1971

# Gregory Hess vs. State of Indiana (Brief of Appellant) In the Supreme Court of Indiana

F. Thomas Schornhorst
*Indiana University Maurer School of Law*

David Colman

IN THE

SUPREME COURT OF INDIANA

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No. 1271-S372

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| GREGORY HESS<br><br>Appellant<br>(Defendant below)<br><br>vs.<br><br>STATE OF INDIANA,<br>Appellee | ) | Appeal from the<br>Monroe Superior Court<br><br><br><br><br><br>The Honorable<br>James M. Dixon, Judge |

BRIEF OF APPELLANT

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PROVISIONS

IC 35-27-2-1 (1971), Burns Ind. Stat. Ann. §10-1510 (1971 Supp.)

"Whoever shall act in a loud, boisterous or disorderly manner so as to disturb the peace and quiet of any neighborhood or family, by loud or unusual noise, or by tumultuous or offensive behavior, threatening, traducing, quarreling, challenging to fight or fighting, shall be deemed guilty of disorderly conduct, and upon conviction shall be fined in any sum not exceeding five hundred dollars [$500] to which may be added imprisonment for not to exceed one hundred eighty [180] days."

Relevant portions of the Constitution of the State of Indiana are as follows:

Article I, Section 9 - "No law shall be passed, restraining the free interchange of thought and opinion, or restricting the right to speak, write, or print, freely, on any subject whatever: but for the abuse of that right, every person shall be responsible."

Article I, Section 12 - "All courts shall be open; and every man, for injury done to him in his person, property, or reputation, shall have remedy by due course of law. Justice shall be administered freely, and without purchase; completely and without denial; speedily, and without delay."

Article I, Section 13 - "In all criminal prosecutions, the accused shall have the right to a public trial, by an impartial jury, in the county in which the offense shall have been committed; to be heard by himself and counsel; to demand the nature and cause of the accusation against him and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process for obtaining witnesses in his favor."

Article I, Section 31 - "No law shall restrain any of the inhabitants of the State from assembling together in a peaceable manner, to consult for their common good; nor from instructing their representatives; nor from applying to the General Assembly for redress of grievances."

Relevant portions of the Constitution of the United States are as follows:

Amendment 1 - "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."

Amendment 14 - "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Issues Presented On Appeal

1. Whether the Disorderly Conduct Statute, IC 35-27-2-1 (1971), Burns Ind. Stat. Ann. § 10-1510 (Supp. 1971), as applied to appellant's conduct, which consisted of speech per se, violates Article I, Section 9 of the Constitution of the State of Indiana, and the First and Fourteenth Amendments to the Constitution of the United States of America.

2. Whether, as a matter of law, the evidence presented on behalf of the State is sufficient to establish beyond a reasonable doubt all the elements of proof necessary to sustain a conviction of disorderly conduct under IC 35-27-2-1 (1971), Burns Ind. Stat. Ann. § 10-1510 (Supp. 1971).

3. Whether the Disorderly Conduct Statute, IC 35-37-2-1 (1971), Burns Ind. Stat. Ann. § 10-1510 (Supp. 1971), is unconstitutional and void on its face for vagueness and overbreadth in violation of Article I, Sections 9 and 31 of the Constitution of the State of Indiana, and the First and Fourteenth Amendments to the Constitution of the United States of America.

4. Whether the form ("boilerplate") affidavits utilized by the Monroe County Prosecutor for the initiation of prosecutions for disorderly conduct and which do not state the specific nature of the defendant's conduct, but instead charge all persons accused of disorderly conduct with all of the forty-eight to fifty-one combinations of disorderly conduct proscribed by Section 10-1510, are inadequate to give the accused, the trial court and the triers of fact notice of the offense charged and of the issues to be

tried as required by Article I, Section 13 of the Constitution of the State of Indiana, and the due process clause of the Fourteenth Amendment to the Constitution of the United States.

## STATEMENT OF THE CASE

This is an appeal from a conviction of disorderly conduct IC 35-27-2-1 (1971), Burns Ind. Stat. Ann. § 10-1510 (Supp. 1971), (hereinafter cited as Section 10-1510), based upon the finding of the Monroe Superior Court that the appellant uttered the phrase: "We'll take the fucking street later [again]," during a disturbance near the campus of Indiana University in Bloomington, Indiana, on May 13, 1970.

In an affidavit filed in the City Court of Bloomington on May 14, 1970, appellant was charged as follows:

> "The undersigned, being duly sworn on information and belief, says that at and in the County of Monroe and State of Indiana, to wit: 100 block of South Indiana Avenue on the 13th day of May, 1970, one Gregory Hess late of said County, did then and there unlawfully: act in a loud, boisterous and disorderly manner so as to disturb the peace and quiet of the (household) and (neighborhood) in and around the aforementioned place by loud and unusual noise, and by tumultuous and offensive behavior, threatening, traducing, quarreling, challenging to fight and fighting contrary to the form of the statute in such cases made and provided and against the peace and dignity of the State of Indiana."

On May 28, 1970, appellant, through counsel, filed a Motion to Quash the aforementioned affidavit with a supporting memorandum attached. The Motion to Quash challenged the affidavit on the grounds that (1) the offense of disorderly conduct was not stated with sufficient certainty; (2) the facts stated in the affidavit did not constitute a public offense in that (a) Section 10-1510 is unconstitutional on its face because it is impermissibly vague and overly broad, (b) the affidavit did not allege that appellant's conduct tended to provoke a breach of the peace, and (c) the affidavit

did not include an allegation of mens rea. Appellant's motion was accompanied by an extensive memorandum of law in support of the Motion to Quash. Record pp. 7-19.

The State did not respond to appellant's Motion to Quash and, without explanation, the City Court judge overruled the motion on June 3, 1970. Appellant entered a plea of not guilty on June 12, 1970, and the cause was tried without a jury in City Court on October 29, 1970. Appellant was found guilty on the same date and was assessed a fine of $25.00 and costs of $24.00.

On November 23, 1970, the appellant filed a notice of appeal and the cause was transferred to Monroe Superior Court for trial de novo. Cash bond of $100 was set by the City Court and was posted by the appellant. Appellant requested a jury trial.

The cause was on June 3, 1971, submitted to the Monroe Superior Court on a stipulated record and in appellant's Memorandum in Support of Appeal the issues were formulated as follows:

> "A. Whether the City Court judge properly overruled the defendant's motion to quash the affidavit on the ground that it did not state the offense with sufficient certainty, and that the affidavit did not state a public offense.
>
> B. Whether, even if constitutional on its face, the disorderly conduct statute [Section 10-1510] is being unconstitutionally applied in this case." Record p. 6.

Appellant on June 18, 1971, filed an extensive memorandum of points and authorities in support of his position. Record pp. 20-30. On July 14, 1971, the State filed a half-page answer to the memorandum asserting merely that the Motion to Quash had been properly overruled in the City Court and that Section 10-1510 had not been

applied unconstitutionally in appellant's case. No authority was cited in support of these conclusions. Record p. 31.

On July 19, 1971, without ruling separately on appellant's Motion to Quash, the Monroe Superior Court entered judgment against the appellant as follows:

> "This cause having been submitted to this Court for trial on Stipulated Facts agreed to by the defendant and the State of Indiana, and the Court having examined the Memoranda of counsel and now being duly advised in the premises, now finds the defendant guilty of the charge of Disorderly Conduct (Burns Ind. Statutes Annotated, Section 10-1510) and, the Court having found the defendant guilty as charged, now assesses a fine of $1.00, plus the costs of this action and the defendant is now granted sixty (60) days to pay said fine and costs, as assessed, or in lieu thereof, to file his Motion to Correct Errors. JUDGMENT."

The trial judge did not include with his judgment any findings of fact or any interpretation of Section 10-1510.

On July 22, 1971, appellant filed a Motion for Clarification of Judgment noting that

> "At no time in these proceedings has the State responded substantively to the points made by the defendant, and neither the City Court nor this Court has offered any reasons for finding that the State's pleading was legally sufficient; that the disorderly conduct statute is constitutional on its face; and that the said statute was applied constitutionally in the instant case.
>
> "The clarification hereby requested is important to counsel's preparation of a motion to correct errors and any subsequent appeal that may become necessary.
>
> "Counsel would welcome the Court's advice as to the basis upon which this conviction was upheld in light of the authorities discussed in the memoranda filed herein and in light of the absence of authority offered by the State or by this Court for sustaining the conviction herein."

The court not having responded to the above-quoted motion by September 16, 1971, appellant on that date filed his Motion to

Correct Errors alleging: (1) that the Court erred in overruling appellant's Motion to Quash in light of the grounds stated therein and supported by the memorandum of points and authorities; (2) that the verdict and judgment are contrary to law in that Section 10-1510 is unconstitutional on its face because it is overbroad and vague; (3) that Section 10-1510 is unconstitutional as applied to the appellant; and (4) that the verdict and judgment were not supported by sufficient evidence upon all necessary elements of the offense. Record p. 33.

A memorandum was attached to the Motion to Correct Errors supporting the motion and incorporating by reference the memoranda previously filed by the appellant in support of his Motion to Quash and in support of his arguments on the merits. Record p. 37.

Without waiting for a response from the State, the court on September 22, 1971, overruled appellant's Motion to Correct Errors and entered the following order:

> "Defendant's motion to correct errors is now overruled by the Court; and in response to the motion for clarification of judgment filed by the defendant's attorney, the Court now advises the defendant's attorney that the statement made by the defendant shortly before his arrest: "We'll take the fucking street later (or again)" is a statement that has a tendency to lead to violence and is in violation of the disorderly statute of the State of Indiana regardless of whether or not the vulgar modifier was used in said statement."

Appellant filed a timely notice of appeal, and the record of proceedings was filed with the Supreme Court of Indiana on December 17, 1971.

FACTS

The facts as stipulated below are as follows:

At approximately 12:30 p.m. on May 13, 1970, units of the Monroe County Sheriff's Department and the Bloomington City Police were summoned to the Indiana Avenue side of Bryan Hall which is located on the western edge of the campus of Indiana University between East 4th Street and Kirkwood Avenue within the city of Bloomington, Monroe County, Indiana. The Sheriff's Department and the Bloomington Police Department had been requested to assist University officials and campus police in removing certain demonstrators who had been blocking the doorways to Bryan Hall in conjunction with protests against the war in Indochina.

Monroe County Sheriff Clifford Thrasher arrived with several of his deputies at about 12:30 p.m. By the time the Sheriff and his deputies arrived there were approximately 200-300 persons assembled in front of Bryan Hall. While clearing the front steps of Bryan Hall, Bloomington City Police arrested one student for disorderly conduct; a second student was arrested near the patrol car in which the first arrested student had been placed. These arrests occurred at approximately 1:00 p.m.

In apparent response to these arrests, about 100-150 of the persons who had gathered as spectators went into Indiana Avenue in front of Bryan Hall and in front of the patrol car in which the two arrestees had been placed. The persons were directed by university and police officials to clear the street to permit passage of the patrol car and other traffic. When they did not respond to verbal

directions, Sheriff Thrasher and his deputies began walking north on Indiana Avenue from 4th Street toward Kirkwood Avenue to clear the street for automobile traffic. The persons who were in the street then moved to the curbs on either side of Indiana Avenue, joining the large number of spectators that had gathered along both sides of the street.

After the street had been cleared and as he was passing along the east curb of Indiana Avenue near the front entrance to Bryan Hall, Sheriff Thrasher arrested the defendant, Gregory Hess, for disorderly conduct. The evidence presented in City Court established that Hess was standing off the street on the eastern curb of Indiana Avenue slightly to the north of the walkway leading to the front entrance of Bryan Hall (which entrance had by this time been cleared of any obstructions). According to Sheriff Thrasher, he heard Hess use the word "fuck" in a loud voice and he immediately arrested him for disorderly conduct. He said that this was the first time he had heard that word used on the particular occasion.

The evidence presented in City Court established (and Judge David McCrea found as a matter of fact) that Hess used the phrase: "We'll take the fucking street again," or: "We'll take the fucking street later." Two female witnesses, Bernice Slutsky and Lela Donnelly (both students at Indiana University), were in the immediate vicinity. They testified that they heard Hess use the phrase (i.e., with the word "fucking" modifying street) and witnessed Hess' immediate arrest; that Hess spoke in a loud voice, but not any louder than the other persons around them; that they were not

offended by Hess' use of the word "fucking"; that many other people in the crowd were using that and similar words before and after the Hess arrest; that Hess did not appear to be exhorting the crowd to go back into the street; that he was facing the crowd and not the street when he uttered the phrase; and that his statement did not appear to be addressed to any particular person or group.

Dr. Owen Thomas, Professor of English at Indiana University, testified as an expert witness on language usage, and English slang usage in particular. He testified that the word "fuck" has, in various forms, been a part of the English language for hundreds of years; that the word (or derivations of the word) is used in many contexts for many purposes; that its use as a method of denoting sexual intercourse is limited and that it is more commonly used as an expletive to show disgust, to relieve tension, to shock others, or to demonstrate group identification or membership. He was of the opinion that such expression does not reflect a particularly imaginative use of language. He noted that the use of the word is not considered particularly offensive among certain groups, such as college students. He did acknowledge, however, that the majority of the citizens in the Bloomington community would consider the expression used by Mr. Hess to be offensive, but that he did not believe that it would have been offensive to persons in the crowd in front of Bryan Hall in the particular circumstances. Dr. Thomas added that in such circumstances use of the word alone or in a phrase such as that uttered by Hess may serve as a means of avoiding the acting out of feelings. In other words, such an expression

may function as a "safety valve" by which the speaker may avoid violent or other antisocial behavior. Dr. Thomas also testified that the use of the word, either alone or in a phrase such as that uttered by Hess, may be the person's way of identifying himself with one group of persons and disassociating himself from another group. That is, the phrase used by Hess may have been his way of signifying his identification with the persons who had gathered in the street and his opposition to what Sheriff Thrasher and his deputies were doing in clearing the street.

Sheriff Thrasher testified that he was offended by Hess' expression, and that he did not interpret the expression as being directed personally at him.

## SUMMARY OF ARGUMENT

The trial court's conclusion that, with or without the vulgar modifier, appellant's statement "has a tendency to lead to violence" and therefore violated Section 10-1510 reflects an unconstitutional application of the statute to appellant's conduct. Since speech per se is the basis for the conviction, the court would have had to determine that, under the circumstances, such speech fell outside the protections of the First Amendment.

Since the court was concerned with the violence-producing potential of the appellant's words, the standard by which such potential must be measured under the First Amendment is that of "clear and present danger." In other words, for the court lawfully to have found appellant's speech to fall within the proscriptions of the disorderly conduct statute, the record would have to support a finding that appellant's statement (1) was directed to inciting or producing imminent lawless action, and (2) was likely to incite or produce such action. The court applied the wrong legal standard and this alone should lead to reversal of appellant's conviction.

Moreover, the evidence is insufficient to support a conviction for disorderly conduct. The appellant's phrase: "We'll take the fucking street later (or again)" itself belies any imminent danger. Also, the record shows that, under the circumstances, appellant's statement carried not the slightest risk of producing any lawless action by others. In addition, the Sheriff made his decision to arrest appellant not on the basis of the danger potential of the appellant's statement, but because he heard the single word "fuck."

Apart from the "clear and present danger" standard, the only other situations in which criminal sanctions may be applied to speech are where (1) speech is obscene (clearly appellant's phrase would not have aroused anyone's prurient interest); (2) speech amounts to "fighting words" (the record established that appellant's words were not directed toward any person, and no one, including the Sheriff, was in any way angered by the statement); or (3) speech amounts to a public nuisance by invading privacy interests in a substantially intolerable manner (the circumstances as outlined in the statement of facts do not permit any such finding in this case).

Excluding constitutional considerations, the evidence in the instant case was insufficient to support a finding on all the essential elements of disorderly conduct. This Court recently has emphasized that, for purposes of Section 10-1510, conduct must be analyzed in context. Here the record shows that appellant (1) spoke no louder than anyone else in the crowd; (2) at the time of his statement he was standing lawfully on the curb; (3) that the "neighborhood" had been disturbed by several events long before his statement; (4) that no one, save the Sheriff, took any offense. Under the circumstances, appellant's speech did not disturb, nor by its nature would it have disturbed, the neighborhood around Bryan Hall on the date and at the time in question.

Section 10-1510 is also void on its face due to overbreadth and vagueness. Under this statute a person may be found guilty of disorderly conduct in forty-eight to fifty-one different ways. The statute, inter alia, proscribes acting in a "disorderly manner so as

to disturb the peace and quiet of a neighborhood . . . by unusual noise" or by "offensive behavior." These terms are incapable of precise definition. There are no standards, either in the statute or in the decisions of this Court, by which a policeman may determine whether a person is "disorderly" or making "unusual noise." Such lack of specificity invites arbitrary and discriminatory enforcement not subject to meaningful control by trial and appellate courts. Also, there is nothing in the statute that would prevent its application to constitutionally protected activity such as speech that may, by some standard known only to a particular police officer, be deemed "offensive" or "unusual." Section 10-1510 furnishes a ready vehicle for the suppression of free speech. It creates an impermissible "chilling" effect on the exercise of rights under the First Amendment and is unconstitutional on its face.

Finally, the "boilerplate" pleadings employed by the State to initiate disorderly conduct prosecutions in Monroe County do not give accused persons adequate notice of the charges against them. Due to the multiple combinations of disorderly conduct possible under Section 10-1510, a pleading which merely charges an accused with all combinations under the statute violates a fundamental principle of due process of law—i.e., such an affidavit cannot possibly give adequate notice of the charges. The State's pleading is tantamount to handing a person forty-eight (or fifty-one) separate statutes and asking him to guess which one (or which combination) the State will seek to invoke at trial. Such pleadings are obviously defective and the appellant's Motion to Quash should have been sustained.

ARGUMENT

I Section 10-1510 is Unconstitutional As Applied to the Appellant.

It is important at the outset to note that in light of the trial court's response to his Motion for Clarification of Judgment, appellant's conviction rests on speech per se, i.e., his use of the phrase "We'll take the fucking street later (or again)" in the context of the situation existing at the time of his arrest. Quite recently the Supreme Court of the United States has had occasion to review and re-emphasize the limited circumstances in which governmental interests in the maintenance of public order may outweigh the individual's right of free speech guaranteed by the First Amendment to the Constitution of the United States. Cohen v. California (1971) 403 U.S. 15, 91 S.Ct. 1780, 29 L.Ed.2d 233.

As summarized in Cohen, a person may not be subjected to criminal sanction for his oral or written remarks unless his speech: (1) is obscene within the standard of Roth v. United States (1957), 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498; (2) amounts to "fighting words" within the meaning of Chaplinsky v. New Hampshire, (1942) 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031 ( and as explained in Cohen, 403 U.S. at 20); (3) amounts to a public nuisance in that "substantial privacy interests are being invaded in an essentially intolerable manner. . . ." 403 U.S. at 21;[1] or (4) advocates law violation or use of force and "is directed to inciting or producing

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[1] Cf. Williams v. District of Columbia, (1969) 419 F.2d 638, 646 (D.C. Cir.).

imminent lawless action and is likely to incite or produce such action . . . ." Brandenburg v. Ohio, (1969) 395 U.S. 444, 447-48, 89 S.Ct. 1827, 1829-30, 23 L.Ed.2d 430, 434. See also Terminiello v. City of Chicago, (1949) 337 U.S. 1, 4, 69 S.Ct. 894, 896, 93 L.Ed. 1131, 1134 (to sustain a conviction speech must be shown "likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.").

The latter of these criteria assumes major importance on this appeal since the trial court found that appellant's statement "has a tendency to lead to violence" regardless of use of the word "fucking." (Emphasis supplied.) Unless the record shows the State has met its burden of showing that appellant's words constituted a "clear and present danger" within the meaning of the Brandenburg standard, his conviction cannot be sustained.[2] It will be demonstrated below that the court did not apply the correct constitutional standard.

Although the trial court's response to appellant's motion for clarification necessarily implies a finding that the evidence was insufficient to support a finding of guilt on any other statutory or constitutional ground, appellant will demonstrate that there is absolutely no legal basis upon which his conviction of disorderly conduct can be affirmed by this Court.

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[2] Moreover, the trial court's use of the present tense ("has") and the finding as to the irrelevance of the vulgar modifier suggests a conclusion that the utterance of the phrase "We'll take the street later (or again)," is sufficient to bring the appellant's speech within the disorderly conduct statute without regard to the circumstances.

A. The Trial Court's Finding That Appellant's Statement "Has a Tendency to Lead to Violence" Is Not Adequate to Sustain A Conviction for Disorderly Conduct In View of the Constitutional Standard Requiring Proof of "Clear and Present Danger."

The trial court's finding that the appellant's statement "has a tendency to lead to violence" reflects this Court's dictum in Whited v. State, (1971) _____ Ind. _____, 269 N.E.2d 149, 152 that:

> "[D]ue to First Amendment freedoms a statute such as the one here in question must be read to require that any prohibited speech related activity must be proscribed because it has a tendency to lead to violence." (Emphasis by the Court.)

The dictum cannot, standing alone, be accepted as an accurate statement of First Amendment standards. First, the quoted language is premised upon the Court's acceptance of the constitutional analysis expressed in Williams v. District of Columbia, 419 F.2d 638, 646 (D.C. Cir. 1969): "[A] breach of the peace is threatened either because the language creates a substantial risk of provoking violence, or because it is, by 'contemporary community standards,' so grossly offensive to members of the public who actually overhear it as to amount to a nuisance." (Emphasis supplied). Second, both Whited and Williams are limited by the constitutional principle that before the State may impose criminal sanctions for the type of utterance here involved it must show that appellant's statement was "likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest." Terminiello v. City of Chicago, (1949) 337 U.S. 1, 4, 69 S.Ct. 894, 896, 93 L.Ed. 1131, 1134. More recently the Supreme Court has restated the applicable test as follows:

> "[C]onstitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action. . . . A statute which fails to draw this distinction impermissibly intrudes upon the freedom guaranteed by the First and Fourteenth Amendments. It sweeps within its condemnation speech which our Constitution has immunized from governmental control."

Brandenburg v. Ohio, (1969) 395 U.S. 444, 447-48, 89 S.Ct. 1827, 1829-30, 23 L.Ed.2d 430, 434 (emphasis supplied). Likewise, any application of a statute such as Section 10-1510 without proper regard to this standard is unconstitutional.

The trial court's finding suggests that the mere use of the words by the appellant would have a tendency to lead to violence. But a finding of mere "tendency", even if it could be supported by the evidence, would be insufficient to overcome the appellant's rights under the First Amendment. Bridges v. California, (1941) 314 U.S. 252, 273, 62 S.Ct. 190, 198, 86 L.Ed. 192, 208: "[N]either 'inherent tendency' nor 'reasonable tendency' [to bring about a substantive evil] is enough to justify a restriction of free expression."

In order to sustain a conviction under the danger standard when, as here, the conduct alleged to be criminal is speech per se, the State must show (1) that appellant advocated use of force or law violation; and (2) that such advocacy was directed to inciting or producing imminent lawless action; and (3) that such advocacy was likely to produce such action under the circumstances. A failure of proof on any one of these elements must lead to reversal of appellant's conviction.

As to the first element, the appellant's statement, "We'll

take the fucking street later (or again)" was uttered in an emotive sense rather than as an incitement of others to go back into the streetin violation of police orders. It was, at most, an exercise of false bravado and an expression of distaste for the tactics employed by the police and university officials in handling the situation. Appellant made no move toward the street as he spoke nor did he repeatedly urge others to action.

Dr. Thomas testified that speech often functions as a safety valve. Record p. 5. Men will be less inclined to resort to violence if they are free to express themselves in strong language and thereby discharge feelings of anger and frustration into the air. This important cathartic effect of speech has been confirmed in psychological studies. See Seymour Feshbach, The Function of Aggression and The Regulation of Aggressive Drive, 71 Psychological Review 257 (1964); John W. Thibaut and John Coules, The Role of Communication in the Reduction of Interpersonal Hostility, 47 Journal of Abnormal and Social Psychology 770 (1952): Leonard Berkowitz, Some Factors Affecting the Reduction of Overt Hostility, 60 Journal of Abnormal and Social Psychology 14 (1960). In Cohen v. California, supra, the Supreme Court recognized the First Amendment status of emotive speech:

> [M]uch linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech has little or no regard for the emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated." 403 U.S. at 26, 91 S.Ct. at 1788, 29 L.Ed.2d at 294.

Second, the record is devoid of any evidence of appellant's intent to incite or produce imminent lawless action as required by the Brandenburg formula. Even if appellant's statement could be construed as advocating law violation (which alone is insufficient to sustain a conviction), he qualified his statement with "later" or "again." Record p. 4. Such a qualification belies any purpose to produce imminent lawless action; it was not a call to action, but more of an admonition to others to abide by the orders of the police on the immediate occasion. "Later" or "again" could not, under the circumstances, have meant "now!" The appellant's statement carried with it an assurance that its message would be tempered by the passage of time. "[N]o danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion." Whitney v. California, (1927) 274 U.S. 357, 377, 47 S.Ct. 641, 649, 71 L.Ed. 1095, 1106 (Brandeis concurring).

Finally, there is no proof whatsoever that even if defendant advocated law violation, and even if such advocacy was directed to inciting or producing imminent lawless action, that such conduct was likely to incite or produce such action. The word "likely" implies probability and certainly more than a mere tendency. The factors negating any such likelihood are: (1) The Sheriff based his arrest decision not on fear or apprehension of imminent lawless action, but on the appellant's use of a single word that he claimed was offensive to him. Record p. 4. (2) The crowd was noisy and the appellant's words were overheard only by those in the immediate

vicinity. Record pp. 4-5. (3) Persons who did overhear the appellant did not interpret his words as an exhortation to go back into the street. Id. (4) There was no urging or "stirring up" of a hostile crowd. The appellant's words were never repeated. In fact, no one was paying attention to him. Id.

In sum, there is a total absence of proof as to any actual or potential danger either intended, threatened or risked by appellant's words. Even applying the trial court's erroneous statement of the law, the evidence is insufficient to support a conviction of disorderly conduct.

B. There Is No Other Constitutional or Statutory Basis Upon Which Appellant's Conviction of Disorderly Conduct May Be Sustained.

1. Elements of Proof Essential to a Conviction for Disorderly Conduct.

To sustain a disorderly conduct conviction the State must show (and the trier of fact must find beyond a reasonable doubt) that the accused:

(1) acted

(2) in a loud, boisterous or disorderly manner[3]

---

[3] It would seem that by application of the doctrine of ejusdem generis that the broad term "disorderly" must be read as referring to conduct that is "loud or boisterous" in manner. This interpretation seems to have been accepted by the Court in Whited, supra, wherein Judge Hunter, writing for the majority, omitted reference to the term "disorderly" when stating the necessary elements of the offense:

> "As indicated by the statute there must exist under the facts of this case evidence of probative value that appellant
>
> (1) acted in a loud, boisterous manner
> (2) so as to disturb the peace and quiet of the neighborhood." 269 N.E.2d at 150.

(3) so as to [i.e., cause]

(4) disturb the peace and quiet of any neighborhood or family

(5) by

(6) loud or unusual noise or by tumultuous or offensive behavior, threatening, traducing, quarreling, challenging to fight or fighting.[4]

The gravamen of the offense is the disturbance of the peace and quiet of a neighborhood or family. Romary v. State, 223 Ind. 667, 671, 64 N.E.2d 22, 23 (1945). In Whited, this Court added a judicial gloss explaining the harm contemplated by the statute ruling that proof of loud, boisterous conduct "which by its nature is offensive in the context in which it is committed is required to support a conviction under the statute. . . ." 269 N.E.2d at 151 (emphasis by the court). In other words, the prosecution must, at the very least, be able to prove "that an accused's actions were possessed of loud and offensive characteristics in the setting in which they were done." Id. Where, as in the instant case, speech per se is the basis for the charge and conviction, "due to First Amendment freedoms a statute such as the one here in question must be read to require that any prohibited speech related activity must be

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3] cont.
A broader interpretation of "disorderly" would surely render the statute void for vagueness and overbreadth. See pp. , infra.

4] It is significant that in the statement of the necessary elements of disorderly conduct in Whited, supra note 3, the Court omitted any reference to this last portion of the statute. From this omission it may be inferred that the Court regards it as surplusage. See Judge Prentice' dissent: "The acts deemed objectionable are expressed in terms that are not only overlapping, if not actually synonymous, but also relative." 269 N.E.2d at 153.

proscribed because it has a tendency to lead to violence." 269 N.E.2d at 152 (emphasis by the Court).

Applying these criteria, to sustain a conviction for disorderly conduct in the instant case the State would have had to prove that the defendant spoke (1) in a loud manner; (2) that his words, in the context in which they were uttered, would have disturbed the peace and quiet of the neighborhood around Bryan Hall on the date and at the time in question; (3) that such words were offensive in the context of their use; and (4) that such words had a tendency to lead to violence. The necessary "clear and present danger" caveat to this latter element has been developed in the preceding section of this brief. Likewise, all of the elements of disorderly conduct must be analyzed in light of the First Amendment principles expressed by the United States Supreme Court in Cohen v. California, supra. Insufficient evidence as to any one of the above listed elements will require a reversal of the judgment of the trial court. It has already been demonstrated that, as a matter of law, the State has failed to prove the fourth element noted above.

2. The Record Is Devoid of Any Evidence That Could Serve to Bring Appellant's Conduct Within Any Permissible Application of Section 10-1510.

The record shows that the "neighborhood" around Bryan Hall (the nature of which this Court may take judicial notice as being non-residential) was "disturbed" long before his utterance: first, by the presence of picketers and demonstrators; second, by the arrival of a large number of police officers and Sheriff's deputies;

third, by the gathering of 200-300 spectators; fourth, by the presence of 100-150 persons in the middle of Indiana Avenue after the arrest of two students not connected with the appellant; and fifth, by the verbal responses of the demonstrators and spectators as the street was cleared by the Sheriff and his deputies. Record pp. 3-5. It was in this context that Hess uttered the phrase "We'll take the fucking street later [or again]." The words were spoken in a loud voice, but no louder than many other voices in the crowd of 200-300 persons.

a. Defendant Was Not Loud Within the Meaning of Section 10-1510.

The word "loud" as used in the statute must be interpreted with reference to the circumstances. A crowd at a football game and many other public gatherings certainly can be termed "loud," but an individual who seeks to yell above the general noise level of such a crowd may even be regarded with favor by others for his vocal support of his team or his candidate. Obviously the mere fact that appellant spoke loudly while others too were speaking loudly is not sufficient to form the basis for his conviction.

b. The Neighborhood Was Not Disturbed by Appellant's Words.

There was considerable "disturbance" of the neighborhood well before appellant's utterance, and which was caused by no activity of his. In Whited, this Court upheld the disorderly conduct conviction of a person who loudly thrust verbal epithets at police officers who had come to his home to conduct a search. The Court found it significant that

> "This conduct occurred in an area of residences that prior to such acts had from all that is in the record, been devoted to normal and usual urban pursuits. The mood that existed was broken." 269 N.E.2d at 151 (emphasis supplied).

Here, of course, appellant's utterance was fully consistent with the existing mood, and had no additional disturbing effect upon the neighborhood. Therefore, a finding of the harm contemplated by the statute (i.e., the actual or probable disturbance of a neighborhood) is not established by the evidence.

c. Appellant's Words Were Not Offensive in the Context in Which They Were Uttered.

Sheriff Thrasher made it clear that it was not the volume of defendant's utterance that he considered offensive, but the content, i.e., the use of the word "fuck" as a single expletive or the word "fucking" as a modifier. He certainly did not perceive appellant's speech as threatening any clear and present danger of lawless action by others in the crowd.

The United States Supreme Court very recently has reversed on First Amendment grounds the conviction (under a statute similar to Section 10-1510) of a defendant who wore a jacket bearing the words "Fuck the Draft" in the corridor of the Los Angeles Courthouse. Cohen v. California, (1971) 403 U.S. 15, 91 S.Ct. 1780, 29 L.Ed.2d 279. The California courts had upheld the conviction on the ground that such a display amounted to "offensive conduct" under their statute which, as interpreted by those courts, meant "behavior which has a tendency to provoke others to acts of violence or to in turn disturb the peace." (Emphasis in the original.)

The Supreme Court found, first of all, that the conviction

could not be supported on the basis of the state's interest in preserving the decorous atmosphere of the courthouse. There was nothing in the statute that would inform persons that, in its applications, distinctions were to be made on the basis of location. While the expression was quite likely to have been distasteful to some of the persons present, the Supreme Court found that fact insufficient to justify curtailing Cohen's chosen mode of expression:

> "While this Court has recognized that government may properly act in many situations to prohibit intrusion into the privacy of the home of unwelcome views and ideas which cannot be totally banned from the public dialogue, e.g., Rowan v. Postmaster General, 397 U.S. 728 (1970), we have at the same time consistently stressed that we are often 'captives' outside the sanctuary of the home and subject to objectionable speech. Id. at 738. The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is, in other words, dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner . . . . While it may be that one has a more substantial claim to a recognizable privacy interest when walking through a courthouse corridor than, for example, strolling through Central Park, surely it is nothing like the interest in being free from unwanted expressions in the confines of one's own home." 403 U.S. at 21-22, 91 S.Ct. at 1786, 29 L.Ed.2d at 292 (emphasis supplied).

Here the State produced only the Sheriff who testified that he was offended by appellant's language. In contrast, the defense produced expert testimony as well as two college age female witnesses who overheard the appellant and who testified that such language was not offensive in the context and in the company in which it was used. Certainly Sheriff Thrasher, during the performance of his official police duties, cannot assert "a recognizable privacy interest" paramount to the appellant's right of free expression.

As formulated by the Court in Cohen, the issue there was

> "[W]hether California can excise, as 'offensive conduct,' one particular scurrilous epithet from the public discourse, either upon the theory of the court below that its use is inherently likely to cause violent reaction or upon a more general assertion that the States, acting as guardians of public morality, may properly remove this offensive word from the public vocabulary." 403 U.S. at 22, 91 S.Ct. at 1787, 29 L.Ed.2d 292.

In its decision the Court rejected both of these theories holding that

> "[A]bsent a more particularized and compelling reason for its actions, the State may not, consistently with the First and Fourteenth Amendments, make the simple public display here involved of this single four-letter expletive a criminal offense." 403 U.S. at 26, 91 S.Ct. at 1789, 29 L.Ed.2d at 294-95.

No such "particularized and compelling reason" has been (nor can be) asserted here by the State. It follows that the use of the word "fucking" as a modifier in the sentence uttered by the appellant cannot, in the circumstances of this case, sustain a disorderly conduct conviction in light of the rationale of Cohen and Whited. As the Supreme Court noted in Cohen:

> "We cannot lose sight of the fact that, in what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a privilege, . . . fundamental societal values [achieved through the process of open debate] are truly implicated. That is why '[w]holly neutral futilities . . . come under the protection of free speech as fully as to Keats' poems or Donne's sermons' . . . and why 'so long as the means are peaceful, the communication need not meet standards of acceptability. . .' [citations omitted]." 403 U.S. at 25, 91 S.Ct. at 1788, 29 L.Ed.2d 294.

As indicated by the record, the function of appellant's language was to display his emotions and feelings rather than to communicate ideas. The use of emotive language varies significantly with ethnic, cultural, regional, social class, and age groupings. See generally J. Hertzler, A Sociology of Language, Random House, 1965.

The work of a peace officer necessarily cuts across group lines and brings him in contact with different elements of the population. That the norms, values, modes of expression and speech of some groups will differ from his own, and on occasion offend him, may be unfortunate. In a pluralistic society, however, that fact is not sufficient in itself to criminalize the behavior or speech in question. As the Court observed in Cohen:

> "[W]hile the particular four-letter word being litigated here is perhaps more distasteful than most others of its genre, it is neverthless true that one man's vulgarity is another's lyric. Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual. 403 U.S. at 25, 91 S.Ct. at 1788, 29 L.Ed.2d at 294.

Cohen also precludes the State from urging that the expression used by the defendant is "offensive" because it is obscene:

> "Whatever else may be necessary to give rise to the States" broader power to prohibit obscene expression, such expression must be, in some significant way, erotic. Roth v. United States, 354 U.S. 476 (1957). It cannot plausibly be maintained that this vulgar allusion to the Selective Service System would conjure up such psychic stimulation in anyone likely to be confronted with Cohen's crudely defaced jacket. Id. at , 91 S.Ct. at , 29 L.Ed.2d

In the present case it is equally implausible that anyone overhearing the alleged remark of the appellant would reasonably have understood it to suggest sexual intercourse in or with, the street, nor would prurient interests at all be stimulated by the mere hearing of the word. The adjectival form of this Middle English verb is in common usage in the United States as an intensifier and has, in this form, no erotic meaning.

d. The Evidence Does Not Support a Finding That Appellant's Statement Amounted to "Fighting Words."

The only remaining theory upon which the State may seek to sustain this conviction is that the use of the word or phrase by the appellant constituted "fighting words" punishable under the rationale of Chaplinsky v. New Hampshire, (1942) 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031.

This approach also has been closed by the United States Supreme Court in Cohen:

> "While the four-letter word displayed by Cohen in relation to the draft is not uncommonly employed in a personally provocative fashion, in this instance it was clearly not "directed to the person of the hearer." Cantwell v. Connecticut, 310 U.S. 296, 309 (1940). No individual actually or likely to be present could reasonably have regarded the words on appellant's jacket as a direct personal insult . . . . There is . . . no showing that anyone who saw Cohen was in fact violently aroused or that appellant intended such a result." 403 U.S. at 20, 91 S.Ct. at 1785-86, 29 L.Ed.2d at 291.

Similarly, appellant's remark clearly was not directed to the person of the Sheriff nor to any other listeners. Neither did the Sheriff interpret the remark as a direct insult nor could any other individual reasonably have so interpreted it. There was not the slightest proof that the defendant intended or even risked such a result. Mere annoyance of the Sheriff may not form the basis of a criminal conviction. Coates v. City of Cincinnati, (1971) 402 U.S. 20, 91 S.Ct. 1785, 1786, 29 L.Ed.2d 291.

II SECTION 10-1510 IS UNCONSTITUTIONAL ON ITS FACE BECAUSE OF VAGUENESS AND OVERBREADTH

A. General Principles

Appellant recognizes the general rule that statutes are presumed to be constitutional and that doubts are to be resolved in favor of validity. State v. Clark, (1966) 247 Ind. 490, 217 N.E.2d 588. This general rule must give way when a penal law cannot meet the Constitutional requirements of specificity and permissible scope of application. This is particularly true where, as here, we are faced with "the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application." N.A.A.C.P. v. Button, (1963) 371 U.S. 415, 432-33, 83 S.Ct. 328, 9 L.Ed.2d 405. See generally Amsterdam, The Void-for-Vagueness Doctrine in the Supreme Court, 109 U. Pa. L. Rev. 67 (1960); Comment, The First Amendment Overbreadth Doctrine, 83 Harv. L. Rev. 844 (1970).

The so-called vagueness doctrine is a combination of overlapping, but distinct concepts reflecting different constitutional principles, vagueness or indefiniteness, and overbreadth:

1. Vagueness

The concept of vagueness or indefiniteness rests on the constitutional principle that procedural due process requires fair notice and proper standards for adjudication. The primary issues involved are whether the provisions of a penal statute are sufficiently definite to give reasonable notice of the prohibited conduct to persons who wish to avoid its penalties and to apprise judge

and jury of standards for the determination of guilt. Coates v. City of Cincinnati, (1971) 402 U.S. 611, 91 S.Ct. 1686, 29 L.Ed.2d 214; Landry v. Daley, (1968) 280 F. Supp. 938, 951 (N.D. Ill.), rev'd sub nom. on other grounds, Boyle v. Landry, (1971) 401 U.S. 77; Collings, Unconstitutional Uncertainty--An Appraisal, 40 Cornell L. Rev. 195 (1955). If the statute is so obscure that men of common intelligence must necessarily guess at its meaning and differ as to its applicability, it is unconstitutional. Bagget v. Bullitt (1964) 377 U.S. 360, 84 S.Ct. 1316, 12 L.Ed.2d 377; Lanzetta v. New Jersey, (1939) 306 U.S. 451, 453, 59 S.Ct. 618, 83 L.Ed. 888; Connally v. General Construction Co., (1926) 269 U.S. 385, 391, 46 S.Ct. 126, 70 L.Ed. 322. This Court recently has stated the test as follows:

> "[A] statute is not unconstitutional by reason of indefiniteness if it is capable of intelligent construction and interpretation by persons who possess but ordinary comprehension, if its language conveys an adequate description of the evil intended to be prohibited."

Stanley v. State (1969), Ind. , 245 N.E.2d 149, 152. But see Grody v. State, Supreme Court of Indiana, No. 1270 S294, February 10, 1972. However, "the freedom of speech and of the press which are secured by the First Amendment against abridgment by the United States, are among the fundamental personal rights and liberties which are secured to all persons by the Fourteenth Amendment against abridgment by a State." Thornhill v. Alabama, (1940) 310 U.S. 88, 95, 60 S.Ct. 736, 740, 84 L.Ed. 1093. The Supreme Court of the United States time and again has admonished state legislatures and courts that "standards of permissible statutory vagueness are strict in the area of free expression." See, e.g., Keyishian v. Board of Regents, (1967) 385 U.S. 589, 604, 87 S.Ct. 675, 684, 17 L.Ed.2d 629.

2. Overbreadth

In a recent case before a three judge panel in the United

States District Court for the Northern District of Illinois, Judge Will accurately and succinctly described the overbreadth aspect of the void for vagueness doctrine:

> "The concept of overbreadth . . . rests on principles of substantive due process which forbid the prohibition of certain individual freedom. The primary issue is not reasonable notice or adequate standards, although these issues may be involved. Rather the issue 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. Frequently, the resolution of this issue depends upon whether the statute permits police and other officials to wield unlimited discretionary powers in its enforcement [citations omitted]. 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."

Landry v. Daley, supra at 951-52; Coates v. City of Cincinnati, supra; Thornhill v. Alabama, supra at 97-98. See also Comment, 83 Harv. L. Rev., supra at 852-58, and authorities cited therein.

3. The Primary Vice of a Vague or Overbroad Statute Is Its Chilling Effect Upon the Exercise of First Amendment Rights.

In summary, a penal statute is unconstitutional on its face if it either (1) fails to give fair notice of what conduct is forbidden; (2) invites arbitrary and discriminatory law enforcement; or (3) overreaches federally protected freedoms of speech, free movement and assembly Coates v. City of Cincinnati, supra. Any one or any combination of these factors in a penal statute is sure to have a deterrent effect beyond that necessary to fulfill a legitimate state interest in the maintenance of public order. Rather than chance prosectution, citizens will tend to refrain from speech and assembly that might come within the ambit of the statute. Dombrowski v.

Pfister, (1965) 380 U.S. 479, 489-96, 85 S.Ct. 1116, 14 L.Ed.2d 22. N.A.A.C.P. v. Button, supra at 432-33; Thornhill v. Alabama, supra at 97-98. Such a "chilling" effect upon the exercise of these rights is impermissible under the First Amendment, and the major reason for invalidating a substantially overbroad law is to end its deterrence of constitutionally preferred activity. Dombrowski v. Pfister, supra at 494-96; N.A.A.C.P. v. Button, supra at 437; Thornhill v. Alabama, supra at 101-106.

The First Amendment was designed not only to protect the freedoms of speech and assembly, but also to encourage their use. Consequently, as with the requirement of definiteness, the requirement of permissibly narrow scope must be strictly observed when a statute places any possible limitation upon First Amendment rights. Landry v. Daley, supra at 952, citing Keyishian v. Board of Regents, supra at 603-04; Cox v. Louisiana, (1965) 379 U.S. 536, 551-52, 85 S.Ct. 476, 13 L.Ed.2d 487; Edwards v. South Carolina, (1963) 372 U.S. 229, 237-38, 83 S.Ct. 680, 9 L.Ed.2d 697. Such scrutiny is necessary to provide a buffer between the valid exercise of the police power by the state and excessive restriction of the free dissemination of ideas.

> "These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions . . . . Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity."

N.A.A.C.P. v. Button, supra 371 U.S. at 433, 9 L.Ed.2d at 418.

B. The Provisions of Section 10-1510 Are Impermissibly Broad.

The elements of the offense of disorderly conduct have been outlined above. Supra p. 22. The statute consists of a series of disjunct words and phrases and a person may be found guilty of disorderly conduct in at least forty-eight separate ways.[5] In its broadest context, the statute prescribes punishment for a person who acts in "a . . . disorderly manner so as to disturb the peace and quiet of a neighborhood . . . by unusual noise . . ." or who acts in "a . . . disorderly manner so as to disturb the peace and quiet of a neighborhood . . . by offensive behavior."[6] There are

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[5] This may be illustrated by taking all the disjoined words in the statements of the elements of disorderly conduct and substituting them in sequence.

| | I (manner) | II (disturb peace and quiet of) | III (by) |
|---|---|---|---|
| 1. | Loud | family | loud noise |
| 2. | Loud | family | unusual noise |
| 3. | Loud | neighborhood | loud noise |
| 4. | Loud | neighborhood | unusual noise |
| 5. | Loud | family | tumultuous behavior |
| 6. | Loud | neighborhood | tumultuous behavior |
| 7. | Loud | family | offensive behavior (threatening) |
| 8. | Loud | neighborhood | offensive behavior (threatening) |
| 9. | Loud | family | offensive behavior (traducing) |
| 10. | Loud | neighborhood | offensive behavior (traducing) |
| 11. | Loud | family | offensive behavior (quarreling) |
| 12. | Loud | neighborhood | offensive behavior (quarreling) |
| 13. | Loud | family | offensive behavior (challenging to fight) |
| 14. | Loud | neighborhood | offensive behavior (challenging to fight) |
| 15. | Loud | family | offensive behavior (fighting) |
| 16. | Loud | neighborhood | offensive behavior (fighting) |

If "boisterous" and "disorderly" are substituted for "loud", the forty-eight combinations will appear. This analysis assumes that the phrase "offensive behavior" is limited to acts of "threatening, traducing, quarreling, challenging to fight or fighting." However, this Court's opinion in Whited v. State, supra, suggests that "offensive behavior" may have a broader meaning. 269 N.E.2d at 151. Such an interpretation would increase the number of potential separate offenses within the statute to fifty-one.

no standards in the statute that would serve to protect a citizen who in the subjective view of some policeman may be "disorderly" because he is making "unusual noise" or is engaging in "offensive behavior", even though he may in fact be exercising his constitutional right of free speech. Coates v. City of Cincinnati, supra; Terminiello v. Chicago, (1949) 337 U.S. 1, 69 S.Ct. 894, 93 L.Ed. 1131; cf. Grody v. State, Supreme Court of Indiana, No. 1270 S294, February 10, 1972. Indeed, this problem has been exacerbated by this Court's holding in Whited v. State, supra, indicating that actual disturbance of a neighborhood or family need not be shown, but merely proof of conduct which "by its nature" would have a disturbing effect.

The words "loud" and "disorderly" and the phrases "unusual noise" and "offensive behavior" are incapable of precise application and, as used in the statute, furnish ready vehicles whereby legitimate attempts freely to express and disseminate ideas may be inhibited. Since there are no standards to guide his decision, under Section 10-1510 a policeman could determine that a person is "loud" or "disorderly" because he is making "unusual noise" or is behaving offensively by engaging in constitutionally protected activity such as speaking in a public park or playing phonograph records on a public street. Kunz v. New York, (1951) 340 U.S. 290, 71 S.Ct. 312, 95 L.Ed. 280; Cantwell v. Connecticut, (1940) 310 U.S. 296, 308, 60 S.Ct. 900, 84 L.Ed. 1213. Or the policeman, as in the instant case, may simply

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6] The statute also proscribes acting in a "loud . . . manner so as to disturb the peace and quiet of a neighborhood . . . by unusual noise" or acting in a "loud . . . manner so as to disturb the peace and quiet of a neighborhood . . . by offensive behavior."

be annoyed by the actions of the accused:

> "The [state] is free to prevent people from blocking sidewalks, obstructing traffic, littering streets, commiting assaults, or engaging in countless other forms of anti-social conduct. It can do so through the enactment and enforcement of [statutes] directed with reasonable specificity toward the conduct to be prohibited . . . . It cannot constitutionally do so through the enactment and enforcement of [a statute] whose violation may entirely depend upon whether or not a policeman is annoyed."

Coates v. City of Cincinnati, (1971) 402 U.S. at 614, 91 S.Ct. at 1688, 29 L.Ed. at 217. Cf. Whited v. State, supra.

Moreover, public disturbance, intolerance or animosity cannot be the basis for abridgment of First Amendment freedoms of speech and assembly. Coates v. City of Cincinnati, supra at 615, 91 S.Ct. at 1689, 29 L.Ed.2d at 218. A legitimate exercise of free speech might often be deemed by some persons in a neighborhood to be "loud" or "unusual noise" or "offensive." The statutory requirement that such speech disturb the peace and quiet of a neighborhood or family does not preserve its constitutionality:

> "[A] function of free speech under our system of government is to invite dispute. It may well best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and pre-conceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech . . . is . . . protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far and above public inconvenience, annoyance, or unrest . . . . There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups."

Terminiello v. Chicago, (1949) 337 U.S. 1, 4-5, 69 S.Ct. 894, 896, 93 L.Ed. 1131, 1134-35, quoted with approval in Edwards v. South

Carolina, (1963) 372 U.S. 229, 237-38, 83 S.Ct. 680, 9 L.Ed.2d 697, 703. Cf. Coates v. City of Cincinnati, supra at 615, 91 S.Ct. at 1686, 29 L.Ed. at 218: "The First and the Fourteenth Amendments do not permit a State to make criminal the exercise of the right of assembly simply because its exercise may be 'annoying' to some people."[7]

Certainly the facts of the instant case illustrate that Section 10-1510 is "susceptible of sweeping and improper application," N.A.A.C.P. v. Button, (1963) 371 U.S. 415, 433, 83 S.Ct. 328, 9 L.Ed.2d 405, 418, furnishing in its overbreadth a convenient tool for "harsh and discriminatory enforcement by prosecuting officials, against particular groups deemed to merit their displeasure," Thornhill v. Alabama, (1940) 310 U.S. 88, 97-98, 60 S.Ct. 736, 742, 84 L.Ed.2 1093, 1100. It invites arbitrary, autocratic and harassing uses by police, and "it is enough [to render it unconstitutional] that a vague and broad statute lends itself to selective enforcement against unpopular causes." N.A.A.C.P. v. Button, supra, at 435, 83 S.Ct. at , 9 L.Ed.2d at 419.

C. The Language of Section 10-1510 is Unconstitutionally Vague

Broad terms such as "loud", "disorderly", "unusual", and "offensive" do not contain within themselves nor in the context of their use in Section 10-1510 sufficient notice to the citizen of conduct to be avoided. See Baker v. Binder, (1967) 274 F. Supp.

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7] See also Landry v. Daley, supra, 280 F. Supp. at 970-71 ("The legitimate exercise of freedom of speech, press or expression frequently interrupts a state of peace or quiet or interferes with a planned, ordered or regular procedure, state or habit.").

658, 663 (W.D. Ky.). "No one may be required at penalty of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids." Lanzetta v. New Jersey, (1939) 306 U.S. 451, 453, 59 S.Ct. 618, 619, 83 L.Ed. 888, 890. Also "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process. . ." Connally v. General Construction Co., (1926) 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322, 328. A statute is also unconstitutionally vague if it subjects the right of speech or assembly to an unascertainable standard. Coates v. City of Cincinnati, supra.

The terms "loud" and "unusual noise" are synonymous with the term "improper noise" held to render unconstitutionally vague a Chicago disorderly conduct ordinance:

> "The dictionary defines 'improper' in part as 'not in accordance with fact, truth or right procedure,' and 'not in accord with propriety, modesty, good taste or good manners.'[8] The definition of 'noise' includes 'loud, confused or senseless shouting' 'sound' or a sound that lacks agreeable musical quality or is noticeably loud, harsh or discordant,' 'any sound that is undesired or that interferes with something to which one is listening,' or even alternatively 'sound or a sound that is not regarded as unpleasing or that has a pleasing melodious quality' as, for example, 'the noise of heavenly choirs.'
>
> The number of sounds which are constitutionally permitted and protected and which would fall within the proscription of 'improper noise' is infinite. Political campaigns,

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8] "Unusual" is defined in Webster's Third New International Dictionary as follows: "[B]eing out of the ordinary . . . deviating from the normal . . . being unlike others . . . ."

> athletic events, public meetings, and a host of other activities produce loud, confused or senseless shouting not in accord with fact, truth or right procedure to say nothing of not in accord with propriety, modesty, good taste or good manners. The happy cacophony of democracy would be stilled if all 'improper noises' in the normal meaning of the term were suppressed."

Landry v. Daley, (1968) 280 F. Supp. 968, 970 (N.D. Ill.), rev'd sub nom. on other grounds, Boyle v. Landry, (1971), 401 U.S. 77. Cf. Edwards v. South Carolina, (1963) 372 U.S. 229, 83 S.Ct. 680, 9 L.Ed.2d 697; Carmichael v. Allen (1967) 267 F. Supp. 985, 997-99 (D.C. Ga.) (voiding an Atlanta city ordinance reading: "It shall be unlawful for any person to act in a violent, turbulent, quarrelsome, boisterous, indecent or disorderly manner, or to use profane, vulgar or obscene language, or to do anything tending to disturb the good order, morals, peace or dignity of the City.") See also Hunter v. Allen, (1968) 286 F. Supp. 830 (D.C. Ga.). Disorderly conduct statutes similar to Section 10-1510 have also been declared unconstitutional in a number of recent cases. Gardner v. Ceci, (1970) 312 F. Supp. 516 (E.D. Wis.); Pritikin v. Thurman, (1970) 311 F. Supp. 1400 (S.D. Fla.); The Original Fayette County Civic and Welfare League, Inc. v. Ellington, (1970) 309 F. Supp. 96 (E.D. Tenn.); Livingston v. Garmire, (1970) 308 F. Supp. 472 (S.D. Fla.).

Given the uncertainty of the language of Section 10-1510, and the potential for its abuse in the hands of authorities unconcerned with, and perhaps even hostile to the maintenance of an atmosphere in which freedom of expression can thrive, a definite "chilling" effect results. Rather than risk arrest and prosecution, residents of this State may instead surrender through fear their

rights as citizens of the United States. See Thornhill v. Alabama, supra at 97-98, 60 S.Ct. at 742, 84 L.Ed. at 1100. Section 10-1510 does not meet the requirements for constitutional validity. It is not "a precise and narrowly drawn regulatory statute evincing a legislative judgment that certain specific conduct be limited or proscribed" and which is susceptible of evenhanded application." Edwards v. South Carolina, supra at 236, 83 S.Ct. at 680, 9 L.Ed.2d at 702.

For these reasons the disorderly conduct statute should be declared void on its face in that it is both vague and overly broad in violation of the First and Fourteenth Amendments to the Constitution of the United States.

III The Form Affidavit Employed by the State for the Initiation of Disorderly Conduct Prosecutions Are Inadequate to Give an Accused Notice of the Charge Against Him.

Article 1, § 13, of the Indiana Constitution provides, inter alia: "In all criminal prosecutions, the accused shall have the right . . . to demand the nature and cause of the accusation against him, and to have a copy thereof . . . ." This provision, stating a basic principle of due process of law—that the accused shall be given adequate notice of the charges against him—is implemented by IC 35-1-23-25, 35-1-23-28 (1971), Burns Ind. Stat. Ann. § 9-1126, 91129 (1956). In Taylor v. State, (1957) 236 Ind. 415, 418, 140 N.E.2d 104, 106 this Court observed:

> "[I]t is the well established rule in this State that the particular crime with which the defendant is charged must be shown with such reasonable certainty, by express averments as will enable the court and jury to distinctly understand what is to be tried and determined, and to fully inform the defendant of the particular charge which he is required to meet. The averments must be so clear and distinct that there may be no difficulty in determining what evidence is admissible thereunder."

In accord are Dorsey v. State (1970) Ind. , 260 N.E.2d 800, 802-03; Fletcher v. State, (1961) 241 Ind. 409, 172 N.E.2d 853; Nicholas v. State, (1960) 240 Ind. 463, 165 N.E.2d 149. And see Loveless v. State (1960) 240 Ind. 534, 539, 166 N.E.2d 864, 866: "[A] defendant is entitled to be informed specifically of the crimes charged and not come to trial in the dark and uninformed as to the nature of the evidence to be presented against him." (Emphasis supplied). Cf. Watt v. State (1968) 249 Ind. 674, 234 N.E.2d 471; Large v. State, (1928) 200 Ind. 430, 164 N.E. 263.

While it is conceded that an affidavit will ordinarily be sufficient if the words of the statute defining the crime are followed, the affidavit must specify the particular acts performed by the accused if the crime is defined in general terms. McNamara v. State, (1932) 203 Ind. 596, 181 N.E. 512. There is certainly no more general language to be found in the Criminal Code than that contained in Section 10-1510 defining disorderly conduct.

It has been demonstrated above that under the statute a person may be found guilty of disorderly conduct in at least forty-eight different ways. Supra p. 35, N. 5 . Although the statute purports to define one offense, in reality it seeks to define, in broad and vague terms, forty-eight to fifty-one separate offenses.

The affidavit filed herein is on a printed form obviously designed for the convenience of the State and not to give individual defendants adequate notice of the crimes with which they are charged. Indeed, the affidavit is a part of an all purpose pleading form utilized in the misdemeanor cases that make up a major portion of the Bloomington City Court's business.

Moreover, the State has attempted to avoid objections to its pleading on grounds of lack of specificity insofar as the disorderly conduct allegations are concerned by charging every defendant, regardless of the facts in the individual cases, with every combination of disorderly conduct under the statute. Record p. 1. In fact, the State has attempted to reduce the forty-eight different offenses stated in Section 10-1510 to one by substituting the word "and" in places where the word "or" appears in the statute. In this sense, the present affidavit does not even meet the test of charging

the offense in the language of the statute. It is also to be noted that the affidavit here fails to charge a necessary element of the offense—that the defendant's conduct threatened a breach of the peace. Whited v. State, supra.

Because of thie method of pleading, persons facing disorderly conduct charges are not given adequate notice of the charges against them. The string of conjunctive phrases used to state the offense in the "boilerplate" affidavit do not reveal the real reasons for the prosecution. The accused is left to guess as to the nature of the proof to be offered against him by the State. This point is especially important in light of the constitutional objections to Section 10-1510 developed above. For example, the disorderly conduct statute is used as a "catchall" covering everything from a street brawl to incurring the displeasure of some police officer for exercising rights under the First Amendment. This Court should be on constant guard against the dangerous abuses of its process that are all too possible and tempting under a statute such as Section 10-1510.

Only drunkenness arrests annually outnumber arrests for disorderly conduct. FBI Uniform Crime Reports, 1970, p. 119 (of the total estimated arrests for 1970, 1,825,500 were for drunkenness; 710,000 were for disorderly conduct). It would be safe to assume that a similar pattern holds true in Indiana.

Many persons charged with disorderly conduct via the boilerplate affidavit appear without counsel, and in many instances plead guilty because the fine and costs imposed are likely to be less than the expenditure required to employ counsel to present what could

be a valid defense or objection to the charge. Only if the exact nature of the conduct alleged to be disorderly is set forth in the State's pleading will a court be able to protect citizens against the deprivation of their constitutional rights by the police and prosecuting authorities.

It is especially important that this Court articulate clear standards for the lower courts to follow in evaluating the State's pleadings in disorderly conduct cases so as to protect these rights. Thousands of disorderly conduct cases are processed annually in Indiana. Many of the defects in procedure and substance that have been brought to this Court's attention in the instant case affect the validity of countless other cases. Such defects that may exist usually go unchallenged because of the defendants' lack of resources. It should be of some concern to this Court that out of the thousands of disorderly conduct convictions that must have resulted in the 29-year life of Section 10-1510, less than half a dozen cases have been brought here for review. Such a history must have left in its wake an important group of citizen whose perception of the criminal process cannot reflect the image of fairness and rational treatment supposed in theory. Individually, the cases may seem insignificant, but collectively they represent a severe qualitative and quantitative strain on the process. See generally Foote, Vagrancy-type Law and its Administration, 104 U. Pa. L. Rev. 603 (1956); Katz, Municipal Courts: Another Urban Ill, 20 Case W. Res. L. Rev. 87 (1968).

The vague "boilerplate" pleadings utilized by the State for the initiation of disorderly conduct prosecutions also hide the

fact that such cases are usually initiated with no prosecutorial screening. Illegal arrests and unlawful applications of the statute are easily masked by the type of affidavit here employed. If this Court were to require that the lower courts insist upon proper pleadings in these cases—that is, pleadings that would truly discharge their notice-giving function—it would afford some assurance that persons would be prosecuted for disorderly conduct only when there is good cause to believe they have actually committed an offense.

As matters now stand, the State does not bother to respond seriously to defendants' arguments such as those asserted by the appellant throughout this case. The prosecutor's inaction reflects an expectation that lower courts will not seriously consider arguments attacking "business as usual" methods, or invoking constitutional considerations on behalf of a person accused of disorderly conduct. However, a defendant ought not to be subjected to the time consuming and expensive process of appeal to obtain the first serious consideration of his claim. Most people will have neither the stamina nor the financial resources to survive such a process.

## CONCLUSION

The appellant's conviction should be reversed and he should be ordered discharged on the grounds that (1) Section 10-1510 was applied unconstitutionally to him; (2) the evidence was insufficient to support a conviction under Section 10-1510; (3) Section 10-1510 in unconstitutional on its face. In the alternative, the Court should reverse and remand the cause to the trial court on the ground that the State's pleading was insufficient as a matter of law. If

such a course is chosen, the Court should accompany its order with clear guidelines for the drafting of affidavits in future cases arising under Section 10-1510.

Respectfully submitted,

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