

American Civil Liberties Union

American Civil Liberties Union Fund of Michigan

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July 14, 2008

Chief David Dicks
Flint Police Department
210 East Fifth Street
Flint, MI 48502

VIA FIRST CLASS MAIL AND FAX

Re: Illegal Stops and Searches of Men Wearing Sagging Pants

Dear Chief Dicks:

Your new practice of stopping, searching and threatening young men with disorderly conduct for wearing “saggy pants” is a blatant violation of the United States Constitution. Although you were recently appointed Chief of the Flint Police Department, you cannot appoint yourself as the chief of the “fashion police.” You have no power to criminalize a style of dress simply because you find it distasteful. We ask that you halt this practice immediately.

The Detroit Free Press Video

When you initially announced your “crackdown” on saggy pants, we did not know if it was simply a publicity stunt or whether you would actually start charging young men with a crime for the way they wear their clothes. If it was the latter, we assumed you were going to charge only those who exposed their naked buttocks because any other interpretation would be nonsensical.

Any ambiguity in how you would enforce your new policy was cleared up by the front page article in last Wednesday’s *Detroit Free Press*¹ and particularly the accompanying video that was posted on the *Free Press* website. See video at <http://freep.com/apps/pbcs.dll/article?AID=/20080708/VIDEO01/80708074>.

¹ See article at <http://www.freep.com/apps/pbcs.dll/article?AID=/20080709/NEWS06/807090390>.

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The video is, quite frankly, embarrassing. It shows you patrolling the neighborhoods in order to stop and search young men who are wearing their pants low. You then inform them that they are committing the crime of indecent exposure.

However, none of the men had their buttocks showing. A couple of the men you stopped were wearing their pants in such a manner that the top of their boxer shorts were showing. Amazingly, the other men you stopped and searched did not even have their boxer shorts exposed. Rather, they were wearing long jerseys or t-shirts that fell far below the top of their pants. It was not until you lifted up their shirts for the *Free Press* video camera that the boxer shorts even became visible!

Waste of Scarce Police Resources

We believe that instructing your police officers to spend their time arresting individuals for no other reason than they are wearing sagging pants is a tremendous waste of scarce police resources. According to *Congressional Quarterly*, Flint is the third most dangerous city in the entire country.² Moreover, due to budget problems, Flint just laid off 48 police officers³ and closed the city jail.⁴ Shouldn't the officers that remain on the Flint police force be fighting crime rather than fighting the latest fashion fad?

Wearing Sagging Pants is not a Crime

The main purpose of this letter, however, is not to discuss the way you use police resources. It is to explain why your decision to arrest young men for wearing low riding pants is unconstitutional and exposes the city and its officers to liability.

In your memorandum to "all sworn personnel," dated June 26, 2008, you attempt to explain your rationale for charging youths wearing saggy pants with indecent exposure, a crime punishable by up to 93 days in jail and a \$500 fine. The memo states:

This immoral "self expression" goes beyond free speech; it rises to the level of indecent exposure/disorderly persons.

Therefore, any sworn officer who observes a person committing indecent exposure (sagging/exposing buttocks) within the city of Flint jurisdiction has probable cause to effect a misdemeanor arrest for the following ordinance violation. Ordinance #3192 Section 31-12(o) Disorderly Person may be written as a means to enforce this law.

² See 2007 Study by CQ Press, a unit of Congressional Quarterly, based on FBI crime statistics. <http://www.cqpress.com/media/citycrime2007.html>.

³ See 7/9/08 Flint Journal Article, http://www.mlive.com/flintjournal/index.ssf/2008/07/state_refuses_to_give_badge_ba.html

⁴ See 6/30/08 Flint Journal article, http://www.mlive.com/flintjournal/index.ssf/2008/06/flint_city_jail_to_close_july.html

See 6/26/08 memo, attached as Exhibit A.

However, under no stretch of the imagination does wearing pants in a manner that reveals the top of one's boxer shorts violate the Flint Disorderly Conduct Ordinance. The provision of the ordinance that you cite in the memo clearly requires that a person openly expose certain body parts to be guilty. Specifically, it states that a person is disorderly if she:

Intentionally makes or causes to be made any open exposure of the human male or female genitals, pubic area, buttocks or female breast in any street, alley, park, sidewalk, public building, school or building open to or frequented by the public or any other place that is open to the public view or to which the public has access.

Flint Ordinance #3192, sec. 31-12 (o) (emphasis supplied). Obviously, the buttocks is not "openly exposed" if it is covered by boxer shorts.⁵

Your reading of the Flint ordinance to apply to those wearing saggy pants without their boxer shorts showing is nothing less than preposterous. The *Free Press* video shows you approaching men wearing long jerseys whose boxer shorts are covered by long jerseys or t-shirts that reach well below the top of the men's pants. The only time the viewer can see the boxer shorts is when you lift up the shirts to display them for the *Free Press* cameraman. You then search the individuals and tell them that they are committing the crime of indecent exposure.

This practice is akin to lifting a woman's skirt in front of the camera to expose her underwear and then telling her she is indecently exposed. It must stop.

The New Policy Authorizes Unconstitutional Searches and Seizures

It is well established that a police officer may not stop and search an individual unless he or she has reasonable suspicion to believe that the individual has committed or is committing a crime. *Terry v. Ohio*, 391 U.S. 1 (1968); *Bennett v. City of Eastpointe*, 410 F.3d 810 (6th Cir. 2005). Similarly, a police officer violates the Fourth Amendment if he or she charges a person with a crime without probable cause. *Id.* Given that there is no law outlawing the exposure of boxer shorts, it is unconstitutional to stop, search, arrest or charge a person on this basis.

The New Policy Violates Due Process Principles because it is Unclear that the Flint Ordinance Criminalizes Exposed Undergarments

It is well established that a police officer violates a person's due process rights when the officer charges him with a crime under a law that does not clearly make the activity illegal. Such

⁵ Similarly, the state indecent exposure statute, MCL 750.335a, has been definitively interpreted to apply to openly exposing body parts. See, e.g., *People v. Vronko*, 228 Mich.App. 649, 654 (1998) ("indecent exposure" is defined as being an "intentional exposure of part of one's body (as the genitals) in a place where such exposure is likely to be an offense against the generally accepted standards of decency in a community.")

laws are “void for vagueness” because (1) they “may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits,” and (2) they “may authorize and even encourage arbitrary and discriminatory enforcement.” *Chicago v. Morales*, 527 U.S. 41, 56 (1999); also see *United States v. Salisbury*, 983 F.2d 1369, 1378 (1993) (laws may be void for vagueness “as applied” to certain circumstances even when they clearly prohibit some activity).

In the present case, there is nothing in the Flint Disorderly Conduct statute to suggest that wearing sagging pants, or even exposing one’s undergarments, violates the law. As demonstrated above, the language of the ordinance provides no clue that exposed underwear might be illegal. Accordingly, any application of the law to individuals such as those in the *Free Press* video violates the Due Process Clause. See, e.g., *People v. Boomer*, 250 Mich.App. 534 (2002) (striking down state law criminalizing “indecent,” “immoral” and “vulgar” speech on vagueness grounds).

Further, your unique interpretation of the law is subject to discriminatory enforcement. Are police officers in Flint now going to stop, search and charge women whose slips or bra straps are showing? How about women who wear boxer shorts instead of traditional shorts? Will individuals be charged for wearing bathing suits or halter tops in Flint because some residents or officials believe it to be “indecent” or “immoral”?

In a democracy, it is the role of law enforcement to enforce the laws as written, not to arrest individuals based upon the police chief’s sense of what clothing is tasteful.

The New Policy Interferes with Individuals’ Liberty Interest in their Personal Appearance

As Americans, we are fortunate to live in a society where, with certain narrow exceptions, the police cannot lock us up for what we read, what we say or what we believe. Similarly, the courts have made it clear that the Constitution protects the liberty interest of people to choose their own personal appearance. Government cannot dictate the length of our hair, the message on our t-shirts, whether we wear earrings or the style of our clothes.⁶ Indeed, the right to free expression is a hallmark of a free society and it is a characteristic of the United States which is admired around the globe.

Throughout history, individuals who have pushed the limits of conventional styles have been ridiculed and criticized and have even been called immoral. For example, since the 1960s, men have been castigated by various sectors at various times for long hair, mohawks, very short cutoff shorts, extremely long shorts, bell bottoms, platform shoes, earrings, nose rings, tattoos and midriff shirts. Similarly, women have been excoriated for their short hair, big hair, mini

⁶ See *Lansdale v. Tyler Junior College*, 470 F.2d 659, 663 (5th Cir. 1972) (en banc), cert. denied, 411 U.S. 986 (1973) (“the right of citizens to choose their mode of personal hair grooming [is] within the great host of liberties protected by the Fourteenth Amendment from arbitrary state action”); see also *DeWeese v. Town of Palm Beach*, 812 F.2d 1365, 1367, 1369-70 (11th Cir. 1987) (shirtless male runner had protected liberty interest in his personal dress); *Rathert v. Village of Peotone*, 903 F.2d 510 (7th Cir. 1990) (off-duty police officers wearing ear studs have a liberty interest in personal appearance); *Hodge v. S.T. Lynd*, 88 F. Supp. 2d 1234, 1239 (D. N.M. 2000) (patron of county fair had liberty interest in choice to wear baseball cap backwards).

skirts, short shorts, halter tops, shirts that reveal cleavage and belly buttons, skimpy bikinis and pant suits.

Styles change through time and while we might agree that sagging pants are unattractive, silly or offensive, some were saying the same thing about the extremely short, revealing cutoff shorts that teenage boys wore during the 1970s.

If you think that saggy pants are immoral, you have the right to speak out against them and encourage young men to dress more conventionally. However, just as youngsters in the 1970s could not be imprisoned for their “unique” style of dress, you do not have the authority to stop, search, arrest or charge individuals for a crime for what you consider to be their bad sense of style.

Ironically, we suspect that the controversy that you have generated about sagging pants will do more to popularize the style than suppress it.

Undermining Criminal Prosecutions

Some have suggested that the underlying purpose of your new policy is to simply give police an excuse to approach “suspicious” looking young men and search them for contraband, which, in turn, might lead to prosecutions. However, it is important to note that the policy would actually undermine the prosecution of these individuals.

The courts have made it clear that any contraband found as a result of an illegal search is not admissible as evidence in a criminal trial.⁷ Since wearing sagging pants is not a crime, there is no probable cause to search the youth you are targeting and, in the event the searches of these youth turned up contraband, any resulting criminal charges would be dismissed due to the unconstitutional search.

Potential for Racial Profiling

We are concerned that your new policy might be used by some officers to engage in racial profiling. Sagging pants are worn by kids of all colors and we are certain that you do not intend this policy to be used as a tool for discrimination. But by criminalizing innocent behavior, you are giving officers with racial bias the opportunity to disproportionately target young people of color in order to search them and charge them with crimes. Indeed, a Flint police officer called into a Detroit radio station last week and confirmed that the new policy is already being used by some officers on the force for that purpose.

Exposing the City of Flint and its Police Officers to Liability

Your new policy is not only exposing you to a liability, but also the City of Flint and the individual police officers who carry out the policy. Litigating a lawsuit is very expensive and if the plaintiffs prevail they would be entitled to recover not only damages, but also their attorney fees and costs.

⁷ *Wong Sun v. United States*, 371 U.S. 471, 484 (1963).

In the past couple of years, the ACLU has sued the City of Flint twice. In 2006, U.S. District Court Judge Victoria Roberts ruled that Mayor Don Williamson of Flint violated Tom Hansen's constitutional rights by having him arrested for delivering the Flint Journal to subscribers in City Hall. The mayor had organized a boycott of the Flint Journal because of negative editorials about him and forbade city hall employees from reading the paper during working hours. Following Judge Roberts' ruling, the City settled the case for \$150,000.

We are currently engaged in protracted and expensive litigation against the City over the arrest and strip search of dozens of people for merely being present at the licensed bar called Club What's Next. In dismissing the criminal charges against the 94 patrons we represented, the Genesee County Circuit Court held that there was no probable cause to arrest the individuals, much less strip search them in an unsuccessful attempt to find drugs.

Because the constitutional violations that you are promoting are so obvious, plaintiffs would be entitled to seek punitive damages as well as compensatory damages. *See Smith v. Wade*, 461 U.S. 30 (1983) (punitive damages available against individual government actors when they are in "reckless disregard" of individuals' constitutional rights). The last thing Flint needs is another costly lawsuit over a blatantly unconstitutional policy. It would not be fair to either the police officers who you have instructed to implement the policy or to the taxpayers who would end up footing the bill.


Request to Revise Policy and Stop Harassment

For all the reasons outline above, we ask that you immediately revise your policy and inform your officers that they cannot stop, search or charge a resident for disorderly conduct or indecent exposure merely for wearing sagging pants whether or not their boxer shorts are showing. I urge you to consult with the city attorney on this matter.

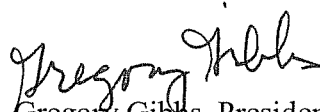
We request a reply by Monday, July 21. If we do not hear by then that you have changed the policy, we will be open to representing any Flint resident who (1) has been stopped, searched and/or threatened or charged with a misdemeanor for wearing sagging pants, or (2) has a legitimate fear that he would be stopped, searched and/or charged with a misdemeanor if he wore sagging pants.

It is our true hope that we can resolve this issue amicably. However, if there is no change in policy, we cannot stand idly by while the city engages in a wholesale and obvious violation of residents' constitutional rights.

Very truly yours,



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cc: Keith Speer, President of the Flint Police Officers Association
Sgt. Rick Hetherington, President of the Flint Sergeants Union
Lt. David Winch, President of the Flint Lieutenants and Captains Union
Trachelle Young, City Attorney
Donald Williamson, Mayor
Darryl Buchanan, City Administrator



FLINT POLICE DEPARTMENT

CITY OF FLINT, MICHIGAN

MEMORANDUM

Donald J. Williamson
MAYOR

David R. Dicks
Chief of Police

FROM: David R. Dicks
Chief of Police

DATE: June 26, 2008

TO: All Sworn Personnel

SUBJECT: Indecent Exposure Enforcement

Due to a significant number of complaints from citizens regarding youths and adults "sagging" wearing pants and/or shorts below their waist and indecently exposing their buttocks, it is necessary that we enforce the law concerning disorderly person(s), only when sworn officers observe this misdemeanor.

This immoral "self expression" goes beyond free speech; it rises to the crime of indecent exposure/disorderly persons.

Therefore, any sworn officer who observes a person or persons committing indecent exposure (sagging/exposing buttocks) within the City of Flint jurisdiction has probable cause to effect a misdemeanor arrest for the following ordinance violation. Ordinance #3192 Section 31-12 (o) Disorderly Person may be written as a means to enforce this law.

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David R. Dicks
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Chief of Police

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