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State v. Groves: The Disorderly Conduct of Overbreadth Analysis in Nebraska

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Note

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I. INTRODUCTION

Traditionally, it has been argued that overbroad laws chill protected expression because they reach conduct that is beyond the scope of permissible regulation.[1] Similarly, vague laws can chill protected conduct because in the absence of an articulated standard, it cannot be predicted with any certainty whether protected conduct is respected by the enforcing governmental unit. When an overbroad and/or vague law is passed, the legislature has abdicated its duty to set standards to those whose duty it is to enforce laws, and vests the enforcers with the power to establish the standards. Even when the police do not offend the political majority in the way they interpret their implied grant of interpretive authority, the very act of interpretation by enforcement personnel offends the most basic political concepts on which our country was founded. When our government has become one more of men than of laws; when one rule of law applies to the unfortunate, the powerless, or the non-conforming, but not to others; when the fundamental rights guaranteed to all citizens are ignored in favor of some vague goals of community peace and tranquility, we look to the judici-

1. M. NIMMER, NIMMER ON FREEDOM OF SPEECH—A TREATISE ON THE THEORY OF THE FIRST AMENDMENT § 4.11 (1984).

ary to realign the operation of powers on which our freedoms ultimately depend.

Overbreadth analysis, and the logically related analysis of vagueness, were developed as methods of scrutinizing perceived statutory infirmities in order to determine whether judicial intervention is appropriate. When these tools are given lip-service but are not applied in good faith or with consistency, they cannot perform the function for which they were created. Many believe that these tools were abused in the past, but this does not indicate that they should be abandoned, only that they should be used with greater care and circumspection.

In *State v. Groves*,[2] the Nebraska Supreme Court entertained an overbreadth challenge raised against the disorderly conduct ordinance of the City of Omaha as though it did not comprehend the nature of that challenge. When the judiciary will not intervene to declare a law overbroad or vague simply because it believes that the individual who raises the challenge is a bad person, our government has the opportunity to become as evil and repressive as unlimited power can lead it to be. Americans should be morally offended by a standardless rule of law that is applied on an arbitrary basis. When the judiciary allows that result, all three branches of government have aligned themselves against the people.

This Article demonstrates that rather than misapplying overbreadth analysis, the court in *Groves* did not apply it at all. It suggests that courts should require that legislatures articulate the goals they seek when they regulate speech based on its content combined with the time, place and manner in which the speech is delivered. Finally, the Article argues that few, if any, disorderly conduct laws are necessary or desirable, and that these statutes are not constitutional either in intent or application.

II. *STATE V. GROVES*

A. Facts

Appellant Kevin R. Groves was convicted on December 9, 1983, of disorderly conduct as defined in the Omaha Municipal Code.[3] The conviction of Groves arose out of an incident that occurred during the early morning hours of October 5, 1983, at a Holiday Inn in Omaha.

2. 219 Neb. 382, 363 N.W.2d 507 (1985).

3. It shall be unlawful for any person purposely or knowingly to cause inconvenience, annoyance or alarm or create a risk thereof to any person by:
   a) engaging in fighting, threatening or violent conduct; or
   b) using abusive, threatening, or other fighting language or gestures; or
   c) making unreasonable noise.

OMAHA, NEB., MUN. CODE § 20-42 (1980).

Omaha Police Officer Edward Hale was moonlighting as a private security guard. Hale's duties included patrolling the parking lot in a pickup.[4] At approximately 3:40 a.m., Hale noticed Groves in the motel parking lot, standing next to a parked vehicle.[5] He saw a pair of boltcutters in Groves pocket. When Hale was within about ten feet of Groves, Groves began to walk away from the vehicle. Wishing to investigate the reason for the man's presence, Hale identified himself as a police officer.[6] Groves responded with the query, "What the fuck do you want?"[7] At Hale's request for identification, Groves produced his driver's license.

Groves walked toward Hale remarking, "I don't give a fuck who you are."[8] Hale felt it was necessary to draw his weapon in response to what he later described as Groves' menacing manner. At trial, Hale acknowledged there were no overt gestures made by Groves that gave the officer cause to draw his gun.[9]

Upon seeing the drawn weapon, Groves began walking toward his own automobile parked some forty feet away.[10] Hale radioed the Omaha Police Department for assistance, and several police cruisers responded approximately eight minutes later.

In the meantime, Groves moved his car next to the Hale vehicle. He taunted Hale, calling him a "motherfucker" and a "pig" and daring Hale to arrest him single-handedly. At trial, Hale admitted that police officers are not infrequently subjected to this type of verbal abuse.[11] The criminality of addressing a police officer in this manner, however, was a point of contention in the opinions filed in *Groves*.[12]

During this period before the on-duty officers arrived, Hale noticed that Groves was carrying a "buck knife" in a sheath on his belt. Though convicted of disorderly conduct, Groves was acquitted of charges of carrying a concealed weapon and trespassing.[13]

When on-duty Omaha police officers arrived, Groves referred to one of them, Officer Michael Cavanaugh, as a "fuckhead."[14] Groves was forcibly handcuffed by Cavanaugh and another officer.[15]

Groves was convicted of disorderly conduct in Omaha Municipal

4. State v. Groves, 219 Neb. 382, 383-84, 363 N.W.2d 507, 509 (1985).
5. Brief for Appellant at 4, State v. Groves, 219 Neb. 382, 363 N.W.2d 507 (1985).
6. *Id.*
7. State v. Groves, 219 Neb. 382, 384, 363 N.W.2d 507, 509 (1985).
8. *Id.*
9. Brief for Appellant at 5, State v. Groves, 219 Neb. 382, 363 N.W.2d 507 (1985).
10. State v. Groves, 219 Neb. 382, 384, 363 N.W.2d 507, 509 (1985).
11. Brief for Appellant at 4-5, State v. Groves, 219 Neb. 382, 363 N.W.2d 507 (1985).
12. State v. Groves, 219 Neb. 382, 395, 363 N.W.2d 507, 515 (1985) (Krivosha, C.J., dissenting).
13. Brief for Appellant at 4, State v. Groves, 219 Neb. 382, 363 N.W.2d 507 (1985).
14. State v. Groves, 219 Neb. 382, 384, 363 N.W.2d 507, 509 (1985).
15. Brief for Appellee at 3, State v. Groves, 219 Neb. 382, 363 N.W.2d 507 (1985).

Court. The court denied Groves' contention that the ordinance was unconstitutionally vague and overbroad and sentenced Groves to seventy-five days. The District Court modified the sentence to twenty days, finding the ordinance not unconstitutional, "at least not in its entirety."[16]

B. Holding

On appeal to the Nebraska Supreme Court, Groves raised two assignments of error. First, he contended that the ordinance criminalized protected conduct under both the United States and Nebraska Constitutions and was therefore overbroad. Second, he contended that the ordinance was vague in failing to give adequate notice of prohibited conduct and in lending itself to arbitrary enforcement.

The court, in an opinion by Justice White, began its analysis with *State v. Frey*.[17] *Frey* was a criminal case which, unlike *Groves*, did not involve first amendment issues. *Frey* applied *Hoffman Estates v. Flipside, Hoffman Estates*[18] as the measure of standing to challenge the overbreadth and vagueness of a law.[19]

Applying *Hoffman Estates*, the court first held that the Omaha disorderly conduct statute was not overbroad because it did not reach a substantial amount of constitutionally protected conduct.[20] Without explicit reference to the circumstances, the court held the words "fuckhead" and "motherfucker" to be fighting words.[21] Turning to the vagueness challenge, the court held that under *Frey* the appellant lacked standing to raise a facial vagueness challenge to the statute since the statute constitutionally prohibited his conduct.[22]

In dissent, Chief Justice Krivosha took issue with every aspect of the majority's opinion. He first argued that *Hoffman Estates* did not reflect Nebraska law, and had effectively been overruled by the Supreme Court's later decision in *Kolender v. Lawson*.[23] The Chief Justice first argued that *Hoffman Estates* involved a civil statute that regulated commercial speech.[24] More important, *Hoffman Estates*

16. Brief for Appellant at 1, State v. Groves, 219 Neb. 382, 363 N.W.2d 507 (1985) (quoting record).
17. 218 Neb. 558, 357 N.W.2d 216 (1984).
18. 455 U.S. 489 (1982).
19. State v. Frey, 218 Neb. 558, 561, 357 N.W.2d 216, 219 (1985).
20. *Id.*
21. At this point the court was clearly discussing the merits of Mr. Groves' case, rather than addressing the appellant's contention that the statute was overbroad as it applied to parties not before the court. *See infra* text accompanying notes 55-72.
22. State v. Groves, 219 Neb. 382, 386, 363 N.W.2d 507, 510 (1985).
23. 461 U.S. 352 (1983)
24. State v. Groves, 219 Neb. 382, 387-88, 363 N.W.2d 507, 511-12 (1985) (Krivosha, C.J., dissenting).

had been "abandoned"[25] in *Kolender*. *Kolender* was a highly publicized case involving a black man who had been arrested at least fifteen times in California for refusing to produce what California police officers considered reliable identification.[26] The Court stated that "the statute as it has been construed is unconstitutionally vague within the meaning of the Due Process clause of the Fourteenth Amendment by failing to clarify what is contemplated by the requirement that a suspect provide a 'credible and reliable' identification."[27] The Krivosha dissent noted that the statute had been held to be facially vague although it was clearly not vague in all of its applications.[28] The *Hoffman Estates* case, in addition to being distinct on its facts, is thus "an anomaly in the law and, as an anomaly, should be disregarded."[29]

The dissent then focused on the preliminary language in the statute and argued that it rendered the statute facially vague.[30] The Chief Justice argued that the words "fuckhead" and "motherfucker" could not be fighting words per se, because words take on a fighting character only with reference to the circumstances in which they are used.[31] Suggesting that "[i]t is difficult to imagine how one could draft an ordinance more vague than the one under consideration,"[32] the dissent discussed the traditionally recognized danger of vague laws, including lack of fair notice and the potential for arbitrary enforcement.[33] The opinion argued that the majority could not construe the ordinance without also construing the particularly vague subsection (c)[34] since Groves had been charged under all three sections of the ordinance. Thus, the Court could not be certain that the appellant had been convicted on constitutional grounds.[35]

The Chief Justice also argued that the evidence did not support a conviction on the merits.

> It is difficult for me to conceive how an officer, with a drawn, loaded service revolver, who is being specifically paid by a private business to provide security of the type that the officer was providing at the moment the altercation occurred, could be either inconvenienced, annoyed, or alarmed by a man with a foul mouth.[36]

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25. *Id.* at 389, 363 N.W.2d at 512.
26. Kolender v. Lawson, 461 U.S. 352, 354-55 (1983).
27. *Id.* at 353-54.
28. State v. Groves, 219 Neb. 382, 389, 363 N.W.2d 507, 512 (1985) (Krivosha, C.J., dissenting).
29. *Id.* at 391, 363 N.W.2d at 513.
30. *Id.* at 391-95, 363 N.W.2d at 513-15.
31. *Id.* at 392, 363 N.W.2d at 513.
32. *Id.* at 393, 362 N.W.2d at 514.
33. *Id.* at 392-93, 363 N.W.2d at 513-14.
34. *See supra* note 3.
35. State v. Groves, 219 Neb. 382, 394, 363 N.W.2d 507, 515 (1985).
36. *Id.* at 395, 363 N.W.2d at 515 (Krivosha, C.J., dissenting).

III. BACKGROUND OF OVERBREADTH ANALYSIS

The practice of allowing defendants who are within the "hard core" of a statute, in the sense that their conduct can be constitutionally restricted, to challenge the impermissibly broad sweep of the statute as to other parties not before the court is generally thought to have begun in *Thornhill v. Alabama*.[37] Allowing an individual whose conduct can be constitutionally punished to litigate the constitutional rights of others is an exception to traditional standing doctrine.[38] Standing to raise the right of another, or *jus tertii*, is limited on the ground that the party before the court may not be the best proponent of another's rights.[39] The courts seek to ensure that the party has "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions . . . ."[40] When the party raising the challenge risks criminal punishment under a law which arguably restricts the rights of others, as in *Groves*, it seems less likely that that party will be lax in asserting those rights. To be sure, if the law is found invalid, the accused must be set free.[41]

When the allegedly restricted rights are those guaranteed under the first amendment, even weightier considerations arise. The courts then must concern themselves with the "chilling" effect that a sweepingly overbroad or vague standard may have on the exercise of rights to free speech and association. "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."[42]

Recognizing that broadly worded laws have the potential for preventing the exercise of legitimate constitutional rights is not difficult. The inherent problem in the overbreadth area is discerning how much protected activity must be reached by the statute for it to be overbroad and therefore facially invalid. During the 1960's, the Warren Court was criticized for allowing overbreadth standing too frequently. The Court often refused to accept the opinions of other governmental entities on the constitutionality of their own actions.[43]

In what was perhaps a question-begging response to those criti-

37. 310 U.S. 88 (1940).
38. United States v. Raines, 362 U.S. 17 (1960).
39. Singleton v. Wulff, 428 U.S. 106, 113-17 (1976).
40. Baker v. Carr, 369 U.S. 186, 204 (1961).
41. *See, e.g.*, Gooding v. Wilson, 405 U.S. 518 (1972); State v. Hamilton, 215 Neb. 694, 340 N.W.2d 397 (1983).
42. NAACP v. Button, 371 U.S. 415, 433 (1963).
43. *See* A. COX, THE WARREN COURT: CONSTITUTIONAL DECISION AS AN INSTRUMENT OF REFORM 19-20 (1968).

cisms, the Burger Court, in *Broadrick v. Oklahoma*,[44] purported to limit overbreadth analysis in certain contexts. The court merely restated what had always been the crux of the inquiry:[45] "To put the matter another way, particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep."[46]

Broadrick represented a vague attempt by the Court to restrict its own power to render state and federal statutes facially invalid due to poor draftsmanship, including inadequate attention to constitutional concerns. The *Broadrick* distinction between conduct and speech has been of little or no significance.[47] Courts, however, continue to require "substantial" overbreadth.[48]

Determining whether the overbreadth of a law is "substantial" re-

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44. 413 U.S. 601 (1973).

45. *Id.* at 630-31 (Brennan, J., dissenting).

46. *Id.* at 615.

47. Any standing rule that purports to distinguish between speech and conduct is of little help to lower courts since speech as used in the first amendment obviously includes many forms of conduct. "As this Court has repeatedly stated, these [first amendment] rights are not confined to verbal expression." Brown v. Louisiana, 383 U.S. 131, 141-42 (1966). *See also* Schad v. Borough of Mount Ephraim, 452 U.S. 61, 66 (1981) (nude dancing "not without its First Amendment protections from official regulation"); Schacht v. United States, 398 U.S. 58 (1970) (street theater critical of armed involvement in Vietnam could not be restricted on basis of content alone); Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 505 (1969) (wearing of black armbands by high school students to protest Vietnam conflict was "the type of symbolic act that is within the Free Speech Clause of the First Amendment").

The court has, of course, restricted expressive conduct where nonexpressive elements of the conduct seriously harm government interests unrelated to the suppression of citizen opinions. *See, e.g.*, Clark v. Community for Creative Non-Violence, 104 S. Ct. 3065 (1984) (Court found prevention of damage to public parks made preventing set-up of "Reaganville" in Washington, D.C. park a reasonable time, place and manner restriction); United States v. O'Brien, 391 U.S. 367, 381 (1968) (government can punish burning of draft cards because doing so "furthers the smooth and proper function of the system Congress has established to raise armies"). One commentator has suggested that the distinction made in *Broadrick* might be defensible if it had been one between expression (rather than speech, which implies verbal communication in its ordinary sense) and conduct. Note, *Overbreadth Review and the Burger Court*, 49 N.Y.U. L. REV. 532, 548-49 (1974). At any rate, the Court seems to have dropped the distinction and focused on perhaps the equally troublesome "substantiality" question. *See, e.g.*, New York v. Ferber, 458 U.S. 747 (1982). *See generally* M. REDISH, FREEDOM OF EXPRESSION—A CRITICAL ANALYSIS 248-55 (1984).

48. *See, e.g.*, Brockett v. Spokane Arcades, Inc., 105 S. Ct. 2794, 2802 (1985) ("If the overbreadth is 'substantial,' the law may not be enforced against anyone, including the party before the court, until it is narrowed to reach only unprotected activity, whether by legislative action or by judicial construction or partial invalidation.").

quires a relative rather than absolute inquiry.[49] In other words, a law that properly reaches 5,000 punishable acts but includes 50 protected acts is not considered substantially overbroad. On the other hand, a law that reaches 50 punishable acts and 50 protected acts would (it is hoped) be substantially overbroad, although it would seem that the two laws reach the identical number of protected acts.[50]

One of the persistent problems in overbreadth analysis is that the numbers hypothesized here are unavailable. In close cases, judges must rely on their own subjective values as well as their sense of how laws are actually enforced. Given the expressed viewpoints of some members of the Burger Court on the relative importance of first amendment values, it is not surprising that the "substantiality" requirement of *Broadrick* has operated to restrict constitutional *jus tertii* standing in this context.[51]

Another continuing problem in the first amendment overbreadth area has been the Court's willful confusion of overbreadth with vagueness.[52] The Court has held that in order for a defendant to raise the vagueness of a statutory standard as to third parties not before the court, the defendant must show that the statute is vague in all of its aspects.[53] This really means that the defendant is precluded from facially challenging the statute. If the statute were truly vague in all of its aspects, the defendant could prove the statute was vague as applied, since its application to him indisputably involves at least one of the operative elements of the statute. Thus, the only situation in which a statute is likely to be declared facially vague is when no one

49. New York v. Ferber, 458 U.S. 747, 773 (1982) ("Yet we seriously doubt, and it has not been suggested, that these arguably impermissible applications of the statute amount to more than a tiny fraction of the materials within the statute's reach.").

50. M. REDISH, *supra* note 47, at 250-55. Professor Redish notes that the Court's implicit justification for concerning itself with relative rather than absolute overbreadth is that a statute which constitutionally punishes a great deal of conduct is more necessary than one which reaches much less criminal activity in relation to its unconstitutional sweep. *Id.* at 252. The effect of this assumption is to avoid the critical question in overbreadth cases: whether a less intrusive means could have served the state's goals.

51. In a dissent joined by the Chief Justice and Justices O'Connor and Powell, Justice Rehnquist remarked: "One might as a matter of original inquiry question whether an overbreadth challenge should ever be allowed, given that the Declaratory Judgment Act and the availability of preliminary injunctive relief will usually permit a litigant to discover the scope of constitutional protection afforded his activity without subjecting himself to criminal prosecution." Secretary of State of Maryland v. Joseph H. Munson Co., 104 S. Ct. 2839, 2858 (1984). These offhand suggestions are so impracticable as to indicate that their author believes the rights of citizens to be nothing more than an annoyance.

52. Justice White accuses the majority of willfully confusing the two areas in his dissent in Kolender v. Lawson, 103 S. Ct. 1855, 1865 (1983) (White, J., dissenting).

53. Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489, 497 (1982).

has been charged with its violation.[54]

With the void-for-vagueness doctrine essentially unavailable to a defendant charged under a sweeping, standardless law, the only chance for the defendant to attack the constitutionality of the statute is to convince the court that the statute is substantially overbroad. A close reading of *Groves* would suggest that it may be impossible to convince the Nebraska Supreme Court that a law is overbroad; at best it is an alternative defense in only certain cases for certain types of defendants. In contrast to the shallow deference given personal rights in its *Groves* decision, the Nebraska Supreme Court should focus more closely on the individual interests at stake in cases requiring overbreadth analysis.

IV. ANALYSIS OF *STATE V. GROVES*

The Nebraska Supreme Court failed to address the issue posed by the appellant in *State v. Groves*. *Groves* involved a facial challenge to the Omaha disorderly conduct ordinance.[55] This means that, at least for purposes of argument, Groves was willing to concede that his conduct was not protected under the first amendment. This type of challenge removes from the court's analysis the conduct of the individual challenger and focuses instead on the ordinance itself. The rights that were being vindicated were the rights of those who might unnecessarily restrict themselves from otherwise protected activity in the knowledge that the Omaha police were armed with sweeping, undefined powers to suppress whomever they might please. Put this way, the question was not whether Groves could be properly jailed for calling a police officer a "fuckhead" in an isolated parking lot. The question was whether the ordinance reached so much constitutionally protected activity that it must be struck down.[56] The rationale of overbreadth scrutiny rests on a recognition that the actual application of overbroad laws against privileged activity is not their only vice. Rather, the doctrine emphasizes the need to eliminate an overbroad law's deterrent impact—or "chilling effect"—on protected activity.[57]

Several Nebraska cases support this approach. In *State v. Adkins*[58] the court struck down as overbroad a statute that made it a crime "to visit or be in any room, dwelling house, vehicle, or place where any controlled substance is being used . . . if the person has knowledge

54. *See, e.g.*, Secretary of State of Maryland v. Joseph H. Munson Co., 104 S. Ct. 2839 (1984).

55. Brief for Appellant at 10, State v. Groves, 219 Neb. 382, 363 N.W.2d 507 (1985).

56. *See generally* M. NIMMER, *supra* note 1, at § 4.11[A].

57. Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 853 (1970).

58. 196 Neb. 76, 241 N.W.2d 655 (1976).

that such activity is occurring."[59] The court did not discuss the "meager" facts of the record before it.[60] Instead, the court considered the innocent acts of parties not before it which were made criminal by the act.[61]

This facial approach to the statute itself is recognized as a peculiar strength of overbreadth analysis. "The difficulties of perceiving relevant facts on cold and perhaps unilluminating records containing contradictory testimony largely vitiate the hope that higher courts may reliably correct errors below and provide systematic guidance to trial courts."[62] Disorderly conduct cases are especially sensitive to factual determination since they are typically emotionally charged and frequently turn on subjective interpretations of the significance of particular actions.[63]

Whatever the strengths or weaknesses of assessing the constitutionality of a law in the abstract, they were not encountered in *Groves* because the court did not go beyond the merits of the case before it. The court proposed the inquiry— "whether or not the enactment reaches a substantial amount of constitutionality protected conduct"[64]—and then proceeded to quote *State v. Boss*[65] regarding the fighting words doctrine.[66] The quote was ostensibly used as authority

59. *Id.* at 77, 241 N.W.2d at 656.

60. *Id.* at 78, 241 N.W.2d at 656.

61. Individuals may find themselves in situations such as at parties, theaters, dance halls, hotel lobbies, buses, apartments, taxis, or even in private automobiles, where their conduct has no relation to the acts of others who may be disposed to use controlled drugs. In such situations, must they either immediately leave because of fear of prosecution under the statute under consideration; or perhaps force the others to discontinue the use of the controlled substance; or perhaps have the others arrested. . . .

. . . What if a person were engaged in a constitutionally protected activity, such as attending a public meeting or voting, when he inadvertently discovers that another at the meeting or at the polls is in possession of a controlled substance?

Id. at 79-80, 241 N.W.2d at 657. *State v. Adkins* can be criticized for not articulating the constitutional rights threatened by the law's overbreadth (presumably freedom of association), but the approach of the case is otherwise correct.

62. Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 868 (1970).

63. The Harvard Note, *id.*, points to the differing interpretations of the same record in the majority and dissenting opinions in disorderly conduct cases. In Edwards v. South Carolina, 372 U.S. 229 (1963), Justice Stewart described the peaceable nature of the petitioners' protest. "There was no violence or threat of violence on their part." *Id.* at 236. Justice Clark disagreed. "It is my belief that anyone conversant with the almost spontaneous combustion in some Southern communities in such a situation will agree that the City Manager's action may well have averted a major catastrophe." *Id.* at 244 (Clark, J., dissenting).

64. State v. Groves, 219 Neb. 382, 385, 363 N.W.2d 507, 510 (1985).

65. 195 Neb. 467, 238 N.W.2d 639 (1976).

66. State v. Groves, 219 Neb. 382, 385, 363 N.W.2d 507, 510 (1985).

for the court's rehabilitation of the ordinance, but it was anomalous to attempt to construe the statute *after* considering its constitutionality.[67] The constitutionality of the statute clearly rests upon its construction.

If the statute was improperly construed by the trial court, the Supreme Court could not simply read the statute properly (assuming that were possible) and affirm the conviction. The jury convicted the appellant on the basis of the trial judge's explanation of the law, and the conviction should have been affirmed, if at all, on that ground alone. Any narrower reading by an appellate court, through perhaps rescuing the statute, does not help the appellant. If the jury was told that the defendant's conduct need merely be annoying, the conviction could not be saved under the harmless error doctrine. Overbreadth analysis seeks to avoid judicial usurpation of the legislative function by avoiding such strained construction of defective statutes. By concentrating on the well-settled fighting words doctrine, the court obfuscated the question of whether the overbreadth of the ordinance was substantial in its entirety.

In the next paragraph, presumably still applying its exceptionally narrow overbreadth analysis, the court held that the words "fuckhead" and "motherfucker" were fighting words.[68] The opinion rejected what it called "the implicit argument advanced by appellant" that police officers are unlikely to react violently to abusive language. The court was so concerned with "implicit" arguments that it did not analyze the appellant's explicit overbreadth argument.[69]

The court had good reason to be insecure about the merits of its approach,[70] but its insistence that the statute was *broad enough* to en-

67. Shuttlesworth v. Birmingham, 394 U.S. 147 (1969).

68. State v. Groves, 219 Neb. 382, 386, 363 N.W.2d 507, 510 (1985). Perhaps Chief Justice Krivosha's reading of this part of the opinion is too literal. ("The majority has determined that the words 'fuckhead' and 'motherfucker' are fighting words per se." *Id.* at 392, 363 N.W.2d at 513 (Krivosha, C.J., dissenting)). Given the context, a more natural reading might be that the language was punishable under all the circumstances. Still, one would hope the court would be more careful in these sensitive areas. To make a *word* illegal, regardless of context, is blatant censorship. Hess v. Indiana, 414 U.S. 105 (1973) (disorderly conduct conviction reversed where protester's colorful remark was not directed at anyone in particular). "It hardly needs repeating that '[t]he constitutional guarantees of freedom of speech forbid the States to punish the use of words or language not within "narrowly limited classes of speech." ' " *Id.* at 107 (quoting Gooding v. Wilson, 405 U.S. 518, 521-22 (1972)); *Cf.* FCC v. Pacifica Found., 438 U.S. 726, 747 (1978) (upholding FCC sanctions of radio station for playing George Carlin's "Filthy Words" monologue, proving "it is broadcasting that has received the most limited First Amendment protection").

69. Brief for Appellant at 10, State v. Groves, 219 Neb. 382, 363 N.W.2d 507 (1985).

70. State v. Groves, 219 Neb. 382, 395, 363 N.W.2d 507, 515 (1985) (Krivosha, C.J., dissenting). ("It is difficult for me to conclude that this evidence was sufficient to establish inconvenience, annoyance, or alarm of a man who is being paid to be

compass these facts made the appellant's point in ironic fashion. The court analyzed the statute as though the statute specifically pertained to verbal abuse of police officers.[71] In fact, the court found itself struggling with a law so broad that it was nearly impossible to discern the intent of the lawmaker. The court, rather than addressing the question of whether the statute was sufficiently narrow to serve governmental interests without needlessly chilling free speech, seemed to say "Yes, this law is certainly broad enough to take in this kind of rude and distasteful behavior." Rather than addressing the issue raised, the court ironically proved how sorely overbreadth analysis is needed. Yet the court obviously misunderstood the concept of a facial challenge. "As Groves' conduct is not constitutionally protected, the overbreadth argument must be rejected."[72] In one sentence, the court went to the heart of its own error.

As has been asserted throughout this Article, first amendment overbreadth standing is unusual because its scope transcends the conduct of the individual before the court and focuses instead on abstract concerns about what effect the law may have on the constitutionally protected conduct of other citizens. Mr. Groves' conduct is irrelevant to the inquiry of whether the ordinance is overly broad. Clearly the court misunderstood the nature of overbreadth analysis when it focused on the offensive conduct described in the record.

Once it had clumsily side-stepped the overbreadth question, the court proceeded to the vagueness issue. Here the court acquiesced in one of the United States Supreme Court's most cowardly revisions of due process. When the United States Supreme Court says that "[t]o succeed . . . the complainant must demonstrate that the law is imper-

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inconvenienced, annoyed, or alarmed, and therefore permitted to carry a loaded revolver.").

71. Compare Lewis v. New Orleans, 415 U.S. 130 (1974), in which the statute held facially invalid read: "It shall be unlawful and a breach of the peace for any person wantonly to curse or revile or to use obscene or opprobrious language toward or with reference to any member of the city police while in the actual performance of his duty." *Id.* at 132. The *Lewis* statute was overbroad, but the government interests it protects are arguably more circumscribed than those the Omaha ordinance serves, assuming they can even be identified. In his dissent in *Lewis*, Justice Blackmun identified those interests:

> In the interest of the arrested person who could become the victim of police overbearance, and in the interest of the officer, who must anticipate violence and who, like the rest of us, is fallibly human, legislatures have enacted laws of the kind challenged in this case to serve a legitimate social purpose and to restrict only speech that is "of such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed by the social interest in order and morality."

Id. at 141 (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)) (Blackmun, J., dissenting).

72. State v. Groves, 219 Neb. 382, 386, 363 N.W.2d 507, 510, (1985).

missibly vague in all of its applications,"[73] it is denying criminal defendants an opportunity to mount a facial challenge to the law. If the law is vague in all of its applications, the defendant has no need to invoke the rights of others to escape punishment. One of the applications of a statute is the application to the defendant. If the law is vague in all of its applications, as *Hoffman Estates* requires, the defendant may simply show that the law is vague *as applied to him.* Only the most altruistic defendant, or at least one more generous than the *Hoffman Estates* Court envisioned, would bother to vindicate the rights of teeming hordes of hypothetical citizens. The *Hoffman Estates* test removes what was a legitimate incentive for defendants to clarify the law through facial challenges. If a defendant is otherwise arguably guilty of a crime, but the statute is vague in the majority of its applications, he has no standing to raise the rights of others who might be harmed. The law is not vague in all its applications if it has managed to catch him. On the other hand, if the law is vague in all its applications, it is certainly vague as applied to any one defendant. Unless he has a burning desire to warm over the chilling effect the statute has had on the constitutional rights of people he does not know, the defendant will simply challenge the vagueness of the law as it is applied to himself. Under this reasoning, a defendant will either not have standing, or will not be motivated, to raise a facial challenge to an overbroad statute.

In *Hoffman Estates*,[74] the Court eliminated the opportunity of the guilty to raise the careless drafting of the legislature as a complete defense to the crime. The motivations behind eliminating that practice are evident. Many crimes simply do not lend themselves to easy and precise prohibition.[75] "Condemned to the use of words, we can never expect mathematical certainty from our language."[76] More importantly few judges enjoy freeing otherwise guilty defendants on what is perceived by the layman as a "technicality," and it is not likely that these same judges enjoy confronting the legislature in such a direct manner.

The United States Supreme Court is free to determine due process requirements. The problem with *Hoffman Estates* is not so much what it does, but how it does it. The Court could have forthrightly

73. Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489, 497 (1982).

74. Even if *Hoffman Estates* is the law, see State v. Groves, 219 Neb. 382, 391, 363 N.W.2d 507, 513 (1985) (Krivosha, C.J., dissenting), in which Chief Justice Krivosha calls *Hoffman Estates* "unsupported" and "an anomaly."

75. Nebraska's difficulty with defining careless driving is a case in point. In State v. Hoffman, 202 Neb. 434, 275 N.W.2d 838 (1979), the court held Nebraska's careless driving statute void for vagueness. A district court ruling that the subsequently enacted careless driving statute suffered from the same infirmity was reversed in State v. Merrithew, 220 Neb. 530, 371 N.W.2d 110 (1985).

76. Grayned v. Rockford, 408 U.S. 104, 110 (1972).

said that criminal statutes that do not implicate first amendment rights are not subject to facial review. Instead of taking the shortest distance between two points, the Court circled around the back.[77]

Perhaps uncomfortable with the major revision of due process jurisprudence it was undertaking, *Hoffman Estates* hedged the application of the "vague in all of its aspects" rule. "These standards should not, of course, be mechanically applied. The degree of vagueness that the Constitution tolerates—as well as the relative importance of fair notice and fair enforcement— depend in part on the nature of the enactment."[78] The Court recognized that a statute which arguably implicates activity protected by the constitution is subject to a more strict analysis.

The Nebraska Supreme Court made an error in applying the *Hoffman Estates* rationale, but it compounded the error by misapplying the *Hoffman Estates* approach. Because it did not look seriously at whether the disorderly conduct ordinance was broad enough to encompass constitutionally protected activity,[79] the court's analysis of the vagueness issue was necessarily flawed. Even under *Hoffman Estates*, a statute that has never been authoritatively construed so as to limit its chilling effect on protected activity can be challenged facially. But since the court looked only at Groves' conduct, it did not even consider "whether the enactment reaches a substantial amount of constitutionally protected conduct."[80]

In ignoring the threat that sweeping disorderly conduct laws pose to constitutional liberties, the court seems to have forgotten that these laws have been abused in recent American history. In fact, the current Supreme Court backlash against overbreadth analysis can largely be explained by the Warren Court's frequent use of the doctrine to protect dissent. Disorderly conduct statutes were, and are, frequently used to punish and harass racial minorities, political protesters, the unfortunate and the nonconforming.[81]

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77. Perhaps one factor which helps to explain the strained analysis of *Hoffman Estates* is that the ordinance in question regulated the sale of drug paraphernalia. Hoffman Estates v. Flipside, Hoffman Estates 455 U.S. 489, 491 (1982). The stuporous jurisprudence that occurs in the context of illicit drugs has been noted elsewhere. *See, e.g.*, Snowden, *A Holistic Jurisprudential View of the Drug Victim*, 54 NEB. L. REV. 350, 379 (1975) ("It is indeed ironic that it is not dope but fear that threatens the rationality of the legal system and society that stand as the guardian of freedom.").

78. Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489, 498 (1982).

79. *See supra* text accompanying notes 64-72.

80. State v. Groves, 219 Neb. 382, 385, 363 N.W.2d 507, 510 (1985) (quoting State v. Frey, 218 Neb. 558, 561, 357 N.W.2d 216, 219 (1984)).

81. The U.S. Supreme Court heard four different cases in five years in which orderly black protesters were charged with a "breach of the peace" in Louisiana. In each case the convictions were reversed. Brown v. Louisiana, 383 U.S. 131 (1966) (sit-in at "whites only" public library); Cox v. Louisiana, 379 U.S. 536 (1965) (protests

The Omaha disorderly conduct ordinance is overbroad as well as unconstitutionally vague. It thus chills exercise of protected first amendment rights, provides inadequate notice and lends itself to arbitrary and discriminatory enforcement. When purportedly analyzing the potential overbreadth of the ordinance, the court baldly stated that Groves' conduct was unprotected. Yet it seems obvious that Groves was exercising his right to express displeasure to those who were exercising dominion over him. One of the benefits of truly free speech that has been long recognized is the opportunity to vent one's anger and frustration with the government. The author of a recent treatise has dubbed this function of free speech "the safety valve function."[82] The rationale behind encouraging the disenchanted to unburden themselves was expressed in a concurring opinion by Justice Brandeis, in which Justice Holmes joined:

> But [those who won our independence] knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones.[83]

Appellate court judges are accustomed to principled and articulate argument, but some, perhaps most, of our citizens cannot meet those standards. And there is no reason to require them to. In *Cohen v. California*, the Court reversed a conviction for disturbing the peace based on the petitioner's wearing a jacket emblazoned with the words "Fuck the Draft."[84] While not approving of that "unseemly epithet,"[85] the Court was able to discern that fundamental values were offended by its suppression.

> Surely the State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us. Yet no readily ascertainable general principle exists for stopping short of that result were we to affirm the judgement below. For, while the particular four-letter word being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often 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.[86]

The State of Nebraska disliked the taste and style of Mr. Groves from the beginning. He was originally charged with trespassing and carrying a concealed weapon, as well as with disorderly conduct, but

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against arrests of fellow demonstrators); Taylor v. Louisiana, 370 U.S. 154 (1962) (sit-in at bus depot waiting room reserved "for whites only"); Garner v. Louisiana, 368 U.S. 157 (1961) (sit-in at "whites only" lunch counter).

82. M. NIMMER, *supra* note 1, at § 1.04.

83. Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

84. Cohen v. California, 403 U.S. 15 (1971).

85. *Id.* at 23.

86. *Id.* at 25.

was acquitted of the more narrowly defined trespass and weapons crimes.[87] The manner in which the Nebraska Supreme Court ignored the essential nature of Groves' constitutional challenge[88] demonstrates the court's orientation toward reaching the "right" result; they wanted this guy badly. It is useful to compare *Groves* to *Fowler v. Nebraska Accountability & Disclosure Commission*,[89] in which overbreadth and vagueness challenges were raised to a law which reached protected first amendment activity. Fowler had been assessed a civil penalty under the Nebraska Political Accountability and Disclosure Act, which provided that "Campaign statements . . . shall not be . . . used by any person for any commercial purpose, for soliciting contributions, ticket sales or other political campaign purposes, or for harassment by a governmental body or any other purpose."[90] Engaged in a hotly contested race for the state legislature, Fowler had mailed questionnaires to political action committees that had supported his opponent through financial contributions.[91]

The holding of the court in *Fowler* is perfectly consistent with a belief that overbreadth cases in Nebraska are decided entirely with reference to the "merits," i.e., the social and economic characteristics of the individual challenging the law, rather than the law itself. The court held that the statute "as it was applied in this case, places an impermissible burden on protected speech and must fall as being overbroad."[92] Turning to the vagueness analysis, the court focused on the word "harassment." The opinion noted with dismay that the definition of harassment depended on the subjective values of the victim.[93] It then looked to *Coates v. City of Cincinnati*,[94] a case relied on by Groves and cited by Chief Justice Krivosha in his *Groves* dissent. The opinion quotes heavily from *Coates*. "Conduct that annoys some people does not annoy others. Thus the ordinance is vague, not in that it requires a person to conform his conduct to an imprecise but comprehensive normative standard, but rather in the sense that no standard

87. Brief for Appellant at 4, State v. Groves, 219 Neb. 382, 363 N.W.2d 507 (1985).
88. *See* text accompanying notes 55-72.
89. 213 Neb. 462, 330 N.W.2d 136 (1983).
90. NEB. REV. STAT. § 49-14,132 (1978).
91. Fowler v. Nebraska Political Accountability & Disclosure Comm'n, 213 Neb. 462, 463, 330 N.W.2d 136, 137 (1983).
92. *Id.* at 467, 330 N.W.2d at 139. A statute, of course, cannot be "overbroad as applied" in a particular case. It is simply unconstitutional as applied. On the other hand, an overbreadth challenge goes to the facial validity of the statute and is unconcerned with the individual before the court. However, a court must look to authoritative construction of the statute in order to determine if it is overbroad. Gooding v. Wilson, 405 U.S. 518 (1972). This is the import of the court's statement.
93. Fowler v. Nebraska Political Accountability & Disclosure Comm'n, 213 Neb. 462, 469, 330 N.W.2d 136, 140 (1983).
94. 402 U.S. 611 (1971).

of conduct is specified at all."[95]

In comparing *Fowler* with *Groves*, one is drawn to the conclusion that a statute is definite enough if applied to individuals the court disapproves of and with whom it does not identify. The requirement of the statute held unconstitutionally vague in *Fowler*—that one's conduct be "annoying"—is the identical *actus reus* of Omaha's disorderly conduct ordinance held not vague in *Groves*. The court's inconsistent statutory construction highlights the most offensive aspect of standardless laws—the potential for arbitrary and discriminatory enforcement. A system of laws in which ad hoc standards are set by the individuals who enforce them is nothing more than a police state. The cases are filled with statements denouncing those laws as creating a government of men and not of laws.[96] There is ample sociological evidence of the disparate effect these laws have on minority groups.[97]

No community can call itself free when its lowliest members are subject to harassment at the whim of its police force. This form of oppression is all the more undesirable because it generally takes place below the perceptive horizon of more conventional members of society. The gravity of the evil, and our responsibility for it, are compounded when we neither see nor care.

V. AN ALTERNATIVE APPROACH TO THE "FIGHTING WORDS" PROBLEM

The seemingly settled relationship between the "fighting words" doctrine and the first amendment requires a new approach. Drafting more modern penal codes does little to improve the situation when the goals of the statute are either undefined or clearly open to constitutional objection.[98] However, a new technique called "focused balanc-

95. Fowler v. Nebraska Political Accountability & Disclosure Comm'n, 213 Neb. 462, 470, 330 N.W.2d 136, 141 (1983) (quoting Coates v. City of Cincinnati, 402 U.S. 611, 614 (1972)).

96. Kolender v. Lawson, 461 U.S. 352, 358 (1983) ("Where the legislature fails to provide such minimal guidelines, a criminal statute may permit 'a standardless sweep [that] allows a policemen, prosecutors, and juries to pursue their personal predilections.' ") (quoting Smith v. Gougen, 415 U.S. 566, 575 (1974)) (brackets in original). *See also* Papachristou v. City of Jacksonville, 405 U.S. 156, 170 (1972) ("Those generally implicated by the imprecise terms of the ordinance—poor people, nonconformists, dissenters, idlers—may be required to comport themselves according to the lifestyle deemed appropriate by the Jacksonville police and courts.").

97. See authorities cited in Stormer & Bernstein, *The Impact of* Kolender v. Lawson *on Law Enforcement and Minority Groups*, 12 HASTINGS CONST. L. Q. 105 (1984).

98. MODEL PENAL CODE § 250.2 (1980) is an example. While the model ordinance is obviously superior to Omaha's, it is open to constitutional objection as its authors apparently realize.

ing," set forth by Professors Farber and Nowak in a recent article,[99] offers one method of approaching the traditional "fighting words" doctrine.

The thesis of the Farber and Nowak article is that restrictions on speech, which are based both upon its content and upon the time, place and manner in which it is communicated, constitute a hybrid form of speech restriction. The authors argue that public forum analysis leads to incorrect results in these circumstances because it fails to focus on the central considerations: freedom of speech and governmental interests. They propose an analysis they call "focused balancing" to apply to situational restrictions, "which are defined as restrictions keyed to content but applicable only in limited contexts."[100] The proposed test has three components. The first is an articulation requirement that would place the burden on the government desiring to restrict speech in a particular context to articulate its goals at the time a statute is passed.[101] As visualized by Farber and Nowak, this would differ from the typical situation where government attorneys create and assert state interests after a citizen has already been charged with the offense. There also seems to be an inherent assumption that requiring a government to define permissible and impermissible speech in a given context, and to articulate the goals that these contextual regulations serve, may in many cases cause these goals to evaporate before the limitations ever achieve the status of law. Many state interests cannot stand the scrutiny which that test would require. "Requiring the government to proceed through clear, explicit regulation also prevents ad hoc administrative decision-making under the guise of situational regulation from becoming a cover for outright censorship."[102] The fertile imaginations of attorneys can frequently create rational interests which were not the actual primary goal of the lawmakers. This first phase of the focused balancing approach requires legislators to confront free speech interests they might otherwise be ignorant of or ignore.

A second, closely related step in focused balancing is that the articulated goals be consistent with free speech values. Although this seems implicit in the articulation requirement, Farber and Nowak believe this would make lawmakers consider whether the contextual limitations are viewpoint-neutral.[103]

Finally, if the contextual regulation passes the first two requirements, it must still be shown that the importance of the governmental

99. Farber & Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 VA. L. REV. 1219 (1984).
100. *Id.* at 1243.
101. *Id.* at 1242.
102. *Id.* at 1242-43.
103. *Id.*

interests outweighs the effect on speech. The goal must be important enough to justify the contextual limitations. The regulation must be reasonably likely to attain these goals.[104]

Professors Farber and Nowak perhaps did not consider that statutes which punish fighting words are themselves hybrids of the traditional categories of content-based restrictions and time, place and manner restrictions. They are apparently comfortable with viewing "fighting words" as a category of permissible content-based regulation.[105] One reason for letting this particular sleeping dog lie is that the categorical approach has made overbreadth analysis in the fighting words context easier, at least as Farber and Nowak see it: "Because proscription is allowed only for specifically defined categories of speech, a particular statute's scope can be easily compared with the permissible categories."[106]

I would argue that the categorical content-based approach to the fighting words doctrine is "easier" because it oversimplifies interests and issues which are not as clear as they may at first seem. In fact, fighting words statutes create the same difficulties in drawing lines as the public school speech cases with which Farber and Nowak concern themselves. These difficulties arise because a statute which punishes speech based on potential audience reaction is as much a "hybrid" of content and time, place and manner regulation as those statutes which regulate certain types of speech only in public schools.

A system of analysis that views speech which incites a violent reaction as merely a category of permissible content-based regulation is grossly over-simplified. If Mr. Groves had called his best friend a "fuckhead" and a "motherfucker" in jest over a couple of drinks, he would not be punished for using fighting words because it is recognized that using those words in that time, place and manner could not possibly harm significant governmental interests, whatever they might be. Assuming that there are legitimate governmental interests in "keeping the peace," we may be reasonably certain that these interests are not threatened by the light-hearted use of profanity between friends. It is also clear that profanity itself cannot be constitutionally proscribed without reference to the circumstances in which it is used.[107]

Thus, a statute which punishes the use of language, which under the circumstances is reasonably certain to incite violence, does not fit neatly into the categorical exception to the general prohibition against

104. *Id.*

105. *Id.* at 1228 n.44 ("Although one might create separate categories for the 'fighting words' or 'hostile audience' restrictions, we include within the same category all speech that creates a clear danger of a violent reaction to the speaker.").

106. *Id.* at 1229.

107. *See, e.g.*, FCC v. Pacifica Found., 438 U.S. 726 (1978).

content-based discrimination. Nor is it merely a time, place and manner regulation. The fighting words doctrine has elements of both and can be usefully analyzed using the focused balancing approach.

The Omaha ordinance would fail under all three of the factors considered in focused balancing. Most seriously, the Omaha City Council did not articulate the goals which it sought to achieve. Nor did it clearly state what constitutes disorderly conduct and what does not.

Looking at the ordinance on its face, it seems clear that the goal was to provide broad discretionary powers to deal with any kind of disagreeable behavior that the political majority wished to punish.[108] This approach is frightening as well as unconstitutional. As an early Nebraska case recognized, " '[i]t is not permissible to enact a law which, in effect, spreads an all-inclusive net for the feet of everybody upon the chance that, while the innocent will surely be entangled in its meshes, some wrongdoers also may be caught.' "[109]

A law-making body can, and must, hire police officers to enforce the laws. It cannot, however, abdicate its responsibility to determine what is and is not prohibited. This principle was most eloquently stated by Justice Black in his concurrence in *Gregory v. Chicago*:

> Since neither the city council nor the state legislature had enacted a narrowly drawn statute forbidding disruptive picketing or demonstrating in a residential neighborhood, the conduct involved here could become 'disorderly' only if the policeman's command was a law which the petitioners were bound to obey at their peril. But under our democratic system of government, lawmaking is not entrusted to the moment-to-moment judgment of the policeman on his beat. Laws, that is valid laws, are to be made by representatives chosen to make laws for the future, not by police officers whose duty is to enforce laws already enacted and to make arrests only for conduct already made criminal. One of our proudest boasts is that no man can be convicted of crime for conduct, innocent when engaged in, that is later made criminal. To let a policeman's command become equivalent to a criminal statute comes dangerously near making our government one of men rather than of laws. There are ample ways to protect the domestic tranquility without subjecting First Amendment freedoms to such a clumsy and unwieldy weapon.[110]

Any court leaning toward invalidating a disorderly conduct statute would want to consider the result of that action. Would the public welfare of Omaha, Nebraska have decayed rapidly absent the protections of its disorderly conduct ordinance? The answer is, certainly, no. Had the statute been invalidated, the City Council probably would have enacted a more narrowly drawn statute adequate to keep the peace. The underlying issue here is whether "domestic tranquility" is

108. Similarly broad ordinances extend the reach of the Omaha Police even further. *See, e.g.*, Porta v. Mayor of Omaha, 593 F. Supp. 863 (D. Neb. 1984) (loitering ordinance upheld against overbreadth and vagueness challenges).

109. State *ex rel.* English v. Ruback, 135 Neb. 335, 340, 281 N.W. 607, 610 (1938) (quoting Fairmont Creamery Co. v. Minnesota, 274 U.S. 1, 10 (1927)).

110. Gregory v. Chicago, 394 U.S. 111, 120-21 (1969) (Black, J., concurring) (citations omitted).

a significant interest, or at least one significant enough to endanger some of our fundamental concepts of liberty. I believe there is no fundamental interest in peace and tranquility, and that even if there were, modern society would be plainly incapable of protecting that interest. People who fight are properly punished under laws pertaining to assault, not under disorderly conduct laws. Any less serious breach of the peace ought to be dealt with in a more informal manner. If my neighbor's raucous party disturbs me, there are effective remedies available to me which do not involve calling the police. I can attempt to reason with him to make him see that if he ignores my wishes I will go out of my way to ignore his. When his party keeps me awake all night, he can be sure my lawnmower will keep him awake all morning. Even if I feel unable to negotiate personally with my neighbor, the police can do this for me. Police officers carry the symbolic authority of the state and are therefore highly effective at resolving disputes through informal means short of invoking institutions like the courts. Disorderly conduct statutes might make police-work easier, but they do so at an unnecessarily high social cost.

VI. CONCLUSION

The Nebraska Supreme Court did not fairly address the issues raised by the appellant in *Groves*. Instead of addressing the facial validity of the challenged statute, the majority focused on the acts of the defendant. When a court determines standing to raise a facial challenge based upon its feelings about that individual, first amendment values are flagrantly violated.

The court should have strictly scrutinized the disorderly conduct ordinance before it since the law was designed to give police officers broad authority. Had the court undertaken that analysis, the unconstitutional aim of the statute would have become apparent.

Finally, disorderly conduct statutes and similar statutes are unnecessarily duplicative of more narrowly defined statutes. Most acts that come under the category of disorderly conduct can be better dealt with on an informal basis.

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