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Disorderly Conduct Statutes and Ohio

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Disorderly Conduct Statutes And Ohio

DISORDERLY CONDUCT WAS NOT AN OFFENSE AT COMMON LAW and is prohibited only as provided by statute. In Ohio it can only be defined in very general terms and normally consists of conduct which annoys, inconveniences, or alarms other members of the community. It may be, but is not necessarily, a breach of the peace. This Note is concerned with the varied statutory definitions of the offense.

The vagueness of disorderly conduct statutes[1] has led a Municipal Court judge in Baltimore, Maryland, to declare that "[j]udges who have the daily responsibility of interpreting conduct and determining whether it amounts to the crime of disorderly conduct have, because of the vagueness of the definition, the added duty to be viligant against abuse."[2]

In Ohio, as throughout the country, the peace and good order of communities are often protected by vague disorderly conduct statutes which fail to sufficiently define prohibited conduct. The failure of such statutes to provide specific standards for enforcement, and the determination of the courts to uphold these laws, may lead to an arbitrary standard of justice.

When the courts are presented with a vagueness question concerning an archaic city or state statute, they should be eager to void, rather than careful to limit and interpret the language of the law. It is the duty of the legislatures to provide specific statutes which benefit the individual and the community and it is the duty of the courts to establish and insure the minimum standard of specificity required of these statutes.

The Scope of the Problem

In 1971, an estimated 750,000 people were arrested in the United States for disorderly conduct,[3] and while this offense recorded the second highest number of arrests for any such category,[4] the nature

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[1] ANNO. CODE OF MARYLAND, art. 27 §123 (1957). This section of the Maryland Code was one of the disorderly conduct statutes to which Judge Watts referred. It provides in part: "Every person who shall be found drunk, or acting in a disorderly manner to the disturbance of the public peace, upon any street or highway . . . shall be deemed guilty of a misdemeanor . . ."

[2] Watts, *Disorderly Conduct Statutes in Our Changing Society*, 9 WM. & MARY L. REV., 354, 355 (1967). The thrust of this article, adapted from a speech to the North American Judges Association Eastern Regional Conference in 1967, is "that with the changes in the attitude of young people in our permissive society . . . the courts must be alert to abuses and distortions in the law." As a result of vague disorderly conduct statutes, "[t]he judge has no objective yardstick and is forced to rely on the opinion of the police officer. This . . . is a dangerous set of circumstances which may lead to a lack of fundamental justice. The answer would be to set forth in the statutes as completely and as broadly as possible those acts which constitute offenses."

[3] FBI, UNIFORM CRIME REPORTS FOR THE UNITED STATES 115 (1971).

[4] *Id.*

of the offense is such that the effect of these arrests is normally dismissed. As the National Advisory Commission on Civil Disorders recognized, however, the possibility of arbitrary arrest and prosecution for even a minor criminal offense may inhibit expression and provoke reactions from those within the minority community.[5] When this possible source of hostility is measured against the estimated 750,000 arrests arising from disorderly conduct, the number of arrests in this category takes on a more serious tone.

In 1967, the Kerner Commission found a need for specific legislation which proscribed "the full range of riot behavior," rather than to "rely on vague disorderly conduct or loitering statutes in riot situations."[6] The law enforcement systems of our major cities, caught unprepared in a wave of civil disorder, had used vague ordinances to clear streets and punish conduct not otherwise prohibited.[7] The apparent "selective enforcement" of these ordinances was cited by the Commission as one source of the minority unrest which led to the explosive condition of America's ghettos.[8] The legislative response to this need varied, but in most jurisdictions we now find statutes which prohibit specific riot behavior.[9]

In 1973, after the fear of civil disorder has declined, there remains a problem with these vague disorderly conduct statutes as they apply to the individual in less than full-blown riot situations. The arbitrary enforcement of a statute may inhibit the only effective method of expression many people have found. That is the right to publicly disagree with the ideas and actions of others. It is a right

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[5] NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, REPORT 186 (1971), [hereinafter cited as Kerner Commission]. This report was prepared by the Commission at the request of President Lyndon B. Johnson to determine the cause of the civil disorders of 1967.

[6] *Id.* at 26, 157. The Commission cited "abrasive relationships between police and . . . minority groups . . . (as a) major source of grievance, tension, and ultimately, disorder."

[7] *Id.* at 26.

[8] *Id.*

[9] *See e.g.* OHIO REV. CODE ANN. §§2923.51-.54 (Page 1972). These sections became effective in 1968 to prohibit this specific riot behavior in Ohio. The first and second degree riot statutes provide:

> §2923.52 SECOND DEGREE RIOT.
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> No person shall participate with four or more others in violent and tumultuous conduct:
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> (A) With intent to do a lawful act with unlawful force and violence in such a manner as to create a clear and present danger to the safety of persons or property;
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> (B) With intent to prevent or coerce official action, or to hinder, impede, or obstruct a function of government;
>
> (C) With intent to commit or facilitate the commission of a misdemeanor.
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> Whoever violates this section is guilty of riot in the second degree, and shall be fined not more than one thousand dollars or imprisoned not more than one year, or both.

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which must be jealously guarded and uniformly restricted for the community good. That restriction must be limited and well defined.[10]

The Nature of the Problem

It is generally accepted that a statute prohibiting criminal conduct must strike a balance between the inherent first amendment freedoms of the individual and the responsibility to protect the peace and good order of the community.[11] There are definite ascertainable interests of the community which will support an exercise of police power.[12] Carefully drawn statutes are necessary to protect these interests from many forms of offensive conduct. For the sake of legislative and administrative ease, however, the result is often a very general statute which prohibits all annoying conduct.[13] Suffering from the constitutional infirmities of vagueness and overbreadth, the statute may readily become a "weapon of oppression" infringing upon the rights of the individual.[14]

An example of such a vague and overbroad city ordinance, a possible "weapon of oppression," can be found in the Code of Ordinances for the City of Cincinnati:

> It shall be unlawful for three or more persons to assemble, on any of the sidewalks, . . . and there conduct themselves in a manner annoying to persons passing by, or occupants of adjacent buildings . . .[15]

(Continued from preceding page)

§2923.53 FIRST DEGREE RIOT.

No person shall participate with four or more others in violent and tumultuous conduct:

(A) With intent to commit or facilitate the commission of a felony;

(B) With intent to commit or facilitate the commission of any offense involving force or violence against persons, whether such offense is a misdemeanor or felony;

(C) When the actor or any participant to the knowledge of the actor uses or intends to use a firearm or other deadly weapon, or dynamite or other dangerous explosive, or any incendiary device.

Whoever violates this section is guilty of riot in the first degree, and shall be fined not more than one thousand dollars or imprisoned not more than one year, or both, or shall be imprisoned not less than one nor more than three years.

[10] NAACP v. Button, 371 U.S. 415, 432 (1963).

[11] American Communications Ass'n, CIO v. Douds, 339 U.S. 382, 399 (1950).

[12] Cleveland v. Anderson, 13 Ohio App. 2d 83, 234 N.E.2d 304, 306 (1968). "Ohio holds that an exercise of police power will be held valid if it bears a real and substantial relation to the public health, safety, morals or general welfare, and if it is not unreasonable or arbitrary."

[13] *See e.g.* SOUTH EUCLID, OHIO ORDINANCE 527.03 which provides in part:

> It shall be unlawful for any person to disturb the peace and good order of the city by fighting, quarreling, wrangling, threatening violence to the person or property of others, or by riot, tumult, lascivious, obscene, profane, or scandalous language, or by making outcries, clamor, or noise in the night, or by intoxication, drunkenness . . .

[14] Connally v. General Constr. Co., 269 U.S. 385 (1926).

[15] CINCINNATI, OHIO, CODE OF ORDINANCES §901-L6 (1956).

The Kerner Commission cited the alleged arbitrary enforcement of this ordinance as an inflammatory element in the 1967 civil disorders which occurred in Cincinnati.[16] Prior to a major disturbance, the Negro community, resentful of an apparent double standard of justice within the city, had presented a list of grievances to the municipal government.[17] Included was a demand for the repeal of this anti-loitering ordinance. Officials failed to realize the volatile frustrations of people in the ghetto, however, and violence erupted.[18]

When this ordinance was later contested in the courts, the Ohio Supreme Court upheld the validity of this language and wrote that "the word annoying is a widely used and well understood word; it is not necessary to guess its meaning."[19] Based on this interpretation, the Court found that the ordinance was not vague.[20] The Supreme Court of the United States disagreed, however, and made a further contribution to the definition of vagueness.[21] It held the ordinance vague because it subjected a first amendment freedom open to an unascertainable standard, and overbroad because it could punish "constitutionally protected conduct."[22] The ordinance, while properly within the power of the city to regulate such conduct, did so in terms from which no objective standard could be drawn. The word "annoying," while capable of definition, provided only a subjective standard for enforcement. What one man considers annoying conduct may not be annoying to another.[23]

It is the arbitrary enforcement of statutes based on such subjective standards which creates one basis for the vagueness doctrine.[24] The lack of specificity may lead to "arbitrary or capricious action" by those charged with its enforcement.[25]

Vagueness and Overbreadth

At common law,[26] and now as an element of due process,[27] a criminal statute must describe prohibited conduct with sufficient

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[16] KERNER COMMISSION, *supra* note 5, at 26.

[17] *Id.* at 26, 27.

[18] *Id.* "Between January of 1966, and June of 1967, 170 of some 240 persons arrested under the ordinance were Negro." While ". . . 135,000 out of the city's 500,000 residents were Negroes."

[19] Cincinnati v. Coates, 21 Ohio St.2d 66, 255 N.E.2d 247 (1970), *rev'd* 402 U.S. 611 (1971).

[20] *Id.*

[21] Coates v. Cincinnati, 402 U.S. 611, 613 (1971).

[22] *Id.* at 614.

[23] *Id.* at 615, 616. The court in its discussion of this anti-loitering statute stated that ". . . such a prohibition . . . contains an obvious invitation to discriminatory enforcement against those whose association together is 'annoying' because their ideas, their lifestyle, or their physical appearance is resented by the majority of their fellow citizens."

[24] Grayned v. Rockford, 408 U.S. 104 (1972).

[25] Watts, *supra* note 2, at 349, 352.

[26] Pierce v. United States, 314 U.S. 306, 311 (1941).

[27] Connally v. General Constr. Co., 269 U.S. 385 (1926).

certainty to give notice of the offense.[28] Statutes which fall short of this necessary specificity are void for vagueness. It is difficult to determine the actual standard of certainty required of criminal statutes,[29] but it is generally accepted that the language must provide notice of the prohibited conduct and mark distinct boundaries for the enforcement of the law.[30] The nature of the offense,[31] the difficulty of definition,[32] the element of intent,[33] and other material factors[34] are considered by the court in its determination of the required certainty; but traditionally, it is the interaction of these factors with the required notice to the reasonable man which determines the necessary specificity of the language involved.[35] The courts will weigh the nature of the individual interest to be regulated against the interest of the community in the regulation of this conduct.[36] It is this weighing of interests which determines the required certainty of statutory language, and the validity of an exercise of police power.

Overbreadth concerns those statutes which, even though possibly describing the prohibited conduct with sufficient certainty, do so in terms so broad that they encompass constitutionally protected conduct.[37] And while a vague statute is usually overbroad, an overbroad statute need not be vague. The vagueness and overbreadth principles are separate and distinct yet similar constitutional flaws, often considered by the courts as one. Here we are concerned with the overbreadth of disorderly conduct statutes, whether vague or

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[28] Watkins v. United States, 354 U.S. 178, 208 (1957).

[29] Eastman v. State, 131 Ohio St. 1, 1 N.E.2d 140, 141 (1936). Here the Ohio Supreme Court, although providing no standard, stated that a statute cannot be held invalid for uncertainty if any reasonable and practical construction can be given to its language; mere difficulty in ascertaining its meaning, or the single fact that it is susceptible of different interpretations will not necessarily render it nugatory . . ."

[30] United States v. Petrillo, 332 U.S. 1, 7, 8, (1947). In this early vagueness decision the Court found the "Constitution presents no . . . insuperable obstacle to legislation." The fact that a more certain definition of the regulated conduct could have been enacted will not render a statute void.

[31] Scull v. Virginia, 359 U.S. 344 (1959).

[32] Winters v. New York, 333 U.S. 507 (1948).

[33] United States v. Petrillo, 332 U.S. 1 (1947); Screws v. United States, 325 U.S. 91 (1945).

[34] Grayned v. City of Rockford, 408 U.S. 104, 116 (1972). "The nature of a place, 'the pattern of its normal activities, dictates the kinds of regulations of time, place and manner that are reasonable.'" *See also*, People v. Shiftin, 301 N.Y. 445, 94 N.E.2d 724 (N.Y. Ct. App. 1950) which finds the individual entitled to an unequivocal warning before conduct "not malum in se" could be prohibited.

[35] Connally v. General Constr. Co., 269 U.S. 385 (1926).

[36] American Communications Ass'n, CIO v. Douds, 339 U.S. 382, 399 (1950). The Supreme Court held that when first amendment freedoms are regulated in the interest of public order "the duty of the courts is to determine which of these two conflicting interests demands the greater protection under the circumstances presented."

[37] Cox v. Louisiana, 379 U.S. 536 (1965). In this decision the Supreme Court held the state construction of a statute to prohibit the orderly expression of an unpopular view unconstitutional.

merely too general for the protection of the rights of the individual.[38] Such statutes may prohibit constitutionally protected conduct, and provide a basis for the inconsistent regulation of that conduct properly within the power of the city to regulate. A statute which provides no objective standard for enforcement, but is interpreted to regulate only that conduct not constitutionally protected may provide no guarantee against arbitrary or capricious action. In fact, it may encourage such action.

In the protection of individual interests, the vagueness and overbreadth doctrines have required a higher degree of certainty in the definition of these offenses in the area of the first amendment freedoms;[39] and recent Supreme Court decisions have held anti-noise,[40] loitering,[41] vagrancy,[42] and lewd or profane speech statutes[43] to this specificity requirement. It is generally recognized that prosecution in this area "involves imponderables and contingencies that themselves may inhibit the full exercise of first amendment freedoms,"[44] and the Supreme Court has been quick to protect these interests of the individual.[45] In fact, the Supreme Court has explained that "[t]he objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice . . . but upon the danger of tolerating, in the area of first amendment freedoms, the existence of a penal statute capable of sweeping and improper application."[46] And although it would seem that disorderly conduct may be distinguished as action rather than a first amendment freedom, the courts will look to the effect of the statute as well as the conduct which it is drawn to prohibit.[47] Where a statute which regulates conduct infringes upon the rights of the individual, it is the duty of the courts to determine which interest demands the greater protection.[48] It is only through this weighing of interests that a standard of required specificity may be determined.

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[38] 12 AM. JUR. 2d *Breach of Peace*, §38 (1964). I would disagree with the statement found herein that "A statute that declares that any person who by offensive or disorderly acts or language annoys or interferes with another person in any place is guilty of the misdemeanor of disorderly conduct is not subject to the charge that it is so vague as to be invalid for lack of objective standards."

[39] NAACP v. Button, 371 U.S. 415 (1963); Scull v. Virginia, 379 U.S. 344 (1959).

[40] Grayned v. Rockford, 408 U.S. 104 (1972).

[41] Coates v. Cincinnati, 402 U.S. 611 (1971).

[42] Papachristou v. Jacksonville, 405 U.S. 156 (1972).

[43] Gooding v. Wilson, 405 U.S. 518 (1972).

[44] Dombrowski v. Pfister, 380 U.S. 479, 486 (1965).

[45] NAACP v. Button, 371 U.S. 415, 433 (1963), "First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity."

[46] *Id.* at 433 (1963).

[47] American Communications Ass'n, CIO v. Douds, 339 U.S. 382, 399 (1950). The court stated that "regulation of 'conduct' has all too frequently been employed by public authority as a cloak to hide censorship of unpopular ideas."

[48] *Id.*

The vagueness concept, once a common law requirement of notice, has become a principle which centers on a "rough idea of fairness,"[49] and hinges on a reasonable weighing of all of the interests involved.[50] It requires no insurmountable standard of certainty of the legislature in the definition of the conduct to be regulated.[51] And the fact that "marginal cases" exist where it is difficult to determine whether the conduct in question is prohibited will not render a statute invalid.[52] Where, however, the conduct to be regulated affects interests of the individual which outweigh the interest of the community in the regulation of this conduct, the courts will require a higher degree of certainty.[53]

In a recent decision, the Supreme Court, moving beyond the traditional requirement of notice to the offender, explained that vague laws are offensive to "several important values."[54]

> First, . . . we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly . . . .
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> Second, . . . if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them.
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> Third, . . . Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked.[55]

The basis for the vagueness principle, at least in the areas which abut on the first amendment freedoms, rests on these three values. The courts must concentrate on each of these factors if our population is to enjoy an unfettered freedom of expression.

Thus, for example, where a statute provides "A person is guilty of disorderly conduct if, with intent to cause public incon-

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[49] Colten v. Kentucky, 407 U.S. 104, 110 (1972).

[50] *See e. g.* Papachristou v. Jacksonville, 405 U.S. 156 (1972). A consideration of the interests involved in the enforcement of a Jacksonville vagrancy ordinance led the court to comment, the ordinance "makes criminal activities which by modern standards are normally innocent.

[51] Colten v. Kentucky, 407 U.S. 104, 110 (1972); United States v. Petrillo, 332 U.S. 1, 7 (1947).

[52] United States v. Petrillo, 332 U.S. 1, 7 (1947).

[53] Grayned v. Rockford, 408 U.S. 104 (1972). The Supreme Court stated that ". . . in assessing the reasonableness of regulation, we must weigh heavily the fact that communication is involved; the regulation must be narrowly tailored to further the state's legitimate interest."

[54] Grayned v. Rockford, 408 U.S. 104, 108 (1972).

[55] *Id.* at 108, 109.

venience," the offender "refuses to comply with a lawful order of the police to disperse,"[56] and the required intent is defined by the state court as the dominant intent, the statute will be upheld.[57] It is necessary that the order be a lawful order linked to the protectable interest of the community, and that the dominant intent of the offender be contrary to this protectable interest. Where, however, a statute prohibits "opprobrious and abusive words tending to cause a breach of the peace," and this language is defined by the state court as prohibiting something less than fighting words, the statute will be found vague and overbroad.[58]

Action may not be restricted because it is unpopular,[59] but reasonable regulation linked to community interests will be permitted.[60] This reasonable regulation must go to the form and effect of the law.

Judicial Interpretation

The offense of disorderly conduct is statutory, and as such subject to variations in scope and legislative provision in each jurisdiction.[61] In Ohio there is no enforceable disorderly conduct statute,[62] and while many sections of the Ohio Revised Code prohibit petty offenses often considered disorderly conduct,[63] the offense is normally covered by the city ordinance.[64] The result is that both the form and enforcement of disorderly conduct statutes vary throughout the state.[65]

Although the form of these statutes varies, when tested in the state courts there seems to be one factor which favors each enactment. The courts will "endeavor by every rule of construction to ascertain the meaning of, and give full force and effect to, every enactment . . . not obnoxious to constitutional prohibition."[66]

The effect of this determination of the courts to uphold each enactment may best be illustrated by concentrating on one element

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[56] Colten v. Kentucky, 407 U.S. 104 (1972).

[57] *Id.*

[58] Gooding v. Wilson, 405 U.S. 518 (1972).

[59] Chicago v. Mosley, 408 U.S. 92 (1972).

[60] Cox v. New Hampshire, 312 U.S. 569, 575, 576 (1940).

[61] 18 OHIO JUR. 2d, *Disorderly Conduct*, §1 (1972).

[62] For a discussion of the existing Ohio law on disorderly conduct *see*, 18 OHIO JUR. 2d, *Disorderly Conduct* (1972); OHIO LEGISLATIVE SERVICE COMMISSION, PROPOSED OHIO CRIMINAL CODE 186 (1971).

[63] *See e.g.* OHIO REV. CODE ANN. Ch. 37 (Page 1953) which prohibits such offenses as: §3773.03 throwing hard objects upon a street; §3773.07 fighting a duel; §3773.09 agreeing to fight; §3773.22 being intoxicated and conducting oneself in a disorderly manner.

[64] OHIO CONST. §3, art. 18, authorizes municipalities to adopt such police regulations as are not in conflict with the general laws of the state, and §§715.49, 715.55 of the Ohio Rev. Code authorize certain specific municipal ordinances which protect against violations of the peace and good order of the community.

[65] 18 OHIO JUR. 2d, *Disorder Conduct*, §1 (1972).

[66] Eastman v. State, 131 Ohio St. 1, 1 N.E.2d 140, 141 (1936).

often present in the statutory definition of disorderly conduct. That is the element of intent.[67] Intent, when required as one element of a crime, has been recognized by the courts as a limiting factor of the required specificity for a criminal statute.[68] In the 1945 Screws decision, the Supreme Court of the United States found the requirement of intent "may avoid those consequences which render a vague or indefinite statute invalid."[69] The prohibition of willful annoying conduct, for example, may provide an element of notice, and guidelines for judicial interpretation, not provided by a statute which prohibits merely annoying conduct.[70] Since the early decisions which determined this limiting factor of intent, the legislatures have drafted,[71] and the courts have interpreted,[72] many statutes to include "willful" conduct which violates an interest of the community. In the judicial interpretation of these statutes, state courts have gone so far as to find the required intent a "dominant intent," thereby precluding the possibility of a prohibition of constitutionally protected action.[73]

Such judicial interpretation of vague statutory language may provide the minimum standard of certainty required of criminal statutes. It requires a consideration of each factor which supports the vagueness and overbreadth concepts, however. When viewed in the light of the recent three-fold reasoning of the *Grayned* decision,[74]

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[67] *See e.g.* CLEVELAND, OHIO, PENAL CODE §13.1124 which prohibits participation in disorderly activities:

> If any person shall knowingly and willfully constitute or make himself a part of any noisy, boisterous or disorderly assemblage of persons, countenancing the same by his presence, which annoys the inhabitanats . . .

This ordinance was declared unconstitutional, however, in *Cleveland v. Anderson,* 13 Ohio App.2d 83, 234 N.E.2d 304 (1968) because the intent required for the offense was simply the knowing presence of an individual at such a gathering. It required no criminal act of the offender.

[68] United States v. Roger, 314 U.S. 513 (1942); Corwin v. United States, 312 U.S. 19, 27 (1940); Connally v. General Constr. Co., 269 U.S. 385 (1926).

[69] Screws v. United States, 325 U.S. 91, 101 (1944).

[70] In *Colten v. Kentucky,* 407 U.S. 104 (1972), the Supreme Court upheld a Kentucky statute which prohibited "disorderly conduct with intent to cause public inconvenience, annoyance, or alarm . . . [where the offender] refuses to comply with a lawful order of the police to disperse." The Kentucky court had interpreted the required intent as a "dominant intent." In *Coates v. Cincinnati,* 402 U.S. 611 (1971), however, the Supreme Court struck down a statute which prohibited merely "annoying" conduct. The word annoying alone will not satisfy the specificity requirement.

[71] CLEVELAND, OHIO PENAL CODE §13.1126 "If any person shall willfully conduct himself in a noisy, boisterous, rude, insulting, or other disorderly manner, by either words or acts, toward any other person, with intent to abuse or annoy such person, or so as to annoy the citizens of the city, or any portion thereof, or disturb the good order and quiet of the same . . ."

[72] Cincinnati v. Hoffman, 31 Ohio St.2d 163, 285 N.E.2d 714 (1972). In this case the Supreme Court of Ohio, citing *Colten v. Kentucky,* 407 U.S. 104 (1972), upheld a Cincinnati ordinance which required "intent to cause . . . annoyance" and the court interpreted this intent as the "dominant intent" thereby prohibiting no constitutionally protected conduct.

[73] Colten v. Kentucky, 407 U.S. 104 (1972).

[74] Grayned v. City of Rockford, 408 U.S. 104 (1972).

and the emphasis of *NAACP v. Button*[75] (discussed in the vagueness section), it would seem that the requirement of a "dominant intent" may mark boundaries for juries but provide no standard for police enforcement. It can do little to insure against the improper application of a vague penal statute. "A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* basis, with the attendant dangers of arbitrary and discriminatory application."[76] The judicial limitation of vague statutory language should eliminate this improper delegation of authority at each level of enforcement. The courts must "endeavor by every rule of construction to . . . give full force and effect to, every enactment . . . not obnoxious to constitutional prohibition."[77] But this will require a consideration of each element obnoxious to the constitution.

The vagueness concept, once a common law requirement of notice, hinges on a reasonable weighing of all of those interests involved.

The Proposed Ohio Criminal Code[78]

A complete revision of the criminal law of Ohio is now before

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[75] 371 U.S. 415 (1963).

[76] Grayned v. City of Rockford, 408 U.S. 104, 108-9 (1972).

[77] Eastman v. State, 131 Ohio St. 1, 1 N.E.2d 140, 141 (1936).

[78] A point beyond the scope of this Note but which merits concern is the form of those "riot statutes" now being considered by the Ohio Legislature in the form of House Bill 511. (The proposed revision of the Ohio Criminal Code.) This revision would change the standard of conduct necessary for the offense of "riot" and "aggravated riot" from "violent and tumultuous conduct" under given explosive conditions as now provided in Section 2923.52 and 2923.53 of the Ohio Revised Code, to "disorderly conduct" as defined in Section 2917.11 of the pending revision (see this section within the text above). The net effect of this change if approved would be to prohibit many actions not generally considered riotous.

AGGRAVATED RIOT

Sec. 2917.02 (A) No person shall participate with four or more others in a course of disorderly conduct in violation of section 2917.11 of The Revised Code:

(1) With purpose to commit or facilitate the commission of a felony;

(2) With purpose to commit or facilitate the commission of any offense of violence;

(3) When the offender or any participant to the knowledge of the offender has on or about his person or under his control, uses, or intends to use a deadly weapon or dangerous ordinance as defined in section 2923.11 of The Revised Code.

(B) No person, being an inmate in a detention facility as defined in section 2921.01 of The Revised Code, shall violate division (A) of this section, or section 2917.03 of The Revised Code. . . .

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(1954).

the state legislature in the form of House Bill 511.[79] The purpose of the bill is to provide a compact and complete criminal code while eliminating those sections of the Ohio Revised Code which have become obsolete since its origin in 1788.[80] Section 2917.11 of this proposed revision would provide the following specific and enforceable disorderly conduct statute.

> Sec. 2917.11 (A) No person shall recklessly cause inconvenience, annoyance, or alarm to another, by doing any of the following:
>
> (1) Engaging in fighting, in threatening harm to persons or property, or in violent or turbulent behavior;
>
> (2) Making unreasonable noise or offensively course utterance, gesture, or display, or communicating unwarranted and grossly abusive language to any person;
>
> (3) Insulting, taunting, or challenging another, under circumstances in which such conduct is likely to provoke a violent response;
>
> (4) Creating a condition physically offensive to persons or hazardous to persons or property, by any act which serves no lawful and reasonable purpose of the offender.

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RIOT

> Sec. 2917.03 (A) No person shall participate with four or more others in a course of disorderly conduct in violation of section 2917.11 of The Revised Code:
>
> (1) With purpose to commit or facilitate the commission of a misdemeanor, other than disorderly conduct;
>
> (2) With purpose to intimidate a public official or employee into taking or refraining from official action, or with purpose to hinder, impede, or obstruct a function of government;
>
> (3) With purpose to hinder, impede, or obstruct the orderly process of administration or instruction at an educational institution, or to interfere with or disrupt lawful activities carried on at such institution.
>
> (B) No person shall participate with four or more others with purpose to do an act with unlawful force or violence, even though such act might otherwise be unlawful. . . .

There can be little doubt that the statutes in this form would be unconstitutionally overbroad, *e.g.* the creation of a physically offensive condition" or the "making of an offensively coarse gesture" by five students with the purpose of disrupting lawful activities at an educational institution would constitute the offense of "riot." The same conduct committed by five inmates at a detention facility would constitute "aggravated riot" and could be punished by two to ten years of imprisonment.

[79] AM. SUB. H.B. 511, 109th Ohio General Assembly (March 31, 1971). The text of this Bill, prior to introduction and House amendments, is available in Ohio Legislative Service Commission, Proposed Ohio Criminal Code (1971). For the sake of convenience references to sections of this Bill will be made to this publication.

[80] OHIO LEGISLATIVE SERVICE COMMISSION, PROPOSED OHIO CRIMINAL CODE viii (1971).

(B) Whoever violates this section is guilty of disorderly conduct, a minor misdemeanor. If the offender persists in disorderly conduct after reasonable request to desist, disorderly conduct is a misdeameanor of the fourth degree.[81]

This section, while covering an area not covered by the present criminal code, would provide a uniform disorderly conduct statute for the state of Ohio. It contains objective standards for enforcement and yet provides "flexibility for police officers" by introducing a lesser offense with which to charge petty malefactors."[82] The adoption of such a section could make a contribution to a uniform protection of the community.

Conclusion

It is the duty of the legislature to provide statutes which protect the peace and good order of the community as well as safeguard the rights of the individual. And while no insurmountable burden should be placed on the legislatures in the definition of that conduct to be regulated, a delegation of those basic policy decisions necessary to strike a balance between those interests in the community may deny the essential due process guaranteed by the vagueness and overbreadth concepts.

When the courts are presented with a vagueness question concerning an archaic city or state statute, they should be eager to void, rather than careful to interpret, the statute. It is the duty of the courts to establish and insure the minimum standard of specificity required of such statutes.

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[81] *Id.* at 192.

[82] *Id.*

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