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## DISORDERLY CONDUCT STATUTES IN OUR CHANGING SOCIETY\*

JUDGE ROBERT B. WATTS\*\*

It is being said over and over again that we are living in the midst of an era of revolution. Social changes are coming fast—not gradually but as leapfrogging sallies into the unknown.

The family, it is being said in many circles, is no longer an adequate vehicle for assimilating and transmitting knowledge and values to our young people, a task so essential in a rapidly changing world. The youth of the nation are becoming more articulate, demanding and questioning. Youth wants to be found; it wants to know the “why” of any proposition and is no longer content to sit back and take in the advice and guidance of its elders, who he suspects of being “square” and “not with it.” We are living in a permissive society where we permit our young people to try anything if others are doing it. They do not want to be I.B.M. cards that you cannot “spindle, bend or mutilate.”

Our Supreme Court has added its voice to the changing scene by its well-known decisions effecting civil rights and civil liberties. It has extended and given greater force and effect to concepts of equal justice. It has enhanced the legal conception of individual worth by pronouncing more rigid rules for arrests, searches and seizures, taking of confessions, and for bringing the suspected criminal to justice. It has thrown its weight behind the civil rights movement, giving greater impetus and validity to concepts of free speech and petition for redress of grievances. *Mapp*, *Escobedo*, *Mallory*, and *Miranda* have spread the word—individuals in our society have rights that must be respected and the most humble man on the street knows this now.

In the midst of all of these changes, as society becomes more complex and ideas of civil liberties trickle down to the man on the street, it is imperative that judges of courts of limited jurisdiction reexamine the concepts *viz-à-viz* disorderly conduct statutes. Changing times demand higher levels of intellectual and emotional competence if our courts of first instance are to be accorded the respect and dignity they should have. Indigents have a new awareness of their rights urged upon them

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\* This article is adapted from a speech delivered before the North American Judges Association Eastern Regional Conference, on March 14, 1967 at Williamsburg, Virginia.

\*\* Judge, Municipal Court of Baltimore, Maryland. A.B. Morgan State (1943); LL.B. University of Maryland School of Law (1949).

daily by the poverty programs, religious groups, labor and the entire body of the more responsible members of society.

We become dismayed, perhaps, seeing during these times protests against our involvement in the Vietnam War and against racial discrimination led by priests, nuns, rabbis, and ministers. We are confounded by school teachers walking picket lines for higher salaries one day and the next seeing police wives' association members picketing City Hall for a fair share of public funds for their police husbands. Youth is in rebellion and many adults have joined the uprising—all living vicariously and enjoying it. The disorderly conduct statutes remain mute and stable throughout the turmoil engulfing and surrounding them. In our cities the controversy rages *vis-à-vis* a proper balance between effective police action and safeguarding individual rights which has the effect of giving new meaning and significance to our disorderly conduct statutes.

At common law, under breach of the peace, it was a crime to do what we punish under disorderly conduct statutes such as making loud and unseemly noises, disturbing the peace and quiet of a neighborhood, collecting a noisy crowd, disturbing a meeting or religious worship. The disorderly conduct statutes have expanded these traditional elements of the crime to include many things, thereby causing the problem to be discussed here. Underhill defines it as "conduct of such a nature as to affect the peace and quiet of persons who may witness the same and who may be disturbed or provoked to resentment thereby."<sup>1</sup> Most state statutes follow a similar broad definition,<sup>2</sup> as in Maryland:<sup>3</sup>

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; and upon conviction . . . shall be [punished, etc.] . . .

The looseness and vagueness of this statute is apparent as disorderly conduct is not spelled out, nor is public peace susceptible to a simple definition.

The Maryland Court of Appeals, in a case in which I was counsel, defined disorderly conduct for the first time in 1961 in *Drews v. State*

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1. 3 UNDERHILL ON CRIMINAL EVIDENCE § 850 (5th ed.).

2. See 27 C.J.S., *Disorderly Conduct*, § 1(2) (1959).

3. ANNO. CODE OF MARYLAND, art. 27, § 123 (1957).

as follows: "The gist of the crime of disorderly conduct . . . is the doing or saying, or both, of that which offends, disturbs, incites, or tends to incite a number of people gathered in the same area."<sup>4</sup> Most statutes and definitions in other states vary but essentially require words or acts which tend to disturb the peace or endanger the morals, safety or health of the community.

Judges 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 vigilant against abuse. It is difficult to enumerate all the acts that may constitute a breach of the peace, or which tend to incite, or which are a threat to the morals, safety and health of the people. Judges must, however, be on guard against a widening gap between vagueness and broadness on one hand and specificity and sufficiently certain standards on the other.

The broadness of the statutes and definitions may lead to violations of civil liberties.<sup>5</sup> Leading cases which demonstrate this aspect of the problem are *Cantwell v. Connecticut*<sup>6</sup> and *Terminiello v. Chicago*.<sup>7</sup> In *Cantwell*, a state court's conviction of a Jehovah's Witness for inciting a breach of the peace when he played a phonograph record attacking the Catholic church was found to be a violation of his freedom of religion. In *Terminiello*, the defendant's conviction of the crime of breach of the peace for making an inflammatory speech denouncing various racial and political groups was reversed on appeal on first amendment grounds. In the case of *Niemotke v. State*,<sup>8</sup> several members of Jehovah's Witnesses were convicted of disorderly conduct for using a public park without a permit. In *Neiman v. McWilliams*<sup>9</sup> a right wing

4. *Drews v. State*, 224 Md. 186, 188, 167 A. 2d 341, 343, *aff'd*, 381 U.S. 421 (1961).

5. See 12 AM. JUR. 2d, *Breach of the Peace and Disorderly Conduct*, § 14 (1964). In another case, the defendant left after playing records and being ordered to leave; the court held that this was not disorderly conduct. For a contrary view denying civil liberties, see *People v. Ghison*, 166 N.Y.S. 711, *aff'd*, 179 App. Div. 926, 166 N.Y.S. 1107 (1917), where the defendant was convicted of disorderly conduct for distributing literature criticizing the nation's declaration of war against Germany. *But see*, *People ex rel. Grahl v. Vogt*, 178 Misc. 446, 34 N.Y.S. 2d 968 (1942); *People v. Downer*, 6 N.Y.S. 2d 566 (1938) (distributing pamphlets of anti-semitic nature); *State v. Korich*, 219 Minn. 268, 17 N.W. 2d 497 (1945).

6. 310 U.S. 296 (1940).

7. 337 U.S. 1 (1949).

8. 194 Md. 247, 71 A. 2d. 9 (1950). Since the group had been allowed to use the park, the Supreme Court reversed stressing not the disorderly conduct ground but freedom of religion and equal protection of law grounds in 340 U.S. 268 (1950).

9. 22 N.Y.S. 2d 571 (1940).

congressional candidate who made an anti-semitic speech was convicted of disorderly conduct. In *Rockwell v. D.C.*,<sup>10</sup> the court held that the insulting nature of the defendant's statements in a public speech could be disorderly conduct, and a conviction is not prohibited by the first amendment. These cases demonstrate the attempts of many lower courts to convict of disorderly conduct in cases where there are first amendment protections involved. Judges should be careful to draw the line expertly.

The vagueness and lack of specificity can lead to the punishment of those involved in civil rights and integration during this era of revolution. In *Drews v. Maryland*,<sup>11</sup> previously referred to, defendants were convicted of disorderly conduct for entering and refusing to leave a public amusement park which did not cater to Negroes. To demonstrate the danger in this regard, one need only look at the dissenting opinions when this case reached the Supreme Court. Justices Warren and Douglas in dissenting made the point that the disorderly conduct statute could not give defendants a fair warning that the conduct in which they were engaged was criminally punishable. In a Georgia case, six Negro teenagers were convicted for playing in a park reserved for whites.<sup>12</sup> In both the *Drews* and *Georgia* cases, the Court reasoned that such conduct *might lead* to disorderly conduct if the participants were attacked, a line of reasoning which seems to negate the usual definition which declares that the conduct *does* incite—a dangerous corollary. Judges must be extraordinarily careful in drawing the line between what does disturb the peace and effect the morals, health and safety of the people and what might tend to do so.

The vagueness or lack of specificity may lead to arbitrary or capricious action on the part of the police. One of the leading cases discussing this danger is *Thompson v. City of Louisville*,<sup>13</sup> called the "Shuffling Sam" case. In this case, the court convicted the defendant of dancing and shuffling on the street while waiting for a bus. No one complained but the officer.<sup>14</sup> The Vietnam demonstrations tend to provoke anger on the part of many very patriotic citizens and police, who feel that those demonstrating are not good Americans. Also, homosexuals and other deviates are arrested for disturbing the peace simply

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10. — D.C. —, 172 A.2d 549 (1961).

11. 224 Md. 186, 167 A. 2d 341, *aff'd*, 381 U.S. 421 (1961).

12. *Wright v. Georgia*, 217 Ga. 453, 122 S.E. 2d 737 (1961), *rev'd*, 373 U.S. 284 (1963).

13. 362 U.S. 199 (1960).

14. *See* 39 CONN. B. J. 405 (1965).

because the officer is offended by their conduct or the way they wear their hair or the way they dress.<sup>15</sup> The courts should be alert to any capricious or arbitrary action under the statutes by policemen based on their personal feelings. Conduct should be judged disorderly more on the basis of its public disorder justification, rather than whether it offends the officer.

In this connection, it might be well to point out that another area of indefiniteness that causes difficulty and should be carefully viewed by the court is the question of what is meant by the public peace. The majority view is that acts must be public in nature. New York takes the view that acts must be such as would disturb the public. Florida and Minnesota take an opposing position.<sup>16</sup> A good example of the difficulty arising out of this vagueness can be found in Maryland. In the first case defining disorderly conduct, *Drews v. State*, the court talked in terms of inciting "a number of people gathered in the same area."<sup>17</sup> Yet, in *Sharpe v. State*<sup>18</sup> defendant was convicted of disorderly conduct for using abusive language to a police officer after being stopped for a traffic violation. The evidence produced indicated that there were no people "gathered in the same place; nor was there the saying or doing of that which offends, disturbs, incites or tends to incite a number of people gathered in the same place."<sup>19</sup>

The dissenting opinion written by Judge Marbury points out that the majority opinion reads into the statute that which is not there—that is, using profane language in the presence of an officer and a failure to comply with a demand of a traffic officer. "The very vio-

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15. See *People v. Pleasant*, 122 N.Y.S. 2d 141 (1953) where the defendant was convicted of disorderly conduct for soliciting a policeman to commit sodomy. This strays a long way from traditional definitions of disorderly conduct.

16. See, Note, 12 How. L. J. 322 (1966).

17. *Drews v. State*, 224 Md. at 188, 167 A. 2d at 344. The Maryland court relied on 3 *Underhill*, *supra* note 1, which likewise refers to "affecting the peace and quiet of persons who may witness the same."

18. 231 Md. 401, 190 A. 2d 628 (1963).

19. Dissenting opinion of Judge Marbury in *Sharpe v. State*, *Id.* at 409, 190 A. 2d at 630. See also *Wanzer v. State*, 202 Md. 601, 97 A. 2d 914 (1953) defines "breach of the peace" and points out it is necessary to show an affray, actual violence, or conduct tending to or provocative of violence by others. See also 40 OPINIONS OF MD. ATT. GEN. 418 (1956) pointing out that at common law, acts constituting crime of fighting, drunkenness and disorderly conduct, not committed in public places, were not crimes. The Maryland statute on disorderly conduct, *supra* note 3, refers to disorderly conduct or "to the disturbance of the public peace," which indicated the legislative intent that the acts be public. New York is also contra. 65 A. L. R. 2d 1152 (1957) discusses the New York law.

lence of feeling aroused by an offensive expression should warn Judges of the dangers of being injudicious and of the impropriety of determining legal significance by their own reactions and feelings. The mere fact that acts or words are offensive does not mean they are 'disorderly' or within that special category of disorderly described as 'noise, riot, disturbance or diversion.'"<sup>20</sup> I think this language is of particular significance to judges of our lower courts in view of our changing times. There is the danger of a police officer arresting and charging young people with being disorderly because they talked "smart" or "were abusive" or angered the officer by displaying long hair and peculiar dress. If the law is to be respected, it must rely on standards readily discernible and not be left to the personal feelings of the police. As Judge Hammond stated in the other dissenting opinion, "An officer has no right to throw his weight around and require subservience to his authority simply because he has it, or to take out his irritation on the other driver . . . Discourtesy or arrogance may infuriate him and so are unwise to indulge in, [but] they are not crimes which the police may translate into disorderly conduct . . ."<sup>21</sup>

It cannot be stressed too vigorously that with the changes in the attitude of young people in our permissive society, where youth is in rebellion, and Negroes are asserting newly discovered rights, the courts must be alert to abuses and distortions in the law. The very nature of the disorderly conduct statutes and definitions creates fertile ground for possible abuse. Until these statutes are more clearly defined so that men of ordinary intelligence do not have to guess at their meaning and differ as to their application, it is up to the judges themselves to protect against abuse.

In *City of St. Paul v. Morris*<sup>22</sup> the defendant was convicted under a municipal ordinance forbidding noise, riot, disturbance or improper diversion for uttering a single abusive obscenity at a policeman who was arresting his brother.<sup>23</sup> Other examples of how the courts have strayed too far from the "public disorder" concept of the disorderly

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20. See *St. Paul v. Morris*, 258 Minn. 467, 472, 104 N.W. 2d 902, 911 (1960) cited by Judge Marbury in his dissenting opinion in *Sharpe v. State*, 231 Md. 401, 409, 190 A. 2d 628, 631 (1963).

21. *Id.* at 410, 190 A. 2d at 632.

22. 258 Minn. 467, 104 N.W. 2d 902 (1960).

23. *But see* *People v. Strudler*, 96 Misc. 650, 161 N.Y.S. 1105 (1916) where the court held it was not disorderly conduct where the accused took hold of an officer to prevent the illegal arrest of accused's brother.

conduct statute can be found in a Kentucky case,<sup>24</sup> where a defendant was convicted of disorderly conduct for breaking a vent glass in an attempt to repossess an automobile; in a case in Connecticut when a defendant was convicted of disorderly conduct for touching a pupil's leg while teaching her to drive;<sup>25</sup> in New York where a man was found not guilty of disorderly conduct for striking his wife while they were alone in their home,<sup>26</sup> and where kicking and spitting on a dog was held to be disorderly conduct;<sup>27</sup> in Tennessee where standing beside a house window and looking in was held to be disorderly conduct;<sup>28</sup> and in Virginia where unlawfully refusing to pay a fare on leaving a streetcar was disorderly conduct.<sup>29</sup>

The authorities are divided on the question of whether refusal to obey a police order to move is disorderly conduct. In these changing times, when individual rights are being enhanced, where the character of the police is being demeaned, and where young people are in rebellion against authority, the question takes on a new meaning. The problem is most acute in the inner city ghettos and in the drive-in shopping centers. In Maryland, the rule is that the failure to obey a reasonable and lawful request by a police officer, fairly made to prevent a disturbance to the public peace, constitutes disorderly conduct.<sup>30</sup> Under the Maryland definition, courts have to be on the alert for unreasonable requests and ascertain whether the request is fairly made to prevent a disturbance of the public peace. It cannot and should not be used to police so-called "indicted corners"<sup>31</sup> or to harass or abuse young people in their lawful pursuits. Unless it can be shown that the crowd or loitering group was disorderly before the officer arrived or that if the group were not dispersed disorder would follow, there could be no conviction.<sup>32</sup>

The problem centers around whether a failure to move on must constitute a public disorder problem or whether displeasure on the

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24. *Driver v. Commonwealth*, 299 S.W. 2d 260 (Ky. 1957) (per curiam).

25. *State v. Timney*, 2 Conn. Cir. 644, 204 A. 2d 417 (1964).

26. *People v. Oczko*, 272 N.Y. 604, 5 N.E. 2d 353 (1936) (per curiam).

27. *People v. Kovalchuk*, 68 N.Y.S. 2d 165 (1947).

28. *Gross v. Abston*, 44 Tenn. App. 68, 311 S.W. 2d 817 (1957).

29. *Veeco v. Wynne*, 149 Va. 882, 141 S.E. 829 (1928).

30. *Harris v. State*, 237 Md. 299, 206 A. 2d 254 (1965).

31. This expression is often used by the police in referring to certain corners where mere standing amounts to a crime.

32. See *People v. Arko*, 40 N.Y.C. 149, 199 N.Y.S. 402 (1922) which held that the mere refusal to comply with the directions of a police officer acting in an arbitrary manner was not disorderly conduct.

part of the officer in not having his order obeyed is enough. The Maryland view is that it amounts to disorderly conduct only when not to order the removal would lead to a breach of the peace. Courts which take a contrary view feel that courts should not read into the statute that which simply is not there, and that the better practice would be to make the change by legislation. Many jurisdictions have passed loitering statutes, but in the absence of such statutes, there should be public disorder involved before disorderly conduct statutes become operative.

### CONCLUSION

First, if conduct is protected by the first amendment to the Federal Constitution—freedom of speech, religion, press and assembly—it cannot be the basis of a conviction for disorderly conduct. It is a mixed issue of law and fact. Judges in lower courts should be alert to the danger of denying these sacred rights under the guise of disorderly conduct statutes. As pointed out, the Supreme Court has established guidelines in the Jehovah's Witnesses cases and in recent years the Court has reversed the lower courts when convictions involving civil rights demonstrations and sit-downs are brought before it.<sup>33</sup> It is to be noted that a change may be in the making, however. In the case of *Cox v. Louisiana*, the court (reversing the Louisiana court on other grounds) stated:

Nothing we have said here is to be interpreted as sanctioning riotous conduct in any form, however peaceful their conduct or commendable their motives, which conflict with properly drawn statutes and ordinances designed to promote law and order, protect community against disorder, regulate traffic, safeguard legitimate interests in private and public property or to protect the administration of justice and other essential governmental functions.

We affirm the repeated holdings of this court that our Constitutional command of free speech and assembly is basic and fundamental and encompasses peaceful social protest so important to the preservation of the freedoms treasured in a democratic society. We also affirm the repeated decisions of this court that there is no place for violence in a democratic society dedicated to liberty under law, and that the right of peaceful protest does

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33. See *Cox v. Louisiana*, 379 U.S. 559 (1965); *Thomas v. Mississippi*, 380 U.S. 524 (1965).

not mean that everyone with opinions or beliefs to express may do so at any time and at any place.<sup>34</sup>

This language reiterates that fundamental rights cannot be suppressed under the guise of preserving order but reaffirms the basic need to preserve order. It is believed by many that the Court, being sympathetic to the aspirations of Negroes to achieve equality, went out of its way to reverse the convictions of demonstrators for civil rights, but when the same proposition is presented to the Court with respect to Vietnam demonstrators or the "Free Speech" variety as we have seen at the University of California at Berkeley, a different result may ensue. Such a case will be presented to the Court next year involving Times Square picketing against the nation's role in Vietnam. The lower court found that the arrests were proper since the group disrupted pedestrian and vehicular traffic, and cited *Cox v. Louisiana* to the effect that authorities have the duty and responsibility to keep their streets open and available for movement. Perhaps new guidelines in this less appealing setting may yet evolve, emphasizing the public order rather than the civil liberties aspect.

Secondly, if first amendment protections are not applicable, then judges should require due process specificity, allow convictions only for conduct which really disturbs and amounts to a breach of the peace, and guard against backing up the personal feelings of the police or giving vent to their own notions of what is offensive and disquieting. Judges should not be crystal gazers, trying to guess what the legislature meant by the disorderly conduct statutes.

It is to be noted that in many jurisdictions, judges in the limited jurisdiction courts are not lawyers and have little or no legal training. What is disorderly conduct or a breach of the peace often requires legal considerations. If we say on the one hand that disorderly conduct consists of the saying or doing of that which disturbs the peace and quiet of those gathered in the same place or the peace and quiet of the community, and on the other, convict for a single intemperate remark to a policeman or for touching a girl on the knee and other non-public acts, then the danger becomes apparent. The judge has no objective yardstick and is forced to rely on the opinion of the police officer. If

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34. 379 U.S. 559 (1965). 2000 students from Southern University in Louisiana descended on the courthouse where the court had previously convicted racial demonstrators. Cox was arrested and charged with disturbing the peace for violating a statute of Louisiana forbidding pickets and parades near a building housing a court with intent to interfere, obstruct, or impede the administration of justice.

so, due process and justice becomes not what the legislature intended but what for a given purpose the police felt was disturbing or inciting. This I submit 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. The various state legislatures could very easily enumerate that conduct which in its wisdom should be criminal, such as a failure to obey a lawful command of a police officer fairly made to prevent a breach of the peace (in Maryland, as I pointed out, this was read into the disorderly conduct statute), or directing intemperate and insulting language to an officer whether members of the public are present or not. Conviction under a disorderly conduct statute for loitering on corners is a dangerous area in view of constitutional safeguards, but it is better for the statute to spell out what constitutes loitering than to leave it to the whim of the police on the beat. Other areas of difficulty include providing what conduct during demonstrations is criminal, such as blocking free passage, failure to provide ingress and egress to fire engines and other necessary transportation, and preventing the movement of public transportation. Until this is done, our courts of limited jurisdiction should interpret disorderly conduct statutes with a view toward due process specificity and avoid making the courts a mirror of the judge's supersensitive prejudices and hypercritical thinking. Judges must be ever alert to insure that they give full force and effect to the legal axiom that we are a nation of laws—not of men. The defendants do not usually appeal their fines and sentences, which gives added weight to the need to be circumspect. Judges can do no less in these revolutionary times if our courts of limited jurisdiction are to meet the demands of a changing society. Infirmities in our system of administering justice can make equal justice under the law more a hope than a universal reality.