



ISSN 1935-0007

*Cite as:* 2011 (10) AELE Mo. L. J. 101  
Civil Liability Law Section – October 2011

**“Contempt of Cop”:  
Verbal Challenges, Disrespect, Arrests,  
And the First Amendment**

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❖ **Introduction**

Under what circumstances, if at all, can police officers arrest citizens for “contempt of cop,” verbal challenges, profanity, or disrespect? Under what circumstances is criticism of police, even if couched in abusive or profane terms, constitutionally protected free speech?

This article briefly looks at some key U.S. Supreme Court cases on the topic. It then examines lower court decisions in which a broad right of freedom of expression to criticize police was found.

That is followed by a presentation of some cases in which courts have upheld arrests that were arguably speech-related because the arrestee’s conduct crossed the line from pure advocacy of ideas to fighting words, active obstruction of officers, or incitement to imminent unlawful actions, including violence.

At the end of the article, there is a short listing of relevant resources and references.

## ❖ Supreme Court Rulings

An important decision establishing a dividing line concerning what words alone can be criminalized is [Brandenburg v. Ohio](#), #492, 395 U.S. 444 (1969), setting forth the legal standard that even advocacy of unlawful acts may not be criminally punished unless they amount to “incitement to imminent lawless action.” This was distinguished from “mere advocacy” of unlawful conduct, including violence.

In [Lewis v. City of New Orleans](#), #70-5323, 415 U.S. 130 (1974), a woman yelled obscenities and threats at an officer who had asked her husband to show his driver’s license. She was convicted of violating an ordinance making it a crime “for any person wantonly to curse or revile or to use obscene or opprobrious language toward or with reference to any member of the city police while in the actual performance of his duty.”

The U.S. Supreme Court held that such an ordinance was overbroad and vacated the conviction, commenting that “a properly trained officer may reasonably be expected to exercise a higher degree of restraint” than an average private person, and therefore be less likely “to respond belligerently” to fighting words.

The leading modern U.S. Supreme Court case on the right of members of the public to express criticism of the police is [Houston v. Hill](#), #86-243, 482 U.S. 451 (1987). In this case, a man shouted at police officers to try to divert their attention from his friend during a confrontation.

He was then arrested for willfully interrupting an officer by verbal challenge during an investigation. The arresting officers claimed that this violated an ordinance making it unlawful to “to assault, strike or in any manner oppose, molest, abuse or interrupt any policeman in the execution of his duty.” The arrestee was acquitted of the charges, and sued, claiming that the ordinance was unconstitutional and violative of his First Amendment rights.

The U.S. Supreme Court held that it was unconstitutionally overbroad and therefore invalid on its face. Taken literally, it criminalized a substantial amount of constitutionally protected speech, the Court stated. It further provided officers with unbridled discretion as to who to arrest for purported violations.

The Court found that the ordinance largely addressed speech rather than “core criminal conduct,” and focused on verbally interrupting an officer, rather than striking or assaulting him.

Some speech, the Court acknowledged, can be prohibited, but the example it gave was that of “fighting words,” statements that “by their very utterance inflict injury or tend to incite an immediate breach of the peace.”

The ordinance was not narrowly tailored to prohibit only disorderly conduct or fighting words, but instead allowed officers to make arrests for words or acts that are “simply annoying or offensive.”

“The freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state,” the Court concluded.

In a myriad of cases, the lower courts have applied these principles, allowing members of the public broad freedom of expression to criticize police, even very harshly, while drawing the line at speech, or speech joined with conduct, that involves the utterance of fighting words, active obstruction of officers performing their duties, or incitement to imminent acts of violence or other unlawful acts.

### ❖ **Broad freedom of expression**

Criticism of police officers, cursing at them, and even making disrespectful or profane gestures towards them, such as “giving them the finger” have been held to be protected First Amendment speech by many courts.

In [Kennedy v. City of Villa Hills](#), #09-6442, 2011 U.S. App. Lexis 5985 (6th Cir.), the court ruled that an officer who arrested a man for disorderly conduct after he called the officer an “SOB” and a “flat slob” was not entitled to qualified immunity from a federal civil rights claim. The arrestee’s voice may not have been loud enough to be unreasonable, and the officer’s decision to arrest him may have been motivated by retaliation against the arrestee for exercising his First Amendment rights.

Similarly, in [Duran v. City of Douglas, Arizona](#), #89-15236, 904 F.2d 1372 (9th Cir. 1990), a federal appeals court held that profanities and obscene gestures directed at a

police officer by a car passenger were speech and conduct protected by the First Amendment.

See also [Nichols v. Chacon](#), #99-5180, 110 F. Supp. 2d 1099 (W.D. Ark. 2000), in which a federal trial court ruled that a motorist's gesture of displaying his middle finger to an officer driving by was protected First Amendment speech. The officer was not entitled to qualified immunity and could be held liable for arresting the motorist for disorderly conduct.

General criticism of police, even if expressed in abusive terms, is generally protected free speech. In [Resek v. City of Huntington Beach](#), #01-56029, 41 Fed. Appx. 57 (9<sup>th</sup> Cir. 2002), the court found that a police officer did not act reasonably in arresting a man for shouting abusive comments at officers and answering them with sarcasm, which "amounted to no more than criticism of the police" and did not constitute either fighting words or incitement of others to imminent unlawful violence.

See also, [Johnson v. Campbell](#), #02-3580, 332 F.3d 199 (3rd Cir. 2003), in which a federal appeals court granted judgment as a matter of law to an African-American high school basketball coach arrested by a police officer solely for calling him a "son of a bitch." The arrestee's statement did not constitute "fighting words," and were therefore protected by the First Amendment.

In [Greene v. Barber](#), #01-1247, 310 F.3d 889 (6th Cir. 2002), the court held that an arrestee, in characterizing an officer as an "asshole," did not say anything sufficient to place the statement outside the protection of the First Amendment as "fighting words." Additionally, even if the officer had probable cause to make an arrest for violation of the city's civil disturbance ordinance, there would be no justification for the arrest if the officer actually was motivated by retaliation for the arrestee's statements prior to the arrest.

In [Gulliford v. Pierce County](#), #96-35614, 136 F.3d 1345 (9th Cir. 1998), cert. denied, 1998 U.S. Lexis 4989, the court ruled that verbal protests or challenges to the police are permitted, even if they knowingly hinder, delay or obstruct the police. The appeals court ruled that, to be criminal, the words must be fighting words.

Incitement of imminent lawless action was required in [Spier v. Elaesser](#), #C-1-01-054, 267 F. Supp. 2d 806 (S.D. Ohio 2003), before First Amendment protection could be lost for harsh criticism of the police.

The court found that an arrestee's chanting of words in protest of the police requirement that persons seeking to attend a protest rally submit to a pat down search, including "two, four, six, eight, fuck the police state," was constitutionally protected speech under the First Amendment for which he could not face arrest for disorderly conduct in the absence of any evidence that his words presented a "clear and present danger" of a violent reaction by the crowd. The arresting officer, however, was entitled to qualified immunity from liability, since he believed that the arrestee was trying to incite the crowd, which had become disorderly the previous day.

Mere distraction is insufficient for speech to constitute interference with or obstructing an officer. In [DeRosa v. Sheriff of Collier County, Florida](#), #10-14046, 2011 U.S. App. Lexis 4057 (Unpub. 11th Cir.), after a deputy stopped her husband's car, in which she was a passenger, and ticketed him for failing to dim its high beam lights, a woman called 911 to express her fears of the deputy, who she described as "shaking, agitated, and nervous," and requested that other officers meet the couple at a local gas station, because the deputy had activated his lights and siren and was following them. She had criticized him during the stop and been told to "shut up."

At the gas station, the deputy instructed another officer to arrest the woman for obstructing an officer without violence. The other officer did so, grabbing her arm as she climbed out of the vehicle, dragging her to his patrol car, pushing her against the hood to handcuff her, and then shoving her inside. A federal appeals court found that the deputy did not have probable cause to order the woman's arrest under these circumstances. Her criticisms of the deputy during and after the traffic stop, even if distracting, did not incite others against, interfere with, or impede the deputy from citing her husband for his traffic infraction.

Similarly, in [Copeland v. Locke](#), #09-2485, 613 F.3d 875 (8th Cir. 2010), a police chief was not entitled to summary judgment in a false arrest lawsuit filed by a man taken into custody for allegedly interfering with official police conduct. The record in the case showed that the arrestee cursed at and "distracted" the police chief, whose car was blocking access to his business. This conduct did indicate that the arrestee intended to

prevent the chief from completing the traffic stop he was engaged in, but purely expressive conduct, even if distracting, is protected under the First Amendment.

Arrests based solely or largely on the content of speech critical of officers can lead to federal civil rights liability. In [Lowe v. Spears](#), #07-1497, 2007 U.S. App. Lexis 29488 (Unpub. 4th Cir.), a police officer who allegedly arrested the plaintiff for criticizing him for writing tickets, rather than for illegal parking, was not entitled to qualified immunity in a lawsuit over alleged violation of First Amendment rights. The officer was writing parking tickets, and wrote one for the plaintiff, who tried to explain he was only parking on the sidewalk temporarily in front of his apartment building to unload, and that he was handicapped, with a handicap parking permit.

When the plaintiff stepped into the building and warned his employees working at the apartment building that they should move their vehicles because the officer was writing tickets, the officer allegedly stated that he was “tired” of the plaintiff’s “mouth,” so that the plaintiff was going to jail, grabbing him by the arm and attempting to pull him out of the building. Other officers arrived on the scene and told the officer to leave the plaintiff alone. Making an arrest that was based entirely on an arrestee’s speech opposing or questioning police actions violated the First Amendment.

### ❖ **Fighting words, obstruction, or incitement to violence**

Courts have, however, upheld the right of officers to make arrests in numerous instances where free speech, harsh criticism, and mere advocacy crosses the line to become fighting words, active obstruction of officers, or incitement to imminent unlawful violence.

The easiest cases, of course, are those in which speech is joined together with actions that together constitute an active threat to the officer. In [Barnes v. Wright](#), #04-6288, 449 F.3d 709 (6th Cir. 2006), for instance, conservation officers had probable cause to seek prosecution of a man who allegedly pointed a gun at them after criticizing their job performance, and they were entitled to qualified immunity on his malicious prosecution and First Amendment retaliation claims, given that he was subsequently convicted on some of the charges he was indicted on based on their grand jury testimony.

Even if the officer may have some hostility to views expressed by the arrestee, that will not establish a viable First Amendment claim when their actions provide probable cause

for an arrest. In [Mims v. City of Eugene](#), #04-35042, 145 Fed. Appx. 194 (9th Cir. 2005), a woman arrested by an officer during a protest demonstration supporting a black radical convicted of murdering a police officer failed to show that her arrest was motivated by his hostility to the political views of the demonstrators, as required to support a claim for violation of the First Amendment.

Instead, the evidence showed that he had probable cause to arrest her for stepping in front of him in order to prevent the arrest of another demonstrator, then fleeing, who had thrown a flaming object at him. The woman's actions caused the officer to collide with her, and both to fall to the ground, preventing him from apprehending the fleeing suspect.

Less dramatic, but just as clear cut, speech can, under some circumstances, amount to conduct that obstructs officers' performance of their duty, making it essentially impossible to do their jobs. Illustrating this is [King v. Ambs](#), #06-2054 519 F.3d 607 (6<sup>th</sup> 2008), in which a police officer was found to have probable cause to arrest a man for interfering with his criminal investigation by repeatedly telling his friend, the owner of a vehicle in which marijuana had been found, not to talk to the officer.

The arrestee acted in a disorderly manner, and allegedly "spoke over" the officer's questions, interfering with the investigation. The officer did not violate either the Fourth or First Amendment, and the plaintiff's speech was not constitutionally protected. Additionally, the officer gave him a warning to be quiet prior to arresting him. The court also stated that, assuming that there was a constitutional violation of free speech rights, it was not clearly established, so the officer would still be entitled to qualified immunity.

Despite the U.S. Supreme Court decisions discussed in the first section of this article, some criminal statutes and ordinances directed at speech critical of police have been upheld, provided that it is subject to a narrowing interpretation limiting its application to "fighting words." See [State v. Baker](#), #CA2002-11-286, 809 N.E.2d 67 (Ohio App. 12th Dist. 2004), ruling that a city ordinance creating an offense of knowing and willful "abusive or derogatory" conduct towards police officers was not a violation of an arrestee's First Amendment rights. It was not unconstitutionally overbroad, and the court could narrowly construe it to only prohibit "fighting words" which are unprotected speech. The appeals court upheld the conviction of an Ohio resident for referring to a police officer as a "real cock sucker."

In accord is [McDermott v. Royal](#), #09-3167, 613 F.3d 1192 (8th Cir. 2010), in which a woman claimed that her arrest and prosecution for obstructing police officers who were arresting her son violated her First Amendment rights. The trial court found that the ordinance, which criminalized obstructing or resisting officers, was facially overbroad, and enjoined its enforcement. Reversing, a federal appeals court found that the ordinance's use of the words "obstruct" and "resist" only covered physical acts or "fighting words," and did not give officers unfettered discretion to arrest persons merely for engaging in speech that was critical or annoyed them.

## ❖ Conclusion

Making inappropriate arrests of individuals for "contempt of cop" in circumstances where courts will find their actions to be merely the exercise of their First Amendment rights of free speech can be counter-productive, both in terms of community relations and potential civil liability.

On the other hand, the right of free speech, which is part of the law and guaranteed freedoms that law enforcement officers are sworn to protect, does not extend to the uttering of fighting words, the obstructing of or interfering with officers doing their duty, or the incitement of others to imminent lawless actions like violence or resisting arrest.

Police departments should endeavor to provide officers with adequate training to give them the tools to understand and recognize the difference.

## ❖ Resources

The following are some useful resources related to the subject of this article.

- [Contempt of Cop](#). Wikipedia article.
- [First Amendment](#). Case summaries from AELE's Law Enforcement Liability Reporter.
- ["The Importance of Privacy, Civil Rights, and Civil Liberties Protections in American Law Enforcement and Public Safety."](#) a training video developed by the U.S. Department of Justice's Global Justice Information Sharing Initiative's Criminal Intelligence Coordinating Council.

## ❖ Prior Relevant Monthly Law Journal Articles

- [Funeral Protests and the First Amendment](#), 2011 (6) AELE Mo. L. J. 101



- [Second Circuit Panel Allows Stun Mode to Gain Compliance of Chained Protestors](#), 2011 (5) AELE Mo. L. J. 501.
- [Sexualized and Derogatory Language in the Workplace](#), 2011 (2) AELE Mo. L. J. 201.

❖ **References:**

- “[Disorderly \(mis\)Conduct: The Problem with ‘Contempt of Cop’ Arrests](#),” by Christy E. Lopez, American Constitution Society for Law and Policy, Issue Brief (June 2010).
- “[N.M. cops can’t arrest for ‘refusing to obey’](#),” by T.J. Williams, Albuquerque Journal (Nov. 25, 2008).
- “[Criminal Speech](#),” by Martin J. King, FBI Law Enforcement Bulletin, 77 (4) FBI Law Enforcement Bulletin 23-32 (April 2008).
- “[Time, Place, and Manner: Controlling the Right to Protest](#),” by Martin J. King, 76 (5) FBI Law Enforcement Bulletin 20-32 (May 2007).

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**AELE Monthly Law Journal**

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