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California's Antiquated Anti-Riot Statute: A Proposal for Change

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CALIFORNIA'S ANTIQUATED ANTI-RIOT STATUTE: A PROPOSAL FOR CHANGE

More often than not courts are plagued with interpreting a statute which is either so vague or so complex that it is difficult to determine the actual legislative intent behind the statute. Judges review prior cases which set forth the manner in which courts have construed the code section in an effort to determine what effect it should be given. Frequently, those prior decisions do not accurately clarify the legislative intent behind the code.

Such a statute is section 404 of California's Penal Code which undertakes to define the elements required to constitute a riot. Enacted in 1872[1] and not subsequently amended, this statute presents several problems.

First, section 404 may have been sufficient to cope with the problem of riot in 1872, but this problem has changed substantially in the last one hundred years. The courts today are being confronted with problems concerning riots which were virtually unknown when the statute was enacted; consequently, the statute has become outdated and antiquated. Campus unrest, labor battles, and political demonstrations are all a part of the new social attitude confronting the courts. When confronted with these situations in the form of a prosecution for riotous conduct, the courts have only a statute enacted in 1872 to rely upon.

Secondly, like the statute itself, most cases dealing with section 404 are old and vague. Nearly all of the cases in California which interpret this section are labor cases concerned with strikers and pickets. The result is that courts have difficulty in applying those earlier decisions to modern cases dealing with dissident students, political gatherings and war demonstrations.

Finally, the statute affords no guidelines which a court may follow to determine what conduct is to be considered riotous in nature. Thus, the question of what constitutes a riot in California is left to the unfettered discretion of the courts, as section 404 provides no adequate test for such determination.

THE STATUTORY DEFINITION

Penal Code section 404 states that a riot occurs when two persons, acting together and without the authority of law, use

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[1] CAL. PENAL CODE § 404 (West 1955).

force or violence, disturb the public peace, or make threats to use force or violence accompanied by the immediate ability to carry out those threats.[2]

A fair reading of this statute sets forth three distinct activities which may be considered riotous. The statute is written in such a manner that each phrase describing an activity is separated in the text of the statute by commas and is plainly another and a separate ground upon which riotous conduct may be founded.[3] These activities are "any use of force or violence, . . . disturbing the public peace, . . . or any threat to use force or violence, if accompanied by immediate power of execution . . . ."[4]

If this literal construction of section 404 were applied to practical situations the results would be disastrous. For example, under the first phrase proscribing any use of force or violence, two persons could be found guilty of riot if they engaged in a fist fight or any form of a battery. Furthermore, a political meeting in which the participants carry banners verbally attacking members of the opposition party and stating that they will be put out of public office would lie within the purview of the second activity described by section 404. Finally, any gathering of demonstrators, or any picketing, however peaceful, might excite a threat to use force or violence in the minds of the public, and if accompanied by the ability to carry out that threat, the members of the gathering would be in violation of section 404. In short, any violence or threat of attack, even a verbal or printed one, could make the members of a gathering liable to the penalties prescribed by the statute.[5]

The legislature may not have intended in 1872 that the coverage of section 404 be stretched to these extremes. However, there is nothing in the statute to prevent just that. The section sets forth no guidelines, and thus forces the courts to rely upon their own discretion when determining which situations fall within the ambit of the statute. It is not clear whether the legislature intended the courts to exercise this wide power of discretion or whether the statute is to be given its literal meaning. However, at the time the statute was enacted it might have been possible that all aspects of the

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[2] *Id.* Section 404 states: " 'RIOT' DEFINED. Any use of force or violence, disturbing the public peace, or any threat to use such force or violence, if accompanied by immediate power of execution, by two or more persons acting together, and without authority of law, is a riot."

[3] *Cf.* International Longshoremen's & Ware. Union v. Ackerman, 82 F. Supp. 65, 101 (D. Hawaii 1949).

[4] CAL. PENAL CODE § 404 (West 1955).

[5] CAL. PENAL CODE § 405 (West 1955).

riot problem were covered by the literal meaning of the statute, and the legislature could not foresee that one day courts would be required to exercise such a wide power of discretion.

A Similar Statute Held Unconstitutional

The problem of judicial use of discretion indirectly arose in *International Longshoremen's & Warehousemen's Union v. Ackerman*[6] where the court was asked to rule on the constitutionality of The Assembly and Riot Act of the Territory of Hawaii.[7] This Act said that a riot consisted of three or more persons, being in unlawful assembly, joining in doing or actually beginning to do an act, with tumult and violence, striking terror, or tending to strike terror into others.[8] In declaring this Act unconstitutional, the court stated that the test laid down by the Act was purely subjective and quite vague.[9] Furthermore, if this section were literally applied, an old fashioned charivari[10] would come within the section's ambit.[11] The court said that the test of reasonableness was absent from the Act; hence, the Act was objectionable and unconstitutional.[12]

The concept of vagueness rests on principles of substantive due process which forbid the prohibition of certain individual freedoms.[13] The test is whether the language of the statute, given its normal meaning, is so broad that its sanctions may apply to conduct protected by the Constitution.[14] Frequently, the resolution

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[6] 82 F. Supp. 65 (D. Hawaii 1949), *rev'd on other grounds,* 187 F.2d 860 (1951), *cert. denied,* 342 U.S. 859 (1951).

[7] Rev. Laws of Hawaii, 1945, § 11571. This statute was in effect and ruled unconstitutional when Hawaii was still a territory of the United States. The statute was never incorporated into Hawaii's present laws. The origin of the law is shrouded in some obscurity. It came into written existence through the hands of the Honorable William Little Lee, the Chief Justice of the Supreme Court of Hawaii. On September 27, 1847, the King-appointed House of Nobles and Representatives of Hawaii, by resolution, authorized Mr. Lee to examine the laws of Hawaii and in effect to compile them. The unlawful assembly and riot act may perhaps have been in existence by edict promulgation prior to 1833 when King Kamehameha III came to the throne. The law appears in substance in the Penal Code of the Hawaiian Islands adopted by the House of Representatives on June 21, 1850, known colloquially as "Lee's Compilation." In any event it is clear that the statute predates the Hawaiian Constitution of 1852 by at least two years.

The present anti-riot statute appears in Hawaii Rev. Stat. § 764-1 (1968).

[8] Rev. Laws of Hawaii, 1945, § 11571.

[9] International Longshoremen's & Ware. Union v. Ackerman, 82 F. Supp. 65, 101 (D. Hawaii 1949).

[10] A charivari is a mock serenade by beating on pans and making a lot of noise. This "serenade" was often inflicted on newlyweds by their "friends." Webster's Third New International Dictionary 378 (1967).

[11] 82 F. Supp. 65, 101.

[12] *Id.* at 101, 125.

[13] Landry v. Daley, 280 F. Supp. 938, 951 (N.D. Ill. 1968).

[14] *See* Collings, *Unconstitutional Uncertainty—An Appraisal,* 40 Cornell L. Rev. 195 (1955).

of this issue depends upon whether the statute permits police and other authorities to wield unlimited discretionary powers in its enforcement.[15] If the scope of the power permitted these officials is so broad that the exercise of constitutionally protected conduct depends on their own subjective views as to the propriety of the conduct, the statute is unconstitutional.[16]

These concepts have particular relevance to statutes touching upon the areas of free speech and assembly.[17] Although the state may regulate speech and assembly where the exercise of these rights conflicts with certain state interests, it may regulate only to the extent necessary to discharge these interests.[18] A vague or overbroad statute, however, is likely to have a deterrent effect which is beyond that necessary to fulfill the state's interests.[19] Rather than risk prosecution, people will tend to refrain from speech and assembly which might come within the statute's ambit.[20]

California's Section 404 Compared With the Hawaii Act

Like The Assembly and Riot Act of the Territory of Hawaii, section 404 offers only subjective tests. For purposes of this comment, the activities which constitute a riot in California are divided into three tests. These tests are: (a) any use of force or violence, (b) disturbance of the public peace, or (c) threat to use force or violence.[21] As in the Hawaii Act it appears that the three tests under section 404 are subjective and therefore insufficient.[22] Furthermore, the statute must provide a test of reasonableness.[23] Without this test it is difficult for the members of a court to reach a fair decision in any factual situation concerning riotous activity, because without that guideline the court cannot conform its opinion to the popular conception of a riot. The courts will be left with only the literal meaning of the statute. If this is the case, the number of activities falling within the scope of the section will border on the fantastic.

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15 *See* Ashton v. Kentucky, 384 U.S. 195 (1966); Shuttlesworth v. City of Birmingham, 382 U.S. 87 (1965).

16 *See* Shuttlesworth v. City of Birmingham, 382 U.S. 87 (1965); NAACP v. Button, 371 U.S. 415 (1963).

17 Landry v. Daley, 280 F. Supp. 938, 955 (N.D. Ill. 1968).

18 *See* De Jonge v. Oregon, 299 U.S. 353 (1937); Stromberg v. California, 283 U.S. 359 (1931).

19 Landry v. Daley, 280 F. Supp. 938, 952 (N.D. Ill. 1968).

20 *See* Dombrowski v. Pfister, 380 U.S. 479 (1965); NAACP v. Button, 371 U.S. 415 (1963).

21 CAL. PENAL CODE § 404 (West 1955).

22 International Longshoremen's & Ware. Union v. Ackerman, 82 F. Supp. 65, 101 (D. Hawaii 1949).

23 *Id.* at 101.

Confronted with these broad characterizations of a riot, California courts have attempted to define boundaries around those activities which may be riotous in nature.

Test (a): Any Use of Force or Violence

The first test of a riot under section 404, that is, any use of force or violence by two or more persons acting without the authority of law, is obviously vague on its face. Courts have held that robberies, assaults and batteries are not riotous in nature, yet these activities surely employ the use of force and violence.[24] On the other hand, conduct such as an assembly of thirty or more persons armed with clubs, sticks, blackjacks and metal cables, assaulting members of the public has been held riotous.[25] Furthermore, courts have had no difficulty finding a riot where thirty or more persons converged on the public throwing large stones, seriously injuring many persons.[26]

Apparently, somewhere between acts of battery and mass disturbance lies the line which must be crossed before an act of force or violence becomes riotous in nature. Case law has not clarified the criteria to be used when determining what activities are riotous. Of course, common sense may tell the court that a simple battery cannot be riotous in nature if committed in a lonely spot where there are no buildings nor even a stray passerby. However, those activities which cause greater turmoil than a mere battery are more difficult to construe. The court cannot always rely upon common sense for guidelines but must look to the statute for help. Where the statute is vague, it affords the courts no help.

Under the rules of statutory construction, the words used in a statute must be given their normal meaning.[27] Hence, the words "force and violence" employed in the first test under section 404 presumedly have their ordinary meanings. Force is defined as dynamic power or motion directed to an end.[28] Usually the word connotes unlawful or wrongful action.[29] Violence is defined as physical force.[30] If these meanings are literally applied, the statute offers to the courts the following test: Any physical force, dynamic and powerful, being directed to an unlawful end is riotous. Surely

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24 Connell v. Clark, 88 Cal. App. 2d 941, 951, 200 P.2d 26, 31-32 (1948).
25 People v. Montoya, 17 Cal. App. 2d 547, 62 P.2d 383 (1936).
26 People v. Bundte, 87 Cal. App. 2d 735, 197 P.2d 823 (1948).
27 State *ex rel.* Erickson v. Sanborn, 101 Ore. 686, 201 P. 430 (1921).
28 BLACK'S LAW DICTIONARY 773 (rev. 4th ed. 1968).
29 Hafner Mfg. Co. v. City of St. Louis, 262 Mo. 621, 172 S.W. 28 (1914).
30 BLACK'S LAW DICTIONARY 1742 (rev. 4th ed. 1968).

this first test, as is, gives no test of the reasonableness which is so important in our judicial system.[31]

Another penal statute used by California also appears to be vague on its face. However, this statute is given a concise meaning through case law. The statute is Penal Code section 242.[32] The wording of this statute is similar in wording to the first test offered by section 404. Code section 242 defines a battery as any willful and unlawful use of force or violence.[33] Although this statute provides no test of reasonableness, case law is quite clear as to the meaning of the statute. For example, violence and force used in this context include any application of force even though it inflicts no pain and leaves no mark.[34] Even though section 242 itself provides no test of reasonableness, case law has laid down the definite meaning of the statute. This is not the same with section 404. Case law has done little to clarify the exact manner in which the statute is to be applied. Judges are left only to their own discretion in many cases. Therefore, it is truly essential that a new statute be enacted.

Test (b): Disturbance of the Public Peace

Under this test any activity which disturbs the public peace may be riotous.[35] This offers no better clarification than that afforded by test (a). Again the test incorporated within the statute purports to be subjective. The only guideline afforded is a breach of the public peace. Lacking is the quality of reasonableness needed to inform the court when a disturbance of the public peace has become riotous.

The courts have attempted to delineate boundaries to ascertain those activities disturbing the public peace which may be classified as violations of section 404. One court said there was clearly a disturbance of the public peace when the members of an assembly were making a loud noise, even though there was no proof of actual force or violence.[36] Blocking of a road by sixty to eighty persons has also been found to be a disturbance of the pub-

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31 International Longshoremen's & Ware. Union v. Ackerman, 82 F. Supp. 65, 101 (D. Hawaii 1949).

32 CAL. PENAL CODE § 242 (West 1955). Section 242 was also enacted in 1872 and has not been amended since.

33 *Id.*

34 People v. James, 9 Cal. App. 2d 162, 163, 48 P.2d 1011, 1013 (1935); *See also,* R. PERKINS, CRIMINAL LAW 107 (2d ed. 1969).

35 CAL. PENAL CODE § 404 (West 1955).

36 People v. Dunn, 1 Cal. App. 2d 556, 559, 36 P.2d 1096, 1099 (1934).

lic peace.[37] However, in *Lisse v. Local Union*[38] the Supreme Court of California ruled that picketing as a means of persuasive inducement is not a breach of the public peace and therefore not riotous in nature. Before the *Lisse* ruling, courts assumed that picketing in its very nature was calculated to and did incite crowds, riots, and disturbances of the peace.[39] This also appears to be the case with political rallies and campus demonstrations of today. The riot statute gives no guidelines which would offer any other choice, and hence it seems that the *Lisse* decision was purely a product of the court's discretion.[40] If courts were to rely solely upon test (b) provided by section 404, it would be impossible for them to define comprehensively or with exactness each and every act which may or may not be legally done by members of an assembly; and it is evident that any attempt to do so would lead into a field of unlimited speculation. All that a court can do is deal with those specific acts which by the evidence are shown to have been committed and hope that it has reached a reasonable solution.

Test (c): Threat to Use Force or Violence

The final test offered by section 404 states that one may be found guilty of a riot by making threats to use force or violence, if accompanied by the immediate power of execution of those threats.[41]

The case law dealing with this test is much clearer than in the areas previously discussed; however, there are still many problems of vagueness and clarity. In *People v. Dunn*[42] a conviction of riot was affirmed based upon conduct by the defendants which indicated they were going to use violence. Even though these threats were made the violence was never carried out.[43] Riotous conduct was also found in cases of promotion of force and violence. In *People v. Bundte*[44] defendant refused to order his union men to stop fighting with nonunion men. Based upon this conduct the court stated that the inference is that defendant thereby purposely encouraged his men, the strikers, to continue the use of force and violence just as much as they desired.[45] In the court's view this conduct alone was enough to violate section 404. Thus, section

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37 People v. Spear, 32 Cal. App. 2d 165, 167-68, 89 P.2d 445, 446 (1939).

38 2 Cal. 2d 312, 321, 41 P.2d 314, 322-23 (1935).

39 Pierce v. Stablemen's Union, 156 Cal. 70, 103 P. 324 (1909).

40 It appears that the judge had a very difficult time reaching a decision and in the end relied solely upon his own discretion.

41 CAL. PENAL CODE § 404 (West 1955).

42 1 Cal. App. 2d 556, P.2d 1096 (1934).

43 *Id.* at 558, 36 P.2d at 1099.

44 87 Cal. App. 2d 735, 197 P.2d 823 (1948).

45 *Id.* at 740, 197 P.2d at 827.

404 would make punishable a threat to use force and violence even though the force and violence was never perpetrated;[46] section 404 would also punish anyone who promotes force and violence even though he did not actively take part in the actual use of the force and violence he promoted.[47]

Again these cases appear to represent only the obvious. But what about the not so obvious? The statute's failure to supply a test of reasonableness leaves the line separating riotous from non-riotous threats vague, unclear and undefined.

A Need for a Change

A statute such as section 404 is a detriment to California's law enforcement system. The statute merely sets forth three subjective tests which may be used as guidelines.[48] The statute is so vague that it does not tell the courts what a person must do before the statute has been violated. Thus, the public is left to act at its own peril.

Of course, the courts could rely upon the literal meaning of the statute, but, as stated earlier,[49] if this were the case the number of activities then falling within the realm of the statute would border on the fantastic. Having neither test of reasonableness nor standard to judge these different activities nor adequate precedent set forth by previous decisions, the courts are left only to speculation as to what solution should be reached.

Like The Assembly and Riot Act of the Territory of Hawaii, California's statute presents too many problems to make it useful any longer. The statute is outdated, antiquated and vague. It does not present tests which can be used to solve modern day riot problems. The subjective test, which may have been adequate in 1872, is no longer sufficient to cope with the new social attitudes facing the courts of today. Nearly all areas which lie within the modern day conception of a riot are left untouched by section 404. It is time for a change.

A Possible Solution

A possible solution is a statute constructed in such a manner that the courts are given guidelines upon which they can rely

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46 People v. Dunn, 1 Cal. App. 2d 556, 36 P.2d 1096 (1934).
47 People v. Bundte, 87 Cal. App. 2d 735, 197 P.2d 823 (1948).
48 Cal. Penal Code § 404 (West 1955).
49 *See* text accompanying note 22 *supra*.

to determine when force or violence, disturbance of the public peace or threats to use force or violence are to be considered riotous in nature. California would be well enlightened by looking at other jurisdictions which have achieved great success in solving this problem.[50] These jurisdictions have particularly and concisely set forth guidelines which may be followed to determine precisely what type of activity will be considered riotous.

The New York Statutes

In New York, for example, Penal Code sections 240.05 and 240.06[51] present the crime of riot in two degrees in an effort to conform their definition to the more popular conception of a riot. The lesser degree, a misdemeanor, states that a person is guilty of riot in the second degree when, acting with four or more other persons, he engages in tumultuous and violent conduct which intentionally or recklessly causes or creates a grave risk of causing public alarm.[52] Unlike California's definition of a riot, New York in its statute attempts to describe what must *result* from the perpetration of the required violent conduct. The statute has shifted the emphasis from the act itself to the direct results of the act. By doing this the statute has incorporated within its purview both a subjective test and a test of reasonableness. The subjective test is tumultuous and violent conduct.[53] The test of reasonableness is the intentional or reckless cause of grave public alarm.[54] By using these two tests together the courts should have little difficulty reaching fair and just decisions.

New York courts seem to have no difficulty following their statute.[55] Therefore, little doubt is left as to what activity is needed to constitute a riot. Intentional and reckless cause of grave public alarm can be used as the underlying element essential to constitute the crime. It is this element which the New York courts use to distinguish the crime of riot from other crimes involving breach of the peace. In contrast, California's statutory definition offers no such underlying element upon which the courts may rely.

Besides presenting the statutory crime of riot in the second

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[50] N.Y. PENAL LAW § 240.05-06 (McKinney 1967); MINN. STATS. ANN. § 609.71 (West 1964).

[51] N.Y. PENAL LAW § 240.05-06 (McKinney 1967). These sections were enacted in 1967 to change § 2090, which had been in effect since 1909.

[52] N.Y. PENAL LAW § 240.05 (McKinney 1967). "A person is guilty of riot in the second degree when, simultaneously with four or more other persons, he engages in tumultuous and violent conduct and thereby intentionally or recklessly causes or creates a grave risk of causing public alarm. Riot in the second degree is a class A misdemeanor."

[53] *Id.*

[54] *Id.*

[55] People v. Kearse, 56 Misc. 2d 586, 289 N.Y.S.2d 346 (Syracuse City Ct. 1968).

degree, New York also defines a riot in the first degree.[56] A person is guilty of riot in the first degree when with ten or more other persons he engages in tumultuous and violent conduct which intentionally or recklessly causes or creates a grave risk of causing public alarm and such conduct results in physical injury to one other than a participant or in substantial property damage.[57]

Similar to the section defining a riot in the second degree, this section sets forth both a subjective test and a test of reasonableness. The subjective test is the use of tumultuous and violent conduct.[58] The test of reasonableness is intentional or reckless cause of grave public alarm and physical injury to one other than a participant, or substantial property damage.[59] Again, these tests may be used in conjunction with one another by the courts to reach a decision which will meet with modern day standards of a riot.

Proposed Action

If courts are to be relieved of the frustrations of trying to determine just what conduct or activities are required to constitute a riot, the legislature will have to first clarify its statutory definition. Some guidelines must be supplied which the courts can follow without unlimited speculation. It is suggested that the legislature adopt a statute similar to that statute used by New York.

Proposed Statute

It is proposed that the California State Legislature adopt the following statute to replace section 404.

A person shall be guilty of riot when he:

A. Uses force or violence in a public place which creates a breach of the public peace; and

B. Causes personal injury to one other than a participant or substantial property damage; and

C. Acts simultaneously with five or more persons; and

D. Acts without the authority of law.

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56 N.Y. PENAL LAW § 240.06 (McKinney 1967).

57 *Id.* "A person shall be guilty of riot in the first degree when (a) simultaneously with ten or more other persons he engages in tumultuous and violent conduct and thereby intentionally or recklessly causes or creates a grave risk of causing public alarm, and (b) in the course of and as a result of such conduct, a person other than one of the participants suffers physical injury or substantial property damage occurs. Riot in the first degree is a class E felony."

58 *Id.*

59 *Id.*