Thanks, thanks a lot.'"

At that moment, a voice rang out telling Hackbart not to make the rude gesture in public. "So I was like, How dare that person tell me? They obviously didn't see what happened. Who are they to tell me what to say?" he says. "So I flipped that person off. And then I looked, and it was a city of Pittsburgh cop in his car right next to me."

That turned out to be police sergeant Brian Elledge, who happened to be passing in the other direction in his cruiser. Elledge whipped around and pulled Hackbart over, citing him under the state's disorderly-conduct law, which bans obscene language and gestures. And here's where the problem lies, says state American Civil Liberties Union (ACLU) legal director Witold (Vic) Walczak: the middle finger and equivalent swear words are not legally obscene. In fact, courts have consistently ruled that foul language is a constitutionally protected form of expression. A famous 1971 Supreme Court case upheld the right of a young man to enter the Los Angeles County Court House wearing a jacket emblazoned with the words "F___ the Draft."

(Read about how disorderly conduct is often a cop's call.)

"The law is clear that people have the constitutional right to use profanity, especially when it comes to government officials because that is a form of

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especially when it comes to government officials, because that is a form of political speech," Walczak says. "But despite that, we have police officers regularly misapplying the law to punish people who offend them — that's really what it comes down to."

(Read a brief history of disorderly conduct.)

U.S. District Judge David Cercone ruled in March that the citation, along with the \$119.75 court costs imposed by a city court, was clearly unconstitutional. The question, however, is whether the city has a pattern of tolerating this kind of constitutional violation. The ACLU says it found 188 cases from 2005 to 2007 in which people were cited under similar circumstances, despite an entry in the police department's training manual making clear that vulgar speech is not illegal.

The question was set to go to trial in Federal District Court last week, but the matter was delayed at the last moment while the two sides explored a settlement. The city's law department declined to comment on the case.

The problem is not confined to Pittsburgh. In 2007, a woman in Scranton, Pa., was cited for yelling obscenities at an overflowing toilet in her home — a tirade overheard by her neighbor, an off-duty police officer. She was later acquitted on constitutional grounds, and the city paid her a \$19,000 settlement. "We probably handle a dozen of these cases every year," Walczak says. "We're actually negotiating with the state police right now, trying to force them to change their training and written materials to make clear you can't do this."

It is, of course, part of a larger question. The recent controversy over the arrest of historian Henry Louis Gates Jr. — who was charged with disorderly conduct in his home after police arrived to investigate an erroneous report of a burglary in progress — was cast in racial terms: a white officer distrusting a black homeowner. But Walczak says this issue seems to have more to do with a police officer being confronted by an angry and disrespectful person and turning disorderly-conduct laws into a "contempt of cop" law, as he puts it. "Frankly, I think having someone dropping the F-bomb is better than resisting arrest or taking a swipe at a police officer," Walczak says. "But what we're seeing too often is that police who are offended by a lack of respect, often manifested by profanity or cursing, will punish people for that."

(Read Ta-Nehisi Coates on the Henry Louis Gates Jr. affair.)

Elledge and the city police department have consistently refused to comment on the case. But Jim Pasco, executive director of the Fraternal Order of Police, says police officers are not out to systematically punish people who mouth off. "There is certainly no substitute for good judgment on the street," says Pasco, whose organization represents officers nationwide, including Pittsburgh, "and if in the officer's judgment, maintenance of order is going to be preserved by giving a citation or making an arrest, then the officer is going to use his judgment to make that arrest or issue that citation."

(See pictures of Henry Louis Gates Jr.)

Officers clearly have varying levels of tolerance for rudeness from the people they encounter, he says, but he expressed little sympathy for anyone making rude remarks to or gestures toward officers. "Police officers have better things to do than give people citations," he says. "And if people are doing things to distract police officers from doing those things, then they should be held accountable in some way."

But Hackbart, a paralegal who learned about court rulings on vulgar language in a communications-law class, says police should not be able to punish people by issuing citations they know to be unconstitutional. Elledge "shouldn't be allowed to conduct himself like that with no repercussions," he says. "Does everybody have to go through this to defend themselves against a bogus charge?"

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