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Cincinnati v. Hoffman: A Critical Analysis of the Constitutionality of a Municipal Disorderly Conduct Ordinance

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CASE COMMENTS

Cincinnati v. Hoffman: A Critical Analysis of the Constitutionality of a Municipal Disorderly Conduct Ordinance

MICHELE BROWN, JEFFREY BERLINER, AND DAVID HOFFMAN attended an anti-war demonstration in downtown Cincinnati on March 7, 1970. The demonstration proceeded without incident and was concluding as some of the participants moved to other downtown areas. The facts, as apparently found by the jury, were that an alleged incident involving the desecration of the American flag caused a melee to break out between police and demonstrators. Miss Brown, age nineteen, was closest to the center of the disturbance and reportedly addressed noisy and abusive language to police officers who then attempted to arrest her. Berliner, age twenty-one, rushed, shouting, to her assistance and joined the struggle between Miss Brown and police. Hoffman, age twenty-six, a newspaper reporter, is supposed to then have included himself in the disturbance, shouting "The press is watching" and "Arrest me, too." Miss Brown was found guilty of disorderly conduct[1] and sentenced to 30 days incarceration, $100 fine and costs. Berliner and Hoffman were found guilty of interfering with a police officer.[2] Hoffman was sentenced to six months' incarceration, $1000 fine and costs. Berliner received a one year's sentence, a $2500 fine, and costs. On appeal all three convictions were affirmed by the Hamilton County Court of Appeals.[3] All three were again affirmed by the Ohio State Supreme Court.

The first question answered by the Court, relating to Miss Brown's conviction was: Is the Cincinnati ordinance as written and as applied void as unconstitutionally vague and overbroad? The majority answered in the negative, relying heavily on *Colten v. Kentucky*[4] and *Coates v. Cincinnati*.[5] These two cases were distinguished

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[1] Section 901-d4 of the CODE OF ORDINANCES OF THE CITY OF CINCINNATI reads:
> It shall be unlawful for any person to willfully conduct himself or herself in a noisy, boisterous, rude, insulting or other disorderly manner, with the intent to abuse or annoy any person or the citizens of the City or any portion thereof.

[2] Section 901-r2 of the CODE OF ORDINANCES OF THE CITY OF CINCINNATI reads:
> No person shall resist, hinder, obstruct, or abuse any police officer while such officer is engaged in the lawful performance of his duties. Whoever violates this provision shall be imprisoned in the Workhouse for a period of not more than one (1) year, or fined not more than five thousand dollars ($5,000) or both.

[3] There were originally four defendants in this case. On appeal the charge against one Joyce Reichman (also disorderly conduct) was reversed. The other three convictions were affirmed on April 19, 1971, without opinion.

[4] 92 S.Ct. 1953 (1972). The Court in this case upheld a law dealing with interfering with officers of the state while they were engaged in the exercise of their duties. The court interpreted "knowingly" as sufficient to mean wrongful purpose and thereby excluded any purpose to exercise constitutional rights.

[5] 402 U.S. 611 (1971). An ordinance against loitering was involved in this case, which contained the word "annoying." The Supreme Court upheld a charge of vagueness, stating "Conduct that annoys some people does not annoy others." *Id.*, at 614.

from the *Hoffman* case in that the proscribed annoying or unlawful conduct was required to be based on a constitutional standard of *scienter* and *mens rea* to save the statutes and ordinances in question from judicial invalidation.

The second question, relating to the convictions of Hoffman and Berliner, was: May a municipal ordinance in conflict with a state statute[6] covering the same area be judicially rehabilitated by a charge to the jury so as not to violate constitutional due process requirements of specificity and clarity? The Court's answer was affirmative.

The decision is supported on the issue of vagueness by *City of Cleveland v. Anderson,*[7] where an almost identical ordinance was considered. Because the court chose to focus on a different element in this ordinance, mere passive attendance at a disorderly incident, the implication may be drawn that the ordinance would be sound otherwise. Statutory vagueness has, on many occasions, been defined by the Supreme Court of the United States as:

> ... [a] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.[8]

In a short paragraph, the majority of the Ohio Supreme Court draws the conclusion that, since it has determined the ordinance not vague, then, if reasonably construed, the ordinance could not be overbroad.[9] The weakness of the decision lies in this reasoning, for although it has been noted that the two doctrines are frequently not differentiated, and in fact are usually inseparable, they are not, in every instance, corollaries.[10]

The twin doctrines of vagueness and overbreadth are almost unique in the area of the "preferred" constitutional rights dealing

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[6] Section 2917.33 of the OHIO REVISED CODE reads:

> No person shall abuse a judge or justice of the peace in the execution of his office, or knowingly and willfully resist, obstruct, or abuse a sheriff, or other officer in the execution of his office. Whoever violates this section shall be fined not more than five hundred dollars ($500) or imprisoned not more than thirty (30) days, or both.

[7] 13 Ohio App.2d 83, 234 N.E.2d 304 (1968). The ordinance in this case made it unlawful for any person to willfully and knowingly engage in noisy, boisterous, or disorderly assemblage of persons, or to *countenance the same by his presence,* to the annoyance of the citizens of Cleveland (emphasis added).

[8] Connally v. General Construction Co., 269 U.S. 385, 391 (1926).

[9] Cincinnati v. Hoffman, 31 Ohio St.2d 163, 285 N.E.2d 714, 718 (1972).

[10] Note, *The First Amendment Overbreadth Doctrine,* 83 HARV. L. REV. 844 (1970); Note, *The Void-For-Vagueness Doctrine in the Supreme Court,* 109 U. PA. L. REV. 67 (1960).

with the expression of ideas.[11] The keen judicial interest in careful scrutiny of statutes in this sensitive area is based on the courts' need to rely on the legislative judgment of responsible policy-making bodies rather than on the ad hoc determinations of lesser delegated officers of the states.

Undeniably, a statute or ordinance, read with imagination, can be applied at *least* beyond the scope of the legislative intent, and at most, unconstitutionally.[12] If every contested statute were ruled void because it could conceivably infringe upon some protected right, the legislatures would be left to draft statutes that covered only whatever else was not constitutionally protected.[13] To insure that the legislatures shoulder their responsibility of careful draftmanship, the Supreme Court has, on a case by case basis, developed guidelines for ruling on the vagueness and overbreadth of a statute.

The "chilling effect" doctrine,[14] a major weapon in the overbreadth area, has two applications. Primarily, and practically by definition, if a statute is so overbroad as to sweep constitutionally protected expression within its ambit, it must be invalidated.[15] Secondly, if a statute, though not patently vague and overbroad on its face, lends itself to such conjecture as to its meaning so as to be obeyed in the negative *(i.e.,* citizens afraid to exercise their rights due to uncertainty as to sanctions), again it must be invalidated.[16]

The dissent draws an apt illustration of the danger of the overbreadth of this statute when it surmises that a citizen giving a political speech could be arrested under the Cincinnati ordinance for engaging in "noisy, and boisterous conduct with the intent to annoy and abuse" other citizens.[17]

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[11] Note, *The First Amendment Overbreadth Doctrine,* 83 HARV. L. REV. 844, 852 (1970); Comment, *Wisconsin's Disorderly Conduct Statute: Why It Should Be Changed,* 1969 WIS. L. REV. 602, 609 (1969). *See* concurring opinion of Justice Frankfurter in Kovacs v. Cooper, 336 U.S. 77, 89-97 (1949); 16 C.J.S. *Constitutional Law* §214 (1956); 10 OHIO JUR.2d *Constitutional Law,* §458 (1954).

[12] In almost every decision in this area the courts are quick to say that they are cognizant of the difficulty in drafting any law that is fair and comprehensive. They are also as quick to state that this is no excuse for sloppy draftsmanship. *See* Whitney v. California, 274 U.S. 357 (1927), and cases following its reasoning to Brandenberg v. Ohio, 395 U.S. 444 (1969), which overruled Whitney. These cases involved, for the most part, criminal syndicalism laws developed during the world war which laws were extended into peacetime to control many types of political expression and association.

[13] A gallant attempt at specificity was made in a Chicago ordinance quoted in full in Landry v. Daley, 280 F. Supp. 968 (N.D. Ill. 1968). The court said that the ordinance still did not properly cover the area of activity at which it was aimed.

[14] First enunciated in Wieman v. Updegraff, 344 U.S. 183, 195 (1952), and further defined in Walker v. Birmingham, 388 U.S. 307, 344-45 (1967). *See generally,* Note, *The Chilling Effect in Constitutional Law,* 69 COLUM. L. REV. 808 (1969).

[15] DeJonge v. Oregon, 299 U.S. 353 (1937); Herndon v. Lowry, 301 U.S. 242 (1937).

[16] NAACP v. Button, 371 U.S. 415 (1963). This application of the doctrine presents some interesting questions on the basis of standing to sue, as it is in actuality the plaintiff advancing another's rights.

[17] Cincinnati v. Hoffman, 31 Ohio St.2d 163, 176, 285 N.E.2d 714, 722-23 (1972).

"Chilling effect" alone, however, is not always enough to strike down a statute for overbreadth. The courts will avoid such legislative-judicial confrontation unless absolutely necessary.[18] The second major guideline developed was the scope of the overbreadth. The Court has generally maintained that the impact of the unconstitutional application must be projected to a substantial part of the population,[19] and that it must in that application affect one of the preferred rights. The majority opinion in *Hoffman* chose to ignore, and the dissent to de-emphasize, the failure of the ordinance in this respect. In the present climate of take-to-the-streets demonstration, the implications of this decision for political protest are disquieting.[20]

Finally, a court presented with a vague or overbroad statute looks to the alternatives to invalidating the statute completely. Ordinances have been limited in their scope by judicial interpretation, or the unconstitutional clauses have been separately voided if this action can be reconciled with any apparent legislative intent. The Cincinnati ordinance, not vague on its face, but overbroad, does not appear to be a likely candidate for any of these measures.

As to the second question, *i.e.*, alleged conflict between a city ordinance and a state statute, it appears that the court has developed a third new solution for the conflict in addition to the one defined in the *Sokol*[21] case and enlarged in *Cleveland v. Betts*.[22] The new solution is not the development of a test to measure the magnitude of the conflict, but implied extension of the powers of the municipalities which would appear to completely evade the purpose of the fourteenth amendment to the Constitution of the United States and article XVIII, section 3 of the Ohio Constitution.[23]

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[18] It has been evident since Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), that courts would have to battle every step of the way in this kind of confrontation. Some are more timorous than others, *e.g.*, ". . . where there is no duty to speak on such issues . . . there is a duty not to speak . . ." Poulous v. New Hampshire, 345 U.S. 395, 414 (1953); *see also* Wechsler, *Toward Neutral Principals of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

[19] Shelley v. Kraemer, 334 U.S. 1 (1947); Thornhill v. Alabama, 310 U.S. 88 (1940).

[20] The dangers of selective enforcement of a vague statute to silence opinions in opposition to those of the majority have been mentioned in Shuttlesworth v. Birmingham, 394 U.S. 147 (1969); Talley v. California, 362 U.S. 60 (1960); Kunz v. New York, 340 U.S. 290 (1951); Martin v. Struthers, 319 U.S. 141 (1943); Cantwell v. Connecticut, 310 U.S. 296 (1940); Schneider v. Irvington, 308 U.S. 147 (1939).

[21] 108 Ohio St. 263, 140 N.E. 519 (1923). The court stated in the syllabus of this decision:

> In determining whether an ordinance is in "conflict" with general laws, the test is whether the ordinance permits or licenses that which the statute forbids and prohibits, and vice versa.

[22] 168 Ohio St. 386, 154 N.E.2d 917 (1958). A city ordinance carrying a more serious penalty than the crime under the state statute was invalidated as contributing to non-uniformity in the state laws. The court expressly rejected the Sokol rule as the only rule in this type of case, and appears to have adopted a test of sufficient difference to lend confusion to state-wide law enforcement. The court stated that policy differences between statutes and ordinances would make a conflict and invalidate the ordinance.

[23] OHIO CONST. art. XVIII, §3:

> Municipalities shall have authority to exercise all powers of self-government

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Prior to this decision, any ordinance in conflict with a state statute as to substance or penalty was invalidated if the conflict was found to be such as to lead to confusion and/or non-uniformity of the law. Both federal and Ohio courts have used a technique of analysis of a statute as written, which injects a curative charge which verges on translation to bring the mere words of the statute into constitutionally narrow limits.[24] The *Hoffman* court has gone beyond this by actually adding words and meaning that are not in the statute.

The majority relies on *State v. Ross*[25] and *State v. Jacobellis*[26] for support of its curative charge, but fails, it appears, to state that the judicial narrowing of which the court is taking notice in these cases is of an element, already in the statutes which has been analyzed in context with other elements also already in the statute. Furthermore, the technique has generally been used against a doubtful statute because the courts are adamant that citizens be fully aware of the nature of the crimes with which they are to be charged. If a person is charged with "knowingly" committing some illegal act, he is on notice that he must have had some degree of "knowledge" of his acts. The only element the courts have attempted to extrapolate as legislative intent is the degree of knowledge necessary.[27] If, however, the courts are allowed, at the jury charge level, to amend the laws by adding prior knowledge elements, each prosecution under theoretically the same law would be a unique prosecution.

Conclusion

The expansion and definition of rights under the first amendment have seen most of their development during the twentieth century. Landmark decisions by the Supreme Court have always placed a heavy burden on the majority, represented by law enforce-

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and to adopt and enforce within their limits such local police, sanitary and other similar regulations as are not in conflict with general laws.

U.S. CONST. amend. XIV:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

[24] A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Massachusetts, 383 U.S. 413 (1966); Jacobellis v. Ohio, 378 U.S. 184 (1964); Smith v. California, 361 U.S. 147 (1959); Roth v. United States, 354 U.S. 476 (1957). In these cases, involving obscenity laws, the Court struggled with the proper definition of the word "obscene"; and in Stanley v. Georgia, 394 U.S. 557 (1969) with what "knowingly" possessing obscene materials meant.

[25] 12 Ohio St.2d 37, 231 N.E.2d 299 (1967).

[26] 173 Ohio St. 22, 179 N.E.2d 777 (1962), *rev'd on other grounds,* Jacobellis v. Ohio, 378 U.S. 184 (1964). *See also,* State v. Saylor, 6 Ohio St.2d 139, 216 N.E.2d 622 (1966).

[27] Stanley v. Georgia, 394 U.S. 557 (1969); Roth v. United States, 354 U.S. 476 (1957); Winters v. New York, 333 U.S. 507 (1948).

ment agencies, to prove that its interests outweighed the individual's right to express his thoughts, whenever, wherever, and in the manner he chooses.[28] The unfettered exchange of thought is basic to democracy as we know it. If the past forty years since *Schenck v. United States*[29] have been progress, the *Hoffman* decision is a step backward.

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[28] Elfbrandt v. Russell, 384 U.S. 11 (1966); Terminiello v. Chicago, 337 U.S. 1 (1949); Herndon v. Lowry, 301 U.S. 242 (1937); Benjamin v. Columbus, 167 Ohio St. 103, 146 N.E.2d 854 (1957); Cincinnati v. Correll, 141 Ohio St. 535, 49 N.E.2d 412 (1943).

[29] 249 U.S. 47 (1919).

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