

TO: PERSONS CHARGED WITH DISORDERLY CONDUCT FOR PROFANITY
FROM: GLEN S. DOWNEY, ESQ., Healey & Hornack, P.C. & WITOLD J. WALCZAK, ESQ., ACLU LEGAL DIRECTOR
RE: THE LAW ON USING DISORDERLY CONDUCT TO PUNISH PEOPLE FOR SWEARING

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The law is clear that swearing (cursing or using profanity) in public or to law enforcement personnel is speech protected by the First Amendment to the U. S. Constitution. Therefore, disorderly conduct citations and arrests for profanity (usually termed “obscenity” in the citations) are unconstitutional.

Countless federal courts and the Pennsylvania Supreme Court have repeatedly held since 1987 that police cannot arrest people for either using profanity in public or directing it at law enforcement personnel. While most of the cases listed in the footnote and discussed below relate to swearing at police, the law applies equally to incidents involving civilians.¹ The rationale for these decisions is straightforward.

¹ See e.g., United States v. Poocha, 259 F.3d 1077 (9th Cir. 2001) (repeatedly saying “fuck you” to park rangers, even in front of crowd, was constitutionally-protected speech that cannot be punished as disorderly conduct); Gulliford v. Pierce County, 136 F.3d 1345, 1350 (9th Cir. 1998), cert. denied, 525 U.S. 828 (1998) (telling police officer to “get the fuck off the island” was constitutionally-protected speech and could not justify disorderly conduct arrest); Sandul v. Larion, 119 F.3d 1250, 1254 (6th Cir. 1997), cert. denied, 522 U.S. 979 (1997) (Yelling “fuck you” out a car window does not create probable cause to arrest the speaker; case law “should leave little doubt in the mind of the reasonable officer that the mere words and gesture ‘f-k you’ are constitutionally protected speech”); Buffkins v. City of Omaha, 922 F.2d 465, 472 (8th Cir. 1990), cert. denied, 502 U.S. 898 (1991) (District court reversed for failing to find as a matter of law that officer did not have probable cause to arrest plaintiff for calling him an “asshole”); Duran v. City of Douglas, Arizona, 904 F.2d 1372 (9th Cir. 1990) (police officer did not have probable cause to stop car simply because passenger yelled “fuck you” at him through the window and thus violated First Amendment); Johnson v. city of Chester, 10 F.Supp.2d 482 (E.D. Pa. 1998) (Mayor’s disorderly conduct charge against woman who called him an “ignorant bastard” during public comment portion of city council meeting stated action for retaliation in violation of First Amendment); United States v. McDermott, 971 F.Supp. 939 (E.D. Pa. 1997) (profane tirade at police officers, including repeated uses of “fuck you,” “are insufficient by themselves to constitute constitutionally unprotected fighting words”); Id. at 942 (“Emphatic and vulgar expressions of one’s discontent with an official’s actions, while distasteful to the ear and offensive to the ego, are not – standing alone – ‘obscene’ under the First Amendment and therefore

“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.”² “Criticism of the police, profane or otherwise, is not [and cannot under the First Amendment to the Constitution be] a crime.”³ And simply because the criticism is accompanied by the “F-word” does not make it a crime.⁴

“The police must expect that, as part of their jobs, they will be exposed to daily contact with distraught individuals in emotionally charged situations.”⁵ “A properly trained police 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” such language.⁶ “[W]hile police, no less than anyone else, may 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.”⁷

without constitutional protection.”); *id.* at 943 (“*id.* at 943 (“It is one thing to be called vulgar for one’s words, but it is quite another to be held a criminal for them.”); *Brockway v. Shepherd*, 942 F.Supp. 1012 (M.D. Pa. 1996) (making obscene gesture, “middle finger” to police officer is constitutionally protected and cannot be disorderly conduct under PA statute); *Commonwealth v. Hock*, 728 A.2d 943 (Pa. 1999) (saying “fuck you, asshole” to police officer is constitutionally-protected speech and cannot be disorderly conduct); (*Commonwealth v. Kelly*, 758 A.2d 1284 (Pa. Super. 2000) (saying “fuck you, asshole” to construction worker is constitutionally protected speech and cannot be disorderly conduct).

² *Hill*, 482 U.S. at 462-63.

³ *Poocha*, 259 F.3d at 1082.

⁴ A state cannot make the simple public display or utterance of a four-letter word, including the “F-word,” criminal conduct. *Cohen v. California*, 403 U.S. 15, 25-26 (1971) (“while the particular four-letter word being litigated here (“fuck you”) is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man’s vulgarity is another’s lyric”); *Hess v. Indiana*, 414 U.S. 105, 107 (1973) (holding the yelling “we’ll take the fucking streets” could not be punished as fighting words).

⁵ *Commonwealth v. Hock*, 728 A.2d 943, 947 (Pa. 1999) (saying “fuck you, asshole” to police officer is constitutionally-protected speech and cannot be disorderly conduct).

⁶ *Hill*, 482 U.S. at 462, quoting *Lewis v. City of New Orleans*, 415 U.S. 130, 135 (1974) (Powell, J., concurring).

⁷ *Poocha*, 259 F.3d at 1082, quoting *Duran v. City of Douglas, Arizona*, 904 F.2d 1372, 1378 (9th Cir. 1990).