



Written by [Jack Kenny](#) on April 20, 2010

## Citizens Rewarded for Giving Cops 'the Bird'

As a headline writer for the Kansas City Star put it, "A bird in the hand is worth four grand." That, at least, is what Scott Schaper will receive after giving "the bird" and saying "F— you!" last September to a Olathe, Kansas police officer who had given him a ticket for running a stop sign.



Schaper, a resident of Overland Park, favored the officer with his single-finger salute and accompanying verbal instruction while pulling away after receiving the citation. The officer then stopped him a second time and charged him with disorderly conduct. The city dropped that charge in November, but still had to contend with an American Civil Liberties Union suit, claiming Schaper's civil rights had been violated. In an out of court settlement announced last week, the city's insurer agreed to pay \$5,000 — \$4,000 for Schaper and \$1,000 for his lawyers.

Douglas Bonney, legal director for the ACLU of Kansas and Western Missouri, said Schaper was expressing his frustration because he was taking his children to school and the traffic stop caused them to cry.

"Courts have interpreted Kansas disorderly conduct statutes and ordinances very narrowly to bar only speech and conduct that is truly obscene and thus outside of First Amendment protection," Bonney told KCTV5 in Kansas City. "Many courts — including the federal district court for Kansas — have held that saying '(expletive) you' and using one's middle finger to express discontent or frustration is expressive conduct protected by the First Amendment. The city has an obligation to train its officers to respect citizens' free-speech rights."

Olathe may have gotten off lightly. The city of Pittsburgh, Pennsylvania, last November agreed to pay \$50,000 to settle a lawsuit brought by a motorist charged with disorderly conduct after holding up his middle finger to a police officer. The officer had just told David Hackbart to stop making that same gesture to another driver. Hackbart said he was trying to parallel park when the car behind him refused to back up to give him room. When he "flipped off" that driver, he heard someone say, "Don't flip him off."

"So I flipped that person off," He told *Time* magazine. "And then I looked and it was a city of Pittsburgh cop in his car right next to me." Hackbart was charged with disorderly conduct and found guilty in a Pittsburgh court, where he was fined \$119.75 for court costs. But Hackbart, a paralegal, and the ACLU filed an appeal in U.S. District Court, where Judge David Cerccone overturned the conviction, ruling that Hackbart's First Amendment rights had been violated. The city argued that the disorderly conduct



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charge was for blocking traffic and not for the offending gesture, but Cercone ruled the officer's action was a retaliatory "response to Hackbart's exercise of his First Amendment right."

According to the *New York Times*, research done by Hackbart's lawyers showed that Pittsburgh police had issued 198 disorderly conduct citations for swearing or offensive gestures in a little more than four years, despite consistent rulings by the Pennsylvania Supreme Court that the practice violates citizens' free speech rights. The ACLU also said an entry in the Pittsburgh Police training manual states that vulgarity is not illegal. Under the terms of the settlement, the city agreed to retrain its officers in the limits of the disorderly conduct law, the *Times* reported. Hackbart would receive \$10,000 of the settlement, while \$40,000 was assigned to the ACLU attorneys.

Disorderly conduct or disturbing the peace charges have turned out to be expensive for a number of municipalities when they are based on vulgar words or gestures. Three years ago a Scranton, Pennsylvania, woman was cited when a neighbor, an off-duty police officer, heard her shouting obscenities at her overflowing toilet. She was acquitted and the city ended up paying her a \$19,000 settlement.

But there is also a long history, extending back at least three decades, of courts finding that pointedly extending the middle finger to or uttering vulgarities directly at police officers, in public or private settings, falls within the boundaries of constitutionally protected free speech. In 1977, a state appeals court in Connecticut overturned the conviction of a high-school student who gave the finger to a state trooper from the back of a school bus. In Oceanside, California, in 1990, a man and his wife were arrested after the man pointed a flashlight at a patrol helicopter hovering over his house and "flipped off" the officers. The prosecutor did not press charges, and the couple won \$300,000 in damages. A jury in Arkansas in 1998 awarded a man \$4,000 in damages after a state trooper arrested him for giving the trooper "the bird" as they passed on a county road.

In 2001, a woman accused of drunk driving asked a Pennsylvania judge to throw out the charge because the officer only pursued her after she had "flipped him off." An appeals court ruled in her favor.

The U.S. Supreme Court extended the protection of vulgar speech to the courthouse — though not necessarily the courtroom — in *Cohen v. California* (1971). The high court overturned a disturbing the peace conviction of a man who showed up in a corridor of a Los Angeles courthouse wearing a jacket with "F\*\*K the Draft" emblazoned on the back. Witnesses said children were present at the time. Writing for the court's 5-4 majority, Justice John Marshall Harlan said: "Surely the State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us.... For, 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."

The issue of disorderly conduct toward a police officer came up again last summer when a Cambridge Police sergeant confronted Harvard Professor Henry Louis Gates, Jr. in the professor's home while investigating a call from a neighbor who suspected someone was breaking into the house. The officer charged Gates with disorderly conduct after Gates allegedly accosted him with loud and abusive language, including a comment about the officer's "mama." Police later dropped the charge, but President Obama made the case a national issue when he said at a press conference that the police "acted stupidly," a phrase he later amended to say there was "an overreaction."

While judges often respond to vulgar or otherwise offensive speech or gestures in a courtroom by locking the offender up for contempt of court, there is seldom any penalty for "contempt of cop," said



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Jon Shane, a former Newark, New Jersey, police officer who now teaches criminal law at John Jay College of Criminal Justice in New York. "You could tell (police officers) to go f— themselves and that's fine," Shane told *Time*.

"Our hard-working law enforcement officers surely deserve better treatment from members of the public," the Ninth Circuit Court of Appeals in San Francisco said in a 1990 ruling on the appeal of Ralph Duran, convicted of giving the finger to and swearing at a police officer in Douglas, Arizona. Still, the court overturned the conviction, saying: "But disgraceful as Duran's behavior may have been, it was not illegal; criticism of the police is not a crime."



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