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Public Disorder Offenses under Pennsylvania's New Crimes Code

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Comments

PUBLIC DISORDER OFFENSES UNDER PENNSYLVANIA'S NEW CRIMES CODE

I. INTRODUCTION

Offenses against the public order are among the most commonly committed[1] and easily observable[2] crimes. Much of the general public gets its primary view[3]—either as participant or observer—of the workings of our criminal justice system within the context of such crimes. Whether it is the relatively minor offense of disorderly conduct or the more serious one of riot, police and judicial treatment of these offenses is a matter of great community concern.[4] Although it is society's basic interest in preserving public peace and order which engenders criminal statutes covering the disorder offenses, such statutes often involve serious questions concerning the individual's basic constitutional rights of free

1. Except for drunkenness, more arrests are made for disorderly conduct than for any other offense. FBI, UNIFORM CRIME REPORTS 117 (1967). In the United States as a whole and in Pennsylvania over one-third of the arrests for non-traffic criminal offenses are for public drunkenness and disorderly conduct. PENNSYLVANIA CRIME COMMISSION, TASK FORCE REPORT: ASSESSMENT OF CRIME AND CRIMINAL JUSTICE IN PENNSYLVANIA 25-27 (1969).

2. Public disorder crimes are, by definition, public and visible offenses. *See* PA. STAT. ANN. tit. 18, §§ 5501-03 (Supp. 1973).

3. "[T]his is a most important area of criminal administration, affecting the largest number of defendants, involving a great ptroion of police activity, and powerfully influencing the view of public justice held by millions of people." MODEL PENAL CODE § 250.1, Comment (Tent. Draft No. 13, 1961).

4. *See* REPORT OF THE NATIONAL COMMISSION ON CIVIL DISORDERS (1968).

speech and assembly.[5] This clash between statutory efforts to secure law and order and the rights of the individual to freely express himself through speech and assembly has been clearly depicted by the persistent civil rights and anti-war demonstrations[6] and the violent urban riot[7] of the last decade. The ability of a public disorder statute to withstand constitutional attack on the grounds of violation of the first amendment freedoms depends, to a large extent, upon the nature of the balance it strikes between these two conflicting interests;[8] the balancing process is a difficult and delicate one for both the legislature[9] and the courts.[10]

In this light, it is the author's purpose to examine the statutory treatment of public disorder crimes under Chapter 55—Riots, Disorderly Conduct and Related Offenses—of the newly enacted Pennsylvania Crimes Code. The sections to be discussed[11] include: Sec. 5501-Riot; Sec. 5502-Failure of disorderly persons to disperse upon official order; and Sec. 5503-Disorderly conduct. To this end, the Comment will examine the general common law origin of public disorder crimes, Pennsylvania law prior to the enactment of the new Code, the changes brought about by the language of the new Code, and first amendment questions raised by Pennsylvania's new statutory definitions of public disorder crimes.

II. The General Background of Public Disorder Crimes

At common law, offenses against the public order are included under the general heading of breach of the peace. Breach of the peace is a generic term covering conduct which disturbs the public tranquility. It is not associated with any particular individual act, but rather includes any violation of the public peace,

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5. U.S. Const. amend. I provides:
> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

6. *See, e.g.*, Bachellar v. Maryland, 397 U.S. 564 (1969) where state disorderly conduct convictions of Vietnam anti-war demonstrators were reversed since the convictions were thought to have been based on the offensiveness of the demonstrators' views rather than the law.

7. "The recent riots in American cities have provided the most striking and visible example of crime in the streets. All but a few Americans have been affected by these massive outbursts of violence and disorder." Pa. Crime Commission Report, *supra* note 1, at 29.

8. *See, e.g.*, Cantwell v. Connecticut, 310 U.S. 296, 308 (1940).

9. *See* notes 135-40 and accompanying text *infra*.

10. *See* United States v. Robel, 389 U.S. 258, 267 (1967); The President's Commission on Law Enforcement and Administration of Justice, Challenge of Crime in a Free Society 93 (1967) [hereinafter cited as Challenge of Crime].

11. The other sections of Chapter 55 have been excluded as irrelevant to the purposes of this Comment. The excluded sections are Pa. Stat. Ann. tit. 18, §§ 5504-14 (Supp. 1973).

order or decorum.[12] It includes conduct which tends to incite others to disturb the peace, as well as actual breaches of the peace by the individual himself.[13] It has been said that the "gist of the offense is the tendency of the defendant's act to annoy and disturb the people affected to such an extent as to deprive them of their right to peace and quiet."[14]

Prior to the first codifications of crimes in England, breach of peace was thought of as generally synonymous with treason[15] or crime itself.[16] Regardless of the particular crimes charged, all of the indictments of that time included some phrase such as "against the peace of the King."[17] As the law developed and criminal charges became more individuated,[18] distinctions among crimes were made according to the interests which they affected. There is an obvious social interest in maintaining the peace and order of the community.[19] Any unjustified wilful action which contravenes this interest is punishable at common law,[20] such actions usually being categorized as affray, rout, riot or unlawful assembly.[21] If the disruptive conduct does not fall within one of the enumerated categories and it is still violative of the social interest in maintaining order, it is known at common law simply as a breach of the peace.[22]

Disorderly conduct, as such, was not known as an offense at common law. The offense is entirely a creature of the statute or local ordinance which creates it. It covers the same general area of conduct as common law breach of the peace; disorderly conduct, however, is somewhat broader in scope "so that a person who

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12. Heard v. Rizzo, 281 F. Supp. 720, 742 (E.D. Pa.), *aff'd*, 392 U.S. 646 (1968).

13. *See, e.g.*, United States v. Kessler, 213 F.2d 53 (3d Cir. 1954) where it was described as "a disturbance of public order by an act of violence, or by an act likely to produce violence, or which by causing consternation and alarm, disturbs the peace and quiet of the community." *Id.* at 56.

14. J. MILLER, HANDBOOK OF CRIMINAL LAW 483 (1934).

15. CLARK & MARSHALL, CRIMES 586 (7th ed. 1967).

16. R. PERKINS, CRIMINAL LAW 399 (2d ed. 1969).

17. *Id.*

18. The English Riot Act of 1714, 1 Geo. I, Stat. 2, c.5, made it a felony for 12 or more rioters to continue together for one hour after a magistrate's proclamation to disperse.

19. "The peace is the very end and foundation of civil society," 1 BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 349 (1765). *See also* Cox v. Louisiana, 379 U.S. 536 (1965).

20. PERKINS, *supra* note 16, at 400.

21. These offenses will be treated in detail in the discussion of Pennsylvania law prior to the new Crimes Code. *See* Section III *infra*.

22. PERKINS, *supra* note 16, at 400.

commits a breach of the peace is necessarily guilty of disorderly conduct, but all disorderly conduct is not necessarily a breach of the peace."[23] Generally speaking, disorderly conduct has been defined as "an act which tends to breach the peace or to disturb those people who hear or see it, or to endanger the morals, safety or health of the community or of a class of persons or a family."[24] However, since it is a wholly statutory offense, its meaning in each jurisdiction can be gleaned only by reference to the appropriate statute.[25] Oftentimes, the disorderly conduct statute serves a catch-all function in order to punish those types of conduct tending toward a breach of the peace which are not otherwise specifically prohibited by law.[26] This function may be served by broad, general language or by listing the particular conduct intended to be covered;[27] but whichever method is used in a particular disorderly conduct statute, the attendant precision of language hoped for in any criminal statute[28] is often lacking.[29] These inadequacies may be due, in large part, to the relative paucity of interest accorded such provisions by legal scholars. In fact, until recently, this entire area of the law has not received the widespread, detailed attention from legislative draftsmen and legal scholars[30] needed in order to clear up the frequent generalities[31] which pervade the present statutory and common law language.

III. Pennsylvania Public Disorder Law Prior to the New Crimes Code

Prior to the recent enactment of a new Crimes Code, the substantive criminal law of Pennsylvania was contained in the 1939 Penal Code.[32] In addition to the crimes delineated therein, all

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23. 12 Am. Jur. *Breach of Peace and Disorderly Conduct* § 1 (1964).
24. *Id.*
25. Disorderly conduct in Pennsylvania prior to the enactment of the new Crimes Code will be discussed in a later section. *See* Section III *infra.*
26. *See* Coates v. City of Cincinnati, 402 U.S. 611 (1971).
27. *See* text accompanying notes 135-167 *infra* for a discussion of the constitutional problems with such an approach. *See also* Annot., 12 ALR 3d 1448 (1967) for a compilation of decisions invalidating disorderly conduct statutes for vagueness.
28. *See, e.g.,* Winters v. New York, 333 U.S. 507, 515 (1948); Lanzetta v. New Jersey, 306 U.S. 451 (1939).
29. *See* note 27 *supra.* Perhaps this is due to the piecemeal nature of the offense and the catchall function of many of the statutes covering the offense.
30. Model Penal Code § 250.1, Comment (Tent. Draft No. 13, 1961) [hereinafter cited as Model Penal Code]. The drafstmen of § 250.1 suggest that the lack of attention may have resulted from the petty nature of many of the offenses and the low economic and social levels of many of the defendants. *Id.*
31. Such characteristics as these have lead to persistent constitutional attacks on public disorder statutes. *See, e.g.,* Cox v. Louisiana, 379 U.S. 536 (1965); Edwards v. South Carolina, 372 U.S. 229 (1963); Heard v. Rizzo, 281 F. Supp. 720 (E.D. Pa.), *aff'd,* 392 U.S. 646 (1968).
32. Act of June 24th, P.L. 872, § 1 *et seq.* (1939).

common law crimes not specifically referred to were retained in their common law form as indictable offenses by a savings clause.[33] Article IV of Title Eighteen of the 1939 Penal Code was entitled "Offenses Against the Public Peace." Under Article IV, the public disorder crimes pertinent to this discussion[34] were divided into group disturbance offenses—riots, routs, unlawful assemblies and affrays—and individual disorderly conduct offenses.

A. *Group disturbance offenses—Sec. 4401*

Section 4401-Riots, routs, assemblies and affrays—provided in part: "Whoever participates in any riot, rout, unlawful assembly or affray is guilty of a misdemeanor, and upon conviction thereof, shall be sentenced to imprisonment not exceeding three (3) years. . . ."[35]

Since the offenses of riot, rout, unlawful assembly and affray were not defined by the statute itself, the Pennsylvania courts found it necessary to resort to accepted common law definitions to give meaning to these group disturbance crimes.[36] A recent federal case[37] ruling on Pennsylvania law approved of this method of statutory construction and noted that such practice had been fully accepted by the United States Supreme Court.[38]

Unlawful assembly, rout and riot were often considered inseparable. Such an understanding of these crimes, however, belies their true nature at common law. In *Commonwealth v. Duitch*,[39] the court cited the following statement with approval: "Riot, rout and unlawful assembly are kindred offenses and the greater includes the less; yet the several offenses are clearly distinguishable each from the others."[40] In actuality, riot usually included rout and unlawful assembly; but neither of the latter two offenses was inclusive of all three crimes.[41] The three offenses were progressive and theoretically distinct steps in a violent or tumultuous group action ascending in degrees toward the ultimate outbreak

33. *Id.* at § 5101.
34. *Id.* at §§ 4401-19.
35. *Id.* at § 4401.
36. Commonwealth v. Duitch, 165 Pa. Super. 187, 190, 67 A.2d 821, 822 (1949).
37. Heard v. Rizzo, 281 F. Supp. 720 (E.D. Pa.), *aff'd*, 392 U.S. 646 (1968).
38. *See* text accompanying notes 94-95 *infra*.
39. 165 Pa. Super. 187, 67 A.2d 821 (1949).
40. *Id.* at 190-91, 67 A.2d at 822.
41. However, since "the greater includes the less" an individual could not be convicted of three separate offenses at common law. All were common law misdemeanors.

of violence from unlawful assembly to rout to riot.[42]

Unlawful assembly was the beginning point. Strictly speaking, it occurred only where three or more persons gathered to the disturbance of the public peace with the intention to act in an unlawful or riotous manner and then disbanded having left their unlawful purpose in the planning stages.[43] And yet, if the riotous purpose were to have been carried out, the crime of unlawful assembly still would have been committed even though no disbanding occurred. Furthermore, it was possible for an assembly lawful in its original purpose to become unlawful "if the group conceive[d] an unlawful purpose and proceed[ed] to carry it out in a tumultuous and riotous manner."[44]

Rout occurred where those who had unlawfully assembled made some motion toward execution of their purpose without actually executing it. The essence of the offense was being on the way from unlawful assembly to riot.[45] It was not necessary that the original intent of the unlawful assembly be carried out or that the trip be made in a tumultuous fashion.[46]

Riot was the culmination of the unlawful purpose in a violent or tumultuous fashion. It was defined in *Commonwealth v. Apriceno*[47] as

> the assembling together of three or more persons in a riotous, tumultuous and disorderly manner, and proceeding with a common intent and purpose to the commission of unlawful acts which tend to alarm and terrify law-abiding citizens, engaged in the peaceful exercise of their constitutional rights and privileges.[48]

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42. MILLER, *supra* note 14, at 386. Miller offers the following hypothetical to illustrate this point. A, B, and C assemble with the purpose of planning just how they will beat X who lives a mile away. This is unlawful assembly at common law. Then they walk to X's house in order to beat him. This is common law rout. Finally, they attack and beat X in the public square in front of his house causing alarm to the onlooking public. This is the offense of riot. *Id.*

43. Commonwealth v. Duitch, 165 Pa. Super. 187, 190, 67 A.2d 821, 822 (1949).

44. Commonwealth v. Zwierzelewski, 177 Pa. Super. 141, 147, 110 A.2d 757, 760 (1955). But, people have a right to gather at a proper place, in an orderly manner, for any lawful purpose, despite illegal threats made by others in an effort to prevent the meeting. And such a gathering does not become an unlawful assembly by reason of the fact that they may have cause to fear they will be violently attacked, and are so attacked. PERKINS, *supra* note 16, at 405.

45. Commonwealth v. Duitch, 165 Pa. Super. 187, 190, 67 A.2d 821, 822 (1949).

46. *Id.*

47. 131 Pa. Super. 158, 198 A. 515 (1938).

48. *Id.* at 161, 198 A. at 516. Another commonly used definition stated that riot is a

> tumultuous disturbance of the peace by three or more persons assembled and acting with a common intent either in executing a lawful private enterprise in a violent and turbulent manner, to the terror of the people, or in executing an unlawful enterprise in a violent and turbulent manner.

It has long been established that there must have been at least three participants acting in concert to constitute a riot.[49] One man or two men, whatever their conduct may have been, could not have been guilty of riot, without aiders or abettors.[50] The required assembly of those three or more participants was not necessarily assembly in the usual sense of the word; as long as the actors were "at approximately the same place at the same time engaging in the same kind of turbulent conduct"[51] they were assembled for the purposes of a riot.

Nor did the law require specific proof that the actual resulting violence resulted from the original intent of the rioters.[52] "If the results which did follow, or ones similar to them in kind, should reasonably have been anticipated, the law presumes they intended the ordinary and natural results . . . . "[53] The element of intent was inferred from the conduct;[54] as a result, all those present and participating in some way were guilty of all subsequent acts done by the group.[55] Moreover, anyone intentionally present at the scene of a riot, who was not actually participating or assisting in its suppression, and whose presence tended to encourage those actually participating was "prima facie inferred to be participat-[ing]."[56] In such a situation, the usual burden of proof for the prosecution in a criminal action was considerably lightened and the defendant somehow had to demonstrate his actual non-interference.[57]

If, in fact, the original purpose or intent to commit an unlawful act had been accomplished, the presence or absence of any actual personal injury or property damage was irrelevant to the charge

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Commonwealth v. Zwierzelewski, 177 Pa. Super. 138, 146, 110 A.2d 757, 760 (1955).

49. *See* Pennsylvania v. Craig, Addeson 190 (1794).

50. *Id.*

51. Commonwealth v. Abney, 195 Pa. Super. 317, 322, 171 A.2d 595, 598 (1961).

52. "A rioter is one who inflames the people's minds and induces them by violent means to accomplish an illegal object." Commonwealth v. Merrick, 65 Pa. Super. 482, 489 (1917).

53. *Id.* at 489-90.

54. "Those participating in the turbulence are presumed to have intended the violence that their acts produced." Commonwealth v. Abney, 195 Pa. Super. 317, 322, 171 A.2d 595, 598 (1961).

55. In fact, evidence of individual acts done in furtherance of the common purpose was admissible against all participants in the riot. *See* Commonwealth v. Zwierzelewski, 177 Pa. Super. 138, 152, 110 A.2d 757, 763 (1955).

56. Commonwealth v. Merrick, 65 Pa. Super. 482, 490 (1917).

57. *Id.*

of riot. "Actual force or violence [was] not an indispensable element of riot."[58] It sufficed that the conditions resulting from the participants' conduct would have naturally tended to alarm or terrify law-abiding citizens. The *in terrorem populi* aspect of the offense was satisfied by the apparent tendency of the act to inspire terror or alarm. Thus, it was not necessary for the prosecution to show affirmatively that particular community members were, in fact, terrorized or alarmed by the defendants' conduct.

Once the unlawful purpose was effectuated, it was also immaterial whether each individual participating in the riot had been a party to the unlawful assembly which precipitated the riot or had had previous knowledge of the common intent.[59] In effect, the prosecution needed only to prove the participating defendant's presence and the element of riotous intent would have been inferred. Nor was it required that the initial meeting of the participating group was for an unlawful purpose;[60] any assembly lawful in its original purpose might have grown into indictable riot if the group subsequently decided on an unlawful purpose and carried out that purpose in a tumultuous or violent manner.[61]

Riot[62] and inciting to riot,[63] a non-statutory offense, were legally distinct offenses.[64] An individual might have participated in a riot without having incited it or have incited the riot and not have participated in it. While inciting to riot was not necessarily a requisite element of riot, it was often true that the two offenses became merged within the charge of riot.[65] Inciting to riot involved the use of words or signs or any other means by which one

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58. Commonwealth v. Paul, 145 Pa. Super. 548, 21 A.2d 421 (1941). *See also* Commonwealth v. Hayes, 205 Pa. Super. 338, 343, 209 A.2d 38, 41 (1965).

59. Commonwealth v. Merrick, 65 Pa. Super. 482, 489 (1917).

60. Commonwealth v. Brletic, 113 Pa. Super. 508, 173 A. 686 (1934).

61. Commonwealth v. Zwierzelewski, 177 Pa. Super. 138, 147, 110 A.2d 757, 760 (1955).

62. Brief mention here of a few cases will serve to illustrate the variety of chaotic circumstances which have given rise to successful riot prosecutions. *See* Commonwealth v. Hayes, 205 Pa. Super. 338, 209 A.2d 38 (1965) (defendant led hundreds in a brick and bottle assault on police); Commonwealth v. Abney, 195 Pa. Super. 317, 171 A.2d 595 (1961) (a group of teen-aged boys attacked members of visiting high school band after a football game, indecently assaulting the girls and beating the boys); Commonwealth v. Zwierzelweski, 177 Pa. Super. 138, 110 A.2d 757 (1955) (a full-scale prison riot); Commonwealth v. Duitch, 165 Pa. Super. 187, 67 A.2d 821 (1949) (members of a striking C.I.O. chapter interrupted a meeting between the A.F. of L. and other C.I.O. members not sympathetic with the strike); Commonwealth v. Apriceno, 131 Pa. Super. 158, 198 A. 515 (1938) (strikers threatened and verbally and physically abused non-striking employees).

63. Inciting to riot, as a common law offense not mentioned in the 1939 Code, was retained by the savings clause of that Code.

64. Commonwealth v. Safis, 122 Pa. Super. 333, 186 A. 177 (1936); Commonwealth v. Apriceno, 131 Pa. Super. 158, 198 A. 515 (1938).

65. Commonwealth v. Apriceno, 131 Pa. Super. 158, 198 A. 515 (1938).

can be urged to action[66] calculated to provoke a riot.[67] Actions or movements were found to be as effective and, therefore, as punishable for this purpose as the use of inflammatory language.[68] Also required was either the specific intent to provoke a riot or a reckless or willful disregard of the probable riotous results of one's conduct or words.[69]

The remaining statutory crime mentioned and left undefined was affray. The leading case on this offense, *Commonwealth v. Merrick*,[70] indicated that "if a sudden disturbance arises among persons meeting together for an innocent purpose, they will be guilty of mere affray."[71] Mention of this offense is infrequent in the Pennsylvania case law on public disorder crimes and it seems that it was intended to cover situations involving minor public fights and scuffles in public places.[72] It was not required that the fight actually cause any public alarm. As long as it occurred in a public place, the *in terrorem populi* aspect of the offense was presumed and it was unimportant whether anyone besides the participants was present.[73]

B. *Disorderly conduct offenses—Section 4406*

> Section 4406 of the Pennsylvania Penal Code of 1939 states:
> Whoever wilfully makes or causes to be made any loud, boisterous and unseemly noise or disturbance to the annoyance of the peaceable residents nearby, or near to any public highway, road, street, lane, alley, park, square or common, whereby the public peace is broken or disturbed or the traveling public annoyed is guilty of the offense of disorderly conduct . . . .[74]

Contrary to the more general language of Section 4401, which left the definition of offenses to the common law, on first reading

66. *Id.* at 160, 198 A. at 517.
67. For a colorful example of a union organizer's speech which incited a riot see Commonwealth v. Merrick, 65 Pa. Super. 482, 485-86 (1917).
68. Commonwealth v. Albert, 169 Pa. Super. 318, 82 A.2d 695 (1951).
69. Commonwealth v. Egan, 113 Pa. Super. 375, 173 A. 764 (1934). In *Egan*, there was sufficient evidence to support an inciting to riot conviction. *See* Commonwealth v. Spartaco, 104 Pa. Super. 1, 158 A. 623 (1932).
70. 65 Pa. Super. 482 (1917).
71. *Id.* at 489.
72. *See* 2A C.J.S. *Affray* §§ 1-20 (1972).
73. PERKINS, *supra* note 16, at 491.
74. Act of June 24th, P.L. 872, § 406 (1939). Section 4407 made disorderly conduct on railway cars, passenger stations or platforms, bus terminals and at picnic grounds a separate summary offense. Act of June 24th, P.L. 872, § 4407.

the words of Section 4406 appear to be quite specific. Specificity is especially important with disorderly conduct since it was an entirely a statutory offense[75] and all the elements of the offense as proscribed by the statute must have been present for a conviction. Thus, the exactness with which these requisite elements are drawn in the statutory language is crucial to the effective and proper functioning of the enforcing police officer and the courts as well as for the understanding of the potential offender. Many disorderly conduct statutes have been subjected to successful constitutional attack[76] on void-for-vagueness[77] or overbreadth[78] grounds.

Generally, disorderly conduct offenses involved any conduct disruptive of the public peace which fell short of constituting breach of the peace or one of the other distinct disorder offenses at common law. The Pennsylvania definition of the offense under Section 4406 was worded somewhat more carefully.[79] In *Commonwealth v. Greene*,[80] the court stated that the "cardinal feature of disorderly conduct is public unruliness which can or does lead to tumult and disorder."[81] While these general words seem to offer little help in pinpointing the basic elements of the offense, the court did go on to consider disorderly conduct in some detail.

In *Greene*, the defendant owned and operated an oval race track on which were held Go-Kart races for children. The cars used were small, four-wheeled go-karts propelled by small gasoline engines. The court held that such activity, despite the apparent loud and boisterous noise, did not constitute disorderly conduct. The operation of a legal business in an orderly manner cannot constitute the crime of disorderly conduct.[82] For noise to have been disorderly, it must have been unseemly as well as loud and boisterous. The noise from the go-karts was admittedly loud and boisterous, but the court decided that it could not be considered unseemly. Unseemly meant "not fitting or proper in respect to the conventional standards of organized society or a legally constituted

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75. Municipalities also have jurisdiction to pass disorderly conduct ordinances. However, they must adhere to the state statute.

76. *See* note 27 *supra*.

77. For a discussion of this doctrine see notes 135-67 and accompanying text *infra*.

78. *Id.*

79. *See* Heard v. Rizzo, 281 F. Supp. 720 (E.D. Pa.), *aff'd*, 392 U.S. 646 (1968) (where the court held that this disorderly conduct provision was specific enough to withstand a void for vagueness attack); text accompanying notes 96-100 *infra*.

80. 410 Pa. 111, 189 A.2d 141 (1963).

81. *Id.* at 115, 189 A.2d at 143. The court depicted the classic example of disorderly conduct as engaging in clamor and outcry in the public streets in a manner which arouses attention and causes people to draw together whereby the highway becomes obstructed. *Id.*

82. *Id.*

community."[83] The court referred to the facts of *Commonwealth ex rel. Jenkins v. Costello*[84] as an example of the unseemly nature of disorderly conduct.[85] There the defendant threatened to punch another individual in the nose and called him vile names in a loud voice which served to attract the attention of persons nearby.

The court said that in Pennsylvania the offense embraced "activity which disturbs the peace and dignity of the community."[86] The important aspect of the conduct was that it disturbed the public because of its loudness, boisterousness and unseemliness. Making loud noises in public, in and of itself, did not constitute disorderly conduct. The court intimated that the proper remedy here might well have been an injunction to abate a nuisance rather than a criminal prosecution,[87] when asserting that "disorderly conduct [was] not intended as a catchall for every act which annoys or disturbs people; it is not to be used as a dragnet for all the irritations which breed in the ferment of the community."[88]

For the Pennsylvania courts, the attempt to define disorderly conduct was not easy.[89] In a concurring opinion in *Greene,* Justice Cohen suggested that such difficulty was due to the vague and uncertain language of Section 4406.[90] Such problems arise from the nature of the activity intended to be enjoined by the statute. The conduct sought to be regulated is described, all too often, simply as that which annoys or disturbs the community. Such activity is not easily subjected to enduring specific definitions; as

83. *Id.* at 113, 189 A.2d at 143.
84. 141 Pa. Super. 183, 14 A.2d 567 (1940).
85. *See also* Commonwealth v. Palms, 141 Pa. Super. 430, 15 A.2d 481 (1940); Commonwealth v. Cooper, 95 Pa. Super. 382 (1928).
86. 410 Pa. 11, 115, 189 A.2d 141, 143 (1963). The court gave the examples of a drunk running through town, fighting in a public place and exploding firecrackers at night in the public square. *Id.* at 116, 189 A.2d at 144.
87. *Id.* at 120, 189 A.2d at 147.
88. *Id.* at 117, 189 A.2d at 145.
89. For conduct which has been affirmed or rejected as disorderly *see, e.g.,* Commonwealth v. Sgrobati, 49 Pa. D. & C.2d 173 (C.P. Phila. 1970) (no, where defendant wore the U.S. flag to his draft induction physical); Commonwealth v. Wysocki, 2 Pa. D. & C.2d 334 (C.P. Montour 1956) (yes, where defendant threw firecrackers onto a main highway); Commonwealth v. Conlin, 1 Pa. D. & C.2d 591 (C.P. Luzerne 1954) (no, where high powered rifles and shotguns were fired near residential property); Commonwealth *ex rel.* Chief, Bureau of Charities and Correction, 48 Pa. D. & C.2d 89 (C.P. Phila. 1943) (no, where impudent and indecent conduct did not involve a public disturbance); Commonwealth v. Brewer, 19 Pa. D. & C. 55 (C.P. Alleg. 1932) (no, where heated discussion following a denial of a permit for a campus anti-war demonstration was not accompanied by any physical violence).
90. 410 Pa. 111, 121, 189 A.2d 141, 147 (1963).

such, it has not been restricted under a limited criminal categorization. Thus, disorderly conduct in Pennsylvania was a catchall offense by the words of its own definition in spite of the protestations of the majority opinion in *Greene*.[91]

C. *Heard v. Rizzo—The final say on Sections 4401 and 4406*

In *Heard v. Rizzo*,[92] plaintiffs sought a determination that the riot and disorderly conduct provisions, among others, of the Pennsylvania Penal Code were unconstitutional per se and had been unconstitutionally applied by the Philadelphia police in clearing the streets of a mob. Plaintiffs based their attack on the alleged vagueness of the statutory language,[93] pointing out that Section 4401 listed, but failed to define, the offenses of riot, rout, unlawful assembly and affray. The court answered by indicating that the offenses were fully and adequately defined at common law. Furthermore, the practice of referring to the accepted common law meanings of offenses left undefined by a statute "not only imparts to these terms an acceptable precision [but] it is a method of statutory construction that has been fully accepted by the United States Supreme Court."[94] The court, in upholding the statute against the void-for-vagueness attack, noted the unlikelihood that these public disorder offenses would or could be given "any definition by any Pennsylvania court other than these common law definitions."[95]

Plaintiffs suffered a similar setback with their vagueness attack on Section 4406.[96] The court held that the Pennsylvania courts had defined the requisite elements of disorderly conduct in sufficiently definite terms and, as required by the Pennsylvania Statutory Construction Act,[97] had strictly construed the statute. Referring with approval to the *Greene* definition of unseemly,[98] the court found the term to be analogous to the accepted and commonly used legal phrase "unreasonable" and at least as clear in meaning.[99] The court noted that the other required elements of loudness and boisterousness were equally as certain of definition[100] and rejected plaintiffs' constitutional argument.

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91. *See* text accompanying note 88 *supra*.
92. 281 F. Supp. 720 (E.D. Pa.), *aff'd*, 392 U.S. 646 (1968).
93. "Where a conviction is 'based on a common law concept of the most general and undefined nature' there is left to the 'executive and judicial branches too wide a discretion in its application.' " *Id.* at 743, *quoting from* Cantwell v. Connecticut, 310 U.S. 296, 308 (1940).
94. *Id.* at 740.
95. *Id.*
96. The court also rejected plaintiffs' contention that the common law offenses of inciting to riot and breach of the peace, as retained under the savings clause of the 1939 Penal Code, were invalid due to vagueness.
97. PA. STAT. ANN. tit. 46, § 558(1) (1937).
98. *See* text accompanying note 83 *supra*.
99. 281 F. Supp. 720, 741 (E.D. Pa.), *aff'd*, 392 U.S. 646 (1968).
100. *Id.*

Thus, the public disorder offenses of the 1939 Penal Code and their definitional ties to the common law were upheld, and the law on public disorder offenses seemed settled. However, such constitutional approval hardly means that Pennsylvania's statutory treatment of these crimes was unobjectionable. The statutes were able to withstand constitutional attack and the various legal definitions were simple enough to verbalize. It is doubtful, however, that such judicial clarity enabled, lay persons, on either side of the law, to measure their conduct accordingly. The precision of language required of and hoped for in criminal statutes was not present. Constitutionality is not the final test of a statute. If it is unclear or improperly used it must be redrafted. With the new Crimes Code, the attempt has been made to bring a much needed specificity to the statutory language. There has also been an effort to fashion a systematic approach, and in view of the prior law, progress has been made.

IV. Public Disorder Offenses Under the New Crimes Code

The public disorder provisions[101] of the new Crimes Code embody a number of significant changes in the substantive law of

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101. Pa. Stat. Ann. tit. 18, § 5501 (Supp. 1973) provides:

> A person is guilty of riot, a felony of the third degree, if he participates with two or more others in a course of disorderly conduct:
>
> (1) with intent to commit or facilitate the commission of a felony or misdemeanor;
>
> (2) with intent to prevent or coerce official action; or
>
> (3) when the actor or any other participant to the knowledge of the actor uses or plans to use a firearm or other deadly weapon.

Pa. Stat. Ann. tit. 18, § 5502 (Supp. 1973) provides:

> Where three or more persons are participating in a course of disorderly conduct which causes or may be reasonably expected to cause substantial harm or serious inconvenience, annoyance or alarm, a peace officer or other public servant engaged in executing or enforcing the law may order the participants and others in the immediate vicinity to disperse. A person who refuses or knowingly fails to obey such an order commits a misdemeanor of the second degree.

Pa. Stat. Ann. tit. 18, § 5503 (Supp. 1973) provides in part:

> (a) Offense defined.—A person is guilty of disorderly conduct if, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he:
>
> (1) engages in fighting or threatening, or in violent or tumultuous behavior;
>
> (2) makes unreasonable noise;
>
> (3) uses obscene language, or makes an obscene gesture; or
>
> (4) creates a hazardous or physically offense condition by any act which serves no legitimate purpose of the actor.
>
> (b) Grading.—An offense under this section is a misdemeanor of the third degree if the intent of the actor is to cause

Pennsylvania. In examining these changes, this section will indicate briefly what the specific changes are and then discuss the extent to which they will serve to correct the inadequacies of prior law.

In the new Code, the section covering riot[102] replaces the section of the previous Penal Code which encompassed riots, routs, unlawful assemblies and affrays.[103] Under prior law, the statute attempted no definition of the listed offenses and the courts resorted to the common law to give them meaning.[104] In the new section, the offense is specifically defined by restricting it to participation in a course of disorderly conduct in specified circumstances.[105] In addition, intent or knowledge is now a requisite element in those specified circumstances.[106] Finally, riot has become a felony of the third degree[107] with a maximum potential imprisonment of seven years.[108]

Similarly, disorderly conduct is defined with more exactness under the new Code.[109] The "loud, boisterous and unseemly noise or disturbance"[110] of the past definition has been subjected to specific delineation resulting in four explicit categories of disorderly conduct rather than one general definition. In so doing, the legislature has streamlined and particularized the offense, simultaneously extending it to conduct not before covered.[111] For each of the four, intent or reckless disregard is now the prerequisite mental state of the actor.[112] Furthermore, the offense is divided into two categories according to the nature of the actor's intent. In this regard, disorderly conduct can be either a third degree misdemeanor, punishable by a maximum imprisonment of one year,[113] or a summary offense, punishable by a maximum of ninety days imprisonment.[114]

The new Crimes Code has added an entirely new offense: a misdemeanor of the second degree is committed by refusing or knowingly failing to obey a peace officer's properly given order to disperse where "three of more persons are participating in a course of disorderly conduct which causes or may be reasonably

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substantial harm or serious inconvenience, or if he persists in disorderly conduct after reasonable warning or request to desist. Otherwise disorderly conduct is a summary offense.

102. PA. STAT. ANN. tit. 18, § 5501 (Supp. 1973).
103. Act of June 24th, P.L. 872, § 401 (1939).
104. *See* text accompanying notes 35-73 *supra.*
105. *See* note 101 *supra.*
106. *Id.*
107. *Id.*
108. PA. STAT. ANN. tit. 18, § 104(b)(4) (Supp. 1973).
109. *See* note 101 *supra.*
110. Act of June 24th, P.L. 872, § 406 (1939).
111. *See* note 101 *supra.*
112. *Id.*
113. PA. STAT. ANN. tit. 18, § 104(b)(8) (Supp. 1973).
114. *Id.* at § 104(c).

expected to cause substantial harm or serious inconvenience, annoyance or alarm."[115]

It is also important to note that, contrary to the 1939 Penal Code[116] common law crimes not specified in the Code are abolished.[117] This means that inciting to riot, breach of the peace, rout and unlawful assembly, as such, are no longer criminal offenses in Pennsylvania.[118] However, the substance of those offenses, as defined under prior law,[119] should be kept in mind when observing the courts as they venture into the new ground of deciding what conduct is covered by the new public disorder provisions.

Before analyzing the effect of these changes, it is well to inspect the preliminary statement of purpose for the entire Code. The goals set forth therein reflect the types and direction of the changes wrought by the new statutory language of Chapter 55. Section 104(2) indicates the emphasis of the definitions of crimes in the Code on the mental state or intent of the actor.[120] Section 104(4) expresses legislative concern with observing the due process requirement of fair notice as to the specific conduct which constitutes an offense.[121] And section 104(5) emphasizes the importance of making rational differentiations among the offenses according to their inherent gravity and of reflecting this rationality in the differentiation of treatment of the various classes of offenders.[122]

These general statutory aims have been closely adhered to in the public disorder provisions.[123] For example, the old common law definitions employed to give meaning to the offenses of riot, rout, unlawful assembly and affray were overlapping, overly general and, despite the *Heard* decision, subject to objection on those

115. *See* note 101 *supra.*
116. *See* note 33 and accompanying text *supra.*
117. PA. STAT. ANN. tit. 18, § 107(b) (Supp. 1973).
118. *See* notes 35-73 and accompanying text *supra.*
119. *Id.*
120. "To safeguard conduct that is without fault from condemnation as criminal." PA. STAT. ANN. tit. 18, § 104(2) (Supp. 1973).
121. "To give fair warning of the nature of the conduct declared to constitute an offense, and of the sentences that may be imposed on conviction of an offense." PA. STAT. ANN. tit. 18, § 104(4) (Supp. 1973).
122. "To differentiate on reasonable grounds between serious and minor offenses, and to differentiate among offenders with a view to a just individualization in their treatment." PA. STAT. ANN. tit. 18, § 104(5) (Supp. 1973).
123. Chapter 55 is very similar to § 250.1 of the Model Penal Code. The stated purposes of that section are closely in line with the general aims of the new Code in Pennsylvania. *See* MODEL PENAL CODE, *supra* note 30.

grounds. There was a patent failure to differentiate between mere public annoyance and true anti-social conduct. In contrast, the new definition of riot is considerably clarified. The specific instances in which a course of disorderly conduct becomes a indicatable riot are set forth inclusively and in detail. Although some definitional difficulty may remain with the public annoyance—anti-social conduct distinction, at least this inclusive detail provides the enforcing officer, the courts and the public with guidelines for the proper conduct suited to each of their respective roles in a public disorder situation. The catchall language has disappeared. Such concern with exactness goes a long way in avoiding the type of constitutional attack[124] to which public disorder statutes are so often subjected. This careful definition of offenses is an important safeguard for individual liberties.[125]

The heavy emphasis of the new statutory language on the intent or knowledge of the actor rightfully supplants the former focus on the effects of the actor's conduct on others, since one of the basic postulates of the criminal law is to base punishment on the unlawful intent or mens rea of the actor.[126] A mentally competent individual has a choice between acting lawfully or unlawfully in a given situation and, if he wilfully chooses the unlawful course of action, he is punished. It is inconsistent with this theory to punish solely for the effect which one's lawful conduct has on others. Under the generally imprecise language of the prior laws, this was entirely possible.[127] For example, a speaker, who had no intention to disrupt, could have been held criminally liable for the provocation of unruly behavior in those hostile to his public statements. This is no longer true under the new Code.[128] Punishable offenses in this area are now limited to that unlawful behavior which in and of itself disturbs the public order and tranquility.[129]

In addition, there appears in the new Code a rational gradation of the offenses which was wholly absent from the 1939 Penal Code. To replace the sometimes imponderable definitions of the past law, the new Code offers a sensible separation of violent group behavior, which is inherently more dangerous, from the less serious offenses of individual disorderliness. Incumbent upon the

124. *See, e.g.*, Heard v. Rizzo, 281 F. Supp. 720 (E.D. Pa.), *aff'd*, 392 U.S. 646 (1968); Commonwealth v. Duitch, 165 Pa. Super. 187, 67 A.2d 821 (1949).

125. *See* MODEL PENAL CODE, *supra* note 30, at 3. *See also* Coates v. City of Cincinnati, 402 U.S. 611 (1971).

126. *See* Morisette v. United States, 342 U.S. 246, 252 (1952).

127. Primary emphasis was put on annoyance to nearby residents or the disruption of public order and tranquility with little or no consideration of the actor's intent.

128. *See* PA. STAT. ANN. tit. 18, § 5507 (Supp. 1973).

129. MODEL PENAL CODE, *supra* note 30, at 6-9. *See generally*, Note, *Freedom of Speech and Assembly: The Problem of a Hostile Audience*, 49 COLUM. L. REV. 1118 (1949).

success of any such statutory scheme is the need for a corresponding graduated scale of punishment. The new Code sections provide for this by punishing the potentially most dangerous offense of group violence most heavily and the least dangerous act of individual unruliness most lightly. It is fair as well as rational to "provide aggravated penalties for disorderly conduct where the number of participants makes the behavior especially alarming"[130] to the community.

Thus, the new Code provides for a graduated pattern of offenses and punishments according to the seriousness of the acts and the number of participants involved. Each offense is grounded on the intent of the individual actor. Once the intent is established the punishemnt is made commensurate with the threat to the community as demonstrated by the nature of the act or the number of people involved. The individual act of disorderly conduct is subjected to relatively light penalties upon conviction.[131] Where three or more individuals participating in disorderly conduct fail to disperse upon a reasonably given official order, their potential penalty is greater.[132] And when the disorderly conduct of three or more individuals acting in concert reaches the level of the four specific instances designated as riot, the penalty is most severe.[133]

Another advantage of the new Code is its unified, inclusive treatment of public disorder offenses. They are spelled out in detail and presented cohesively in succeeding sections of the statute. Definitions for all the public disorder offenses can be ascertained from the statute rather than by the involved and time-consuming reference to the common law which was necessary under prior law. Furthermore, an overview of the legislative intent in this area of law can be gained from a reading of the statutory provisions. Again, this obviates reference to extra-statutory sources for information which should be present in the statute itself.

However, the new Code is not entirely problem free. Of course, much of the success or failure of the public disorder provisions in effectuating the overall aims of the entire Crimes Code will depend upon the tack which courts take in interpreting the statutes. A prospective look at these statutes necessarily includes consideration of the inevitable first amendment problems. Con-

130. MODEL PENAL CODE, *supra* note 30, at 21.
131. PA. STAT. ANN. tit. 18, § 5503 (Supp. 1973).
132. *Id.* at § 5502.
133. *Id.* at § 5501.

stitutional questions are certain to arise with almost any statute which attempts to balance a valid societal interest with a conflicting exercise of individual rights; the public disorder sections of the new Crimes Code are no exception. These constitutional problems may appear in the form of an attack on the wording of the statute itself or as an attack on the manner in which the statutory language is being applied by the courts and the police. Despite the obvious improvements brought about by the new Code, the courts, when interpreting these statutes which attempt to preserve the societal interest in law and order, must still act with cautious and measured deliberation in order to avoid sacrificing the "breathing space"[134] required for the rightful exercise of first amendment freedoms.

V. First Amendment Questions Raised by the Public Disorder Provisions of Pennsylvania's New Crimes Code

The potential conflict between a public disorder statute and the freedoms of speech and assembly is clear; and therefore any legislation which directly or indirectly affects the exercise of basic first amendment freedoms will receive close judicial scrutiny.[135] Legal controls in the form of public disorder statutes are designed to preserve public peace and order and to insure safety and convenience for the citizenry in its use of public places; yet the right of individual members of society to freely speak and assemble in order to air their views is recognized as a basic freedom in our constitutional framework. In striking a balance between these competing interests in the use of public places, a legislature is, in effect, fashioning its individualized conception of ordered liberty.[136]

Striking the balance is not a simple task. "A function of free speech under our system of government is to invite dispute."[137] The function of a public disorder statute is to prevent or punish disruptive public conduct. In this era where organized public demonstration has become well-established as a means of voicing one's grievances, these two functions often seem irreconcilable. Prior cases offer little in the way of definitive definitional guidance to legislators faced with the task of striking the balance with statutory language. Each new case with a new set of facts only provides another general statement to be considered on the respective

134. NAACP v. Button, 371 U.S. 415 (1963). "[S]tandards of permissible statutory vagueness are strict in the area of free expression . . . because First Amendment freedoms need breathing space to survive . . . government may regulate in this area only with narrow specificity." *Id.* at 432.

135. *See* United States v. Carolene Products Co., 304 U.S. 144 (1938).

136. *See* Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. Pa. L. Rev. 67, 115 (1960).

137. Terminiello v. City of Chicago, 337 U.S. 1, 4 (1948).

weight to be given to each competing interest.[138] Mere reference to this series of general pronouncements is of limited value to legislative draftsmen charged with the duty of writing the specific details of public disorder provisions.

The nature of the conduct involved and the inherent limitations of language itself combine to further complicate this task. Mr. Justice Frankfurter succinctly posed the dilemma as "[h]ow to escape, on the one hand, having a law rendered futile because no standard is afforded by which conduct is to be judged, and on the other, a law so particularized as to defeat itself through the opportunity it affords for evasion."[139] The riot and disorderly conduct provisions of the new Pennsylvania Crimes Code are aimed at punishing speech or conduct which has already disrupted the public peace.[140] The general drafting dilemma reflects the nature of the constitutional problems which are likely to arise with the new Code provisions.

A. *Need for precise statutory language: vagueness and overbreadth*

A basic due process notion of fairness[141] requires a penal statute to adequately inform the public of the conduct it proscribes or requires.[142] This element of notice is especially crucial in the area of public disorders where the statutes and common law definitions are so often overly general.[143] Criminal statutes, of necessity, must be more precise than noncriminal statutes;[144] due process fairness demands explicit wording where the potential penalties are most severe. No person "may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes."[145] The test is whether men of common intelligence must guess as to the meaning of the statutory language or differ as to

138. *See, e.g.*, Cox v. Louisiana, 379 U.S. 536 (1965).
139. Winters v. New York, 333 U.S. 501, 533 (1948) (dissenting opinion).
140. For a tri-partite categorization of the aims of disorder statutes see EMERSON, HABER & DORSEN, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 519 (3d ed. 1967).
141. *See* Note, *Due Process Requirement of Definiteness in Statutes*, 62 HARV. L. REV. 77 (1948).
142. *See* McBoyle v. United States, 283 U.S. 25, 27 (1931); Chester v. Elam, 408 Pa. 350, 356 (1962).
143. *See* note 27 and accompanying text *supra*.
144. This is because "it would be unthinkable to convict a man for violating a law he could not understand." Barenblatt v. United States, 360 U.S. 109, 137 (1965) (Douglas, J., dissenting opinion).
145. Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939).

its application.[146] This test buttresses the common law practice of construing criminal statutes strictly in order to afford as much protection as possible to the defendant.[147]

The standard of textual precision required of a criminal statute is not impossible to attain;[148] yet, any statute which fails to satisfy the test is constitutionally infirm. When the criminal activity sought to be prevented directly involves or indirectly affects first amendment freedoms, it will not be assumed that

> in its subsequent enforcement, ambiguities will be resolved in favor of adequate protection for First Amendment rights. Broad prophylactic rules in the area of free expression are suspect.[149]

Thus, legislatures must be particularly careful to draft with narrow specificity so as to insure the breathing speace first amendment rights need to survive.[150]

The primary grounds for constitutional attack on imprecisely drawn criminal statutes are vagueness[151] and overbreadth.[152] The void-for-vagueness doctrine involves the aforementioned principle of due process fairness in notifying the public what is intended to be covered by the statute.[153] Public disorder statutes are subject to first amendment attack under two distinct void-for-vagueness theories.[154] If the statutory language itself fails to give fair notice to those persons potentially subject to it, it is vulnerable to challenge as being void on its face.[155] If the statute is being arbitrarily or discriminatorily enforced or is capable of such enforcement, it may be attacked as unconstitutional as applied. This latter approach has met with success in recent civil rights cases.[156]

Vagueness in the area of first amendment rights is an elusive concept. A statute may appear on its face to be precise enough and subject to fair administration;[157] but, if it is easily adaptable

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146. Cramp v. Board of Public Instruction, 368 U.S. 278, 287 (1961).
147. *See* Pierce v. United States, 314 U.S. 306, 311-12 (1941).
148. United States v. Petrillo, 332 U.S. 1 (1947).
149. NAACP v. Button, 371 U.S. 415, 438 (1963).
150. *Id.* at 432.
151. *See* Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960).
152. *See* Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970).
153. *See* notes 141-47 and accompanying text *supra*.
154. *See, e.g.*, Coates v. City of Cincinnati, 402 U.S. 611 (1971); Cox v. Louisiana, 379 U.S. 536 (1965); NAACP v. Button, 371 U.S. 415 (1963); Terminiello v. City of Chicago, 337 U.S. 1 (1949); Winters v. New York, 335 U.S. 507 (1948); Cantwell v. Connecticut, 310 U.S. 296 (1940); Heard v. Rizzo, 281 F. Supp. 720 (E.D. Pa.), *aff'd*, 392 U.S. 646 (1968).
155. *See* Coates v. City of Cincinnati, 402 U.S. 611 (1971).
156. *See, e.g.*, NAACP v. Button, 371 U.S. 415 (1963). "It is enough that a vague and broad statute lends itself to selective enforcement against unpopular causes. In such circumstances, a statute . . . may easily become a weapon of oppression, however evenhanded its terms may appear." *Id.* at 435-36.
157. *See* note 155 and accompanying text *supra*.

to bad faith administration by police or magistrates in violation of first amendment rights then it should be ruled unconstitutional.[158] The potential danger involved is that a state may be inhibitorily regulating beyond its constitutional prerogative "because persons at the fringes of amenability to regulation will rather obey than run the risk of erroneous constitutional judgment."[159] For instance, in a recent civil rights case, the Supreme Court indicated than an imprecisely drawn statute which impinges upon the lawful exercise of the freedoms of speech and assembly acts as a weapon of oppression.[160] "Its mere existence could well freeze out of existence all such activity on behalf of the civil rights of Negro citizens."[161] This does not mean that legislatures are unable to allow any discretion in the enforcement of a penal statute. The Supreme Court does not require impossible standards.[162] However, the Court does require that such statutes meet the tests of sufficient notice and constitutionally proper application.

Conceptually, an attack on a statute under the vagueness test for potentially arbitrary enforcement closely resembles an attack based on the overbreadth doctrine.[163] There is one distinguishing factor. The vagueness attack is usually directed at statutes which directly affect the first amendment freedoms through the conduct proscribed. The overbreadth attack more often focuses on the invalidation of statutes which indirectly affect first amendment safeguards. These ostensibly legitimate statutes are vulnerable on the basis of the chilling effect[164] which they may have on preferred first amendment freedoms.[165]

These then, are the three available avenues of constitutional attack[166] on public disorder statutes which directly or indirectly

158. *See* NAACP v. Button, 371 U.S. 415 (1963) (Harlan, J., dissenting opinion); P. Freund, *The Supreme Court and Civil Liberties*, 4 VAND. L. REV. 533, 539 (1951).

159. *See* Note, *supra* note 151, at 80.

160. NAACP v. Button, 371 U.S. 415 (1963).

161. *Id.*

162. United States v. Petrillo, 332 U.S. 1 (1947).

163. *Cf.* Zwickler v. Koota, 389 U.S. 241 (1967). A New York statute was struck down as overly broad even though it was specifically determined not to be vague in the due process notice sense. *Id.* at 249-50.

164. *See* Dombrowski v. Pfister, 380 U.S. 379 (1965).

165. A statute is void for overbreadth because "a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." NAACP v. Alabama, 377 U.S. 288, 307 (1963).

166. *See* Note, *Breach of Peace and Disorderly Conduct Laws: Void for Vagueness?*, 12 How. L.J. 318, 323-26 (1966).

affect the freedoms of speech and assembly. The ultimate rationale for all three is the preferred status given these first amendment freedoms by the courts.[167]

B. *First amendment rights involved: speech and assembly*

The first amendment protects the rights of individuals to speak freely and peaceably assemble.[168] The right of assembly is an independent right "cognate to those of free speech and free press and is equally as fundamental."[169] Since the usual purpose of assembly in public places is to deliver or listen to speeches or to demonstrate a point of view, the right of assembly is necessarily intertwined with the right of free speech in the public disorder area.[170] A literal reading of the first amendment might suggest that it is simply unconstitutional for any criminal statute to attempt to punish any kind of verbal communication or any peaceful assembly. However, this is not the case. Those rights are fundamental, but not absolute at all times and under any circumstances. "The rights of free speech and assembly . . . still do not mean that everyone with opinions or beliefs to express may address a group at any public place at any time."[171]

One particular form of communication, not protected by the first amendment, includes obscene, profane, libelous or fighting word utterances which by their nature tend to incite breaches of the public peace.[172] The usual requirement for proscribing speech is the demonstration of a clear and present danger resulting from the speech objected to.[173] This requirement is abrogated, however, for the types of communication listed above since they are deemed so non-expressive and unessential to the exposition of ideas.[174] Such expletives are considered to be of minimal social value in contrast with the overriding public interest in maintaining order.

Other distinctions made according to the nature of the expressive activity and the place of its occurence leave certain modes of expression outside the scope of first amendment protection. One such differentiation is made between speech pure and speech

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167. *See, e.g.*, Kovacs v. Cooper, 336 U.S. 77, 89-97 (1949) (Frankfurter, J., concurring opinion).

168. *See* note 5 *supra.*

169. DeJonge v. Oregon, 299 U.S. 353, 364 (1936).

170. *See* ABERNATHY, THE RIGHT OF ASSEMBLY AND ASSOCIATION (1961); Note, *Public Order and the Right of Assembly in England and the United States*, 47 YALE L.J. 404 (1938).

171. Cox v. Louisiana, 379 U.S. 536, 554 (1965). *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 571 (1942); Whitney v. California, 274 U.S. 357, 373 (1927).

172. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

173. For the classic statement of the clear and present danger test see Schenk v. United States, 249 U.S. 47 (1919).

174. Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

plus.[175] Pure speech receives heavy protection under the judicially-fashioned clear and present danger test. However, speech related activity in the form of picketing, demonstration or other symbolic conduct, while protected, does not receive the same extent of favorable treatment from the courts. The fact that pure speech is intertwined with such conduct is not important.[176] When pure speech and non-speech elements are combined, a state in its legitimate regulation of the non-speech portion can successfuly defend "incidental limitations on First Amendment freedoms."[177] The preferred treatment of pure speech over symbollic expressive conduct would seem to remain even when the conduct actually is an expression of ideas and beliefs.[178] A legislature may not wholly proscribe speech-related conduct; but, controls unavailable as to pure speech may be used provided that they are reasonable, narrowly drawn and non-discriminating among groups of citiznes.[179] Such statutes must avoid directly regulating the actual pure speech content which may be intermingled with the less protected speech-related conduct. The power to control excesses of conduct must not be used to suppress the preferred constitutional right itself.

The other basic distinction relates to the place in which the activity occurs. Whether the speech will be protected, may depend on the court's view of what the predominant intended use of the place in question is. At some indefinite point, the use of a public place to air grievances through symbolic conduct is clearly overridden by another public use intended for the area. The central issue becomes whether a particular public place is to be used primarily as a true public forum.[180] Some public places ap-

175. Kalven, *The Concept of the Public Forum*, 1965 S. Ct. Rev. 1, 22.
176. Cameron v. Johnson, 390 U.S. 611, 617 (1968).
177. United States v. O'Brien, 391 U.S. 367, 377 (1968). The *O'Brien* decision sets out a lengthy test for this proposition. *Id.*
178. *See, e.g.*, Cox v. Louisiana, 379 U.S. 536, 555 (1965); *Id.* at 578 (Black, J., concurring opinion); Brown v. Louisiana, 383 U.S. 131, 162 (Black, J., dissenting opinion); Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 501-02 (1949). The line drawn between pure speech and speech-related conduct is not always a clear one. *Compare* United States v. O'Brien, 391 U.S. 367 (1968) (burning a draft card, even though done solely to express an idea, was not protected as speech) *with* Cohen v. California, 403 U.S. 15 (1971) (breach of the peace conviction for walking through a courthouse wearing a jacket on which were written obscene words reversed).
179. This may be done in the form of regulating the time and place of speech-related conduct. *See, e.g.*, Adderley v. Florida, 385 U.S. 39 (1966) (place); Cox v. Louisiana, 379 U.S. 536 (1965) (place); Edwards v. South Carolina, 372 U.S. 229 (1963).
180. *Compare* Hague v. C.I.O., 307 U.S. 451 (1939) (traditional use of

pear to be obvious centers for protest. But, as Justice Douglas has said, these places may be

> so clearly committed to other purposes that their use for the airing of grievances is anomalous. There may be some instances in which assembly and petitions for redress of grievances are not consistent with other necessary purposes of public property.[181]

Thus, a jailhouse,[182] a courthouse[183] and legislative chambers[184] are public places where speech-related conduct has been prohibited as inappropriate to the primary intended use of the areas. And yet, such varied sites as a state capitol grounds,[185] a major urban bus terminal[186] and the mall of a privately owned shopping center[187] have been approved as public forums for speech-related conduct. The rational for the latter categorization is that those public places sufficiently resemble parks and streets which are "so historically associated with the exercise of First Amendment rights that access to them for the purposes of exercising such rights cannot constitutionally be denied broadly and absolutely."[188]

Thus, society's interest in maintaining order is more likely to prevail over freedom of expression the more the nature of the expression tends away from pure speech and the situs of the expression tends toward private, or restricted public, usage. Pure speech, however, retains its preferred status. It is crucial to maintain these distinctions when examining a public disorder statute which directly or indirectly affects the airing of views through speech and assembly. Even where the societal interest in public order balances most favorably against individual expression, the statute effectuating that interest still must be precise and narrow in order to withstand vagueness or overbreadth attacks. Even as draftsmen's awareness of the need for specificity in the public disorder area becomes more acute, there remains the problem of seemingly valid statutory language which, in practice, lends itself to arbitrary enforcement by arresting officers to the obvious detriment of the rights of free speech and assembly.[189]

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parks and streets as public forums) *with* Cox v. New Hampshire, 312 U.S. 569 (1941) (public forum use subject to accommodation).

181. Adderley v. Florida, 385 U.S. 39 (1966) (dissenting opinion).

182. *Id.*

183. Cox v. Louisiana, 379 U.S. 536 (1965).

184. Adderley v. Florida, 385 U.S. 39 (1966) (Douglas, J., dissenting opinion, dictum).

185. Edwards v. South Carolina, 372 U.S. 229 (1963).

186. Wolin v. Port of New York Authority, 392 F.2d 83 (2d Cir. 1968), *cert. denied*, 393 U.S. 940 (1969).

187. Amalgamated Food Employees' Union v. Logan Valley Plaza, 391 U.S. 308 (1968).

188. *Id.* at 313.

189. *See, e.g.*, Wright v. Georgia, 373 U.S. 284 (1963) (convictions of Negro teenagers for breach of peace for playing basketball on a segregated playground reversed).

C. *Dangers of too much police discretion*

The actual violation of individual rights which occurs as the result of a broadly or vaguely worded criminal statute takes place at the enforcement, not the drafting, level. The potential for selective enforcement is great. While it can happen with any criminal statute,[190] it is particularly endemic to the disorder statutes. To give the enforcing officer too much discretion is "to place those who assert First Amendment rights at his mercy. It gives him the awesome power to decide whose ideas may be expressed and who shall be denied a place to air their claims and petition their government."[191] In effect, each policeman becomes a legislator. Under a vague statute, it is his personal discretion which determines what conduct is disorderly or when a demonstration has become threatening to the public peace. But, it is not the function of a policeman to adjudicate and punish.[192] His task is enforcement; he is supposed to arrest and take offenders into custody and no more. With specific statutory definitions of crimes, the police and the courts would have the necessary guidance to discern illegal conduct without resorting to their own notions of right and wrong.

Legislative failure to define crimes specifically bodes ill for the rights of free speech and assembly under public disorder statutes. The exercise of discretion is perhaps the policeman's most difficult problem.[193] He becomes the interpreter of the law. Without specific statutory language defining the scope of his activity, the policeman has no choice but to substitute his own value judgments when deciding what conduct is criminal. Certainly, conduct should be judged on the basis of law rather than on what offends a particular police officer. Otherwise, in the public disorder area, first amendment rights are likely to be improperly subordinated to the preservation of order.[194]

This danger inheres in both the individual disorderly conduct

190. "A criminal code, in practice, is not a set of specific instructions to policemen but more or less a rough map of the territory in which policemen work. How an individual policeman moves around that territory depends largely on his personal discretion." CHALLENGE OF CRIME, *supra* note 10, at 10.

191. Adderley v. Florida, 385 U.S. 39 (1966) (Douglas, J., dissenting opinion).

192. J. SKOLNICK, POLITICS OF PROTEST, STAFF REPORT TO THE NATIONAL COMMISSION ON THE CAUSES AND PREVENTION OF VIOLENCE 249 (1968) [hereinafter as SKOLNICK].

193. CHALLENGE OF CRIME, *supra* note 10, at 103.

194. "Nonconformity comes to be viewed with nearly as much suspicion as actual law violation; correspondingly, the police value the familiar, the ordinary, the status quo. . . ." SKOLNICK at 261.

arrest and mass arrests during a group demonstration. Without statutory guidance, a policeman's notion of the annoyance quotient of an individual's conduct may stem from the individual's age, race or appearance rather than his conduct.[195] Moreover, when group activity involves individuals or points of view highly offensive to a policeman personally, it is difficult for him to persist in his responsibility to protect the exercise of constitutional freedoms.[196] This is not to say that the police are entirely to blame. "In protest situations, police are in the public eye and frequently find themselves in the impossible position of acting as substitutes for necessary political and social reform."[197] It is, after all, the affirmative duty of the legislature to spell out as precisely as possible that activity which is included or excluded by the criminal statute.[198]

Furthermore, in the exercise of their discretion, police serve as the public's most frequent contact with the criminal justice system. What the policeman does day-to-day "is often perceived as what the law is."[199] Crime looks altogether different on the street than it does from the perspective of a legislative chamber.[200] And when, without policy guidance from the legislature, the policeman makes his "low-visibility"[201] decision, it is often treated as legally conclusive by the court as well as by the general public.[202] Thus, as one municipal court judge has warned, "[i]f the law is to be respected, it must rely on standards readily discernible and not left to the personal feelings of the police."[203]

These factors point to the basic need for specificity in a criminal statute. Without it, legislative intent as to particular offenses is supplanted by police discretion and the attendant probability of arbitrary enforcement. Such a statute would be particularly vulnerable to attack on void-for-vagueness grounds.[204]

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195. *See* case cited note 189 *supra*. "Police view students, the anti-war protestors and blacks as a danger to our political system, and racial prejudice pervades police attitudes and actions." SKOLNICK at 289.

196. This is especially true in the context of demonstrations which advocate social change. For an analysis of what this means in terms of the need for narrowly drawn riot statutes see B. Feld, *Police Violence and Protest*, 55 MINN. L. REV. 731 (1971).

197. SKOLNICK at 194.

198. Nonetheless, it remains true that "the manner in which police respond to demonstrations will determine, in large measure, whether violence will break out." REPORT OF THE TASK FORCE ON POLICE OF THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *The Police*, 24-5 (1968).

199. SKOLNICK at 269.

200. CHALLENGE OF CRIME, *supra* note 10, at 10.

201. *See* Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low Visibility Decisions in the Administration of Justice*, 69 YALE L.J. 543 (1960).

202. *See* text accompanying notes 190-93 *supra*.

203. Watts, J., *Disorderly Conduct Statutes in Our Changing Society*, 9 WM. & MARY L. REV. 349, 354 (1967).

204. *See* § IV, B. *supra*.

D. *Constitutional objections to the new Pennsylvania disorder provisions*

Pennsylvania's new public disorder statutes closely adhere to the guidelines set forth in Article 250 of the Model Penal Code.[205] An express purpose of that Article is to "safeguard civil liberty by careful definition of offenses."[206] This conscious effort to fairly balance constitutional freedoms with public order is a marked improvement over the approach of the previous statutes. However, constitutional attacks seem inevitable.

There is only a limited likelihood of successful attack on the new riot and disorderly statutes[207] on the grounds of their being vague on the face. On the whole, an obvious effort has been made to be as specific as possible, given the limitations of language, as to the constituent elements and circumstances of each offense. There may be a vagueness problem, however, with one section of the disorderly conduct statute. The section states that it is disorderly conduct for anyone to create "a hazardous or physically offensive condition by any act which serves no legitimate purpose of the actor."[208] The draftsmen's comments indicate that this section will cover such activities as the "throwing of garbage or 'stink bombs' into public passages, etc."[209] Despite this, the catchall nature of the language is obvious. There is no way for the police, the courts or the public to discern just what might be included or excluded as criminal conduct. Due to this failure to satisfy the due process fair notice test,[210] it may be that this section will fall under a vagueness on the face attack. Moreover, it is only if free speech and assembly are consistently protected as legitimate purposes that this statute will survive constitutional attack on as applied grounds.[211]

More serious questions arise with the provision which makes criminal a knowing or intentional failure to obey a policeman's dispersal order.[212] This section is completely without precedent

205. MODEL PENAL CODE, *supra* note 30.
206. *Id.* at 3.
207. PA. STAT. ANN. tit. 18, § 5501-3 (Supp. 1973).
208. *Id.* at § 5503.
209. Draftsmen's Comments, PA. STAT. ANN., tit. 18, § 5503 (Supp. 1973).
210. PA. STAT. ANN. tit. 18, § 5502 (Supp. 1973).
211. "Legislation creating 'new' crimes is particularly susceptible to constitutional attack." Note, *The Void-for-Vagueness Doctrine . . .*, *supra* note 151, at 84. It is not that such statutes are, of necessity, generically unclear; but, it is likely since they represent affirmative legislative intrusions into areas previously left to individual freedoms. *Id.*
212. PA. STAT. ANN. tit. 18, § 5502 (Supp. 1973).

in Pennsylvania law.[213] The only basis for the police officer's order is his determination that a course of conduct being participated in by three or more persons is disorderly and that it causes or may be reasonably expected to cause substantial harm or serious inconvenience, annoyance or alarm.[214] Such language reminiscent of the old common law definitions which were superseded by the new Code. And it is subject to the same objection as is any disorderly conduct statute based on those definitions. There is too much left to the individual police officer's discretion. True, the dangers of abuse are modified somewhat by the requirement of a minimum of three participants; but regardless of the number involved, the fact remains that the dispersal order is just as likely to emanate from the officer's personal feelings concerning what annoys or alarms or inconveniences him as from the true nature of the conduct. The gravity of the consequences increases when the conduct involves first amendment-protected activities.

Instead of completely invalidating the entire statute, which seems to give police a new, effective crowd control device, the courts may rule on the constitutionality of each successive application of the statute as it is challenged. It is submitted, however, that the as applied version of the vagueness doctrine would demand invalidation of the statute itself.[215] If the statute is capable of continued arbitrary enforcement which is violative of protected constitutional freedoms, it should be struck down and redrafted.

Conceivably, all the public disorder provisions are subject to constitutional attack for lending themselves to indiscriminate enforcement. While appearing legitimate on their face, these statutes, due to the nature of conduct regulated, may result in arbitrary enforcement practices. It remains to be seen; but it is their only real common point of vulnerability to constitutional objection since they are not facially vague or overbroad. The courts will have to strike the balance. If it results that one or all of these statutes provides too much leeway to enforcing officers acting to maintain order at the expense of individual liberties, the courts must act to overturn convictions and invalidate the legislation.

VI. Conclusion

The Pennsylvania legislature, through the recently enacted Crimes Code, has attempted to balance the validly competing interests in the area of public disorder law. As indicated, the new public disorder provisions have manifest immediate advantages over the prior law. The statutory language has been consolidated and streamlined, the public disorder offenses and their respective

213. *See* text accompanying notes 155-62 *supra.*
214. Pa. Stat. Ann. tit. 18, § 5502 (Supp. 1973).
215. *See* notes 151-64 and accompanying text *supra.*

punishments are set forth in a rationally graduated scheme, and general and overlapping definitions of the past are replaced by more specifically-worded definitions with appropriately greater emphasis on the intent of the offender.

With the few exceptions heretofore mentioned,[216] the statutes are not subject to the constitutional objections of vagueness on the face or overbreadth. For the most part, the required fair notice of what conduct is prohibited is evident in the statutory language. Any constitutional difficulties which may arise are likely to occur only after the statutes have been in effect for a brief time. Then it can be determined whether they are amenable to arbitrary enforcement at the expense of preferred first amendment freedoms. If this proves to be the case they will, of course, have to be nullified as constitutionally infirm. The role of the courts is crucial. They must not be lulled by the patent improvements over the 1939 Penal Code treatment of public disorder offenses. They must insist that the balance struck by the legislature between individual freedom of expression and preservation of public peace and order is preserved. They can accomplish this by preventing police discretion from becoming the policy-making force in this area. With the new Code provisions on public disorder as the starting point, the extent of judicial vigilance will determine the form of ordered liberty which evolves in Pennsylvania.

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216. *See* text accompanying notes 207-15 *supra.*