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STATUTORY CONTROL OF CAMPUS DISORDERS IN WASHINGTON: EFFECT OF R.C.W. §§ 28B.10.570-.573 (1970).

Disgust with America's involvement in Southeast Asia, with the slow progress towards racial equality and with the "unresponsiveness" of the federal government and universities has resulted in hundreds of campus disruptions across the nation.[1] These disruptions often result in property destruction, interruption of classes, and physical violence.[2] In response to these disorders and public concern, many state legislatures have enacted criminal statutes directed specifically at prohibiting conduct which may result in campus disruptions.[3]

In 1970, the Washington Legislature enacted a campus disorder statute which makes it unlawful for any person to "intimidate by any threat of force or violence," or "interfere by force or violence" with any university, college, community college, or public school administrator, teacher or student who is peacefully discharging his duties.[4] A conviction of the crime carries a maximum penalty of six months imprisonment and a fine of five hundred dollars.[5]

This note examines the scope of the new statute, its constitutionality and its potential for furthering the purposes of the criminal law. It is submitted that while the Washington statute can withstand the constitutional tests of vagueness and overbreadth, it is applicable to only a very narrow range of situations, and therefore will have no significant effect in furthering the purposes of the criminal law.

Before one can speculate on the constitutionality and possible value of the campus disorder legislation it is necessary to examine the scope of the situations in which the law is applicable. The new statute does not specify the intent required for conviction of the crime. Neverthe-

1. *See* REPORT OF PRESIDENT'S COMMISSION ON CAMPUS UNREST ix (1970). This Commission was appointed to investigate the causes of campus disorders following the shooting of four Kent State University students by National Guardsmen during a campus demonstration.

2. Of the forty-one incidents of campus protest in Washington State from January 1, 1969 through May, 1970, twenty fell outside the classification of orderly demonstrations. JOINT COMMITTEE ON HIGHER EDUCATION, WASHINGTON STATE LEGISLATURE, STUDENT UNREST IN WASHINGTON 80-83 (1971).

3. *See* Comment, *Recent California Campus Disorder Legislation,* 8 HARV. J. LEGIS. 310 (1971).

4. WASH. REV. CODE §§ 28B.10.570-.573 (1970).

5. In 1971 the Washington legislature struck the words "public school" from the 1970 law and dispelled any doubt that the statute applied to secondary schools by including the penal sanctions under the statute dealing with common schools. Ch. 45, §§ 1-8 [1971] Wash. Sess. Laws 91.

less, since the conduct prohibited is an offense *malum in se,* as distinguished from an offense *malum prohibitum,*[6] the statute implicitly requires that the actor have a guilty mind to be held criminally responsible.[7] Therefore, the statute should not extend to anyone who has no intention of forcibly interfering with or intimidating a student, faculty member or administrator even though his conduct may inadvertently do so.

The statute is more explicit in proscribing the acts required to impose punishment. It provides that prohibited conduct must contain one of two elements. The actor must either forcibly or violently interfere with an administrator, faculty member, or student who is peacefully performing his duties or studies, or he must "intimidate by threat of force or violence" one of the same.

The term "force or violence" is commonly used in defining the crime of robbery.[8] The term is narrowly construed in the criminal law in that it does not include the muscular effort used in accomplishing the result, but rather requires that exertion be exercised in actually overcoming resistance or in weakening the victim.[9] For example, the muscular effort used to pick another's pocket would not be sufficient force or violence to constitute robbery, but if force is exercised either in overcoming the victim's resistance or in overtly attacking the victim the elements of robbery would exist.[10] Likewise, under the campus dis-

6. *Malum in se* and *malum prohibitum* offenses have been distinguished as follows: "An offense malum in se is properly defined as one which is naturally evil as adjudged by the sense of the civilized community, whereas an act malum prohibitum is wrong only because the statute made it so." State v. Horton, 139 N.C. 588, 589, 51 S.E. 945, 946 (1905).

7. This is a basic common law proposition. Turner, *The Mental Element in Crimes at Common Law,* 6 CAMB. L.J. 31 (1936). *See also* MODEL PENAL CODE § 2.02 (3) (Proposed Official Draft, 1962) which provides that if no mental element is required by the statute, "such element is established if a person acts purposely, knowingly or recklessly with respect thereto." Under the same section it provides that to act "recklessly" the actor must have a conscious awareness of the risk involved. *Id.* § 2.02 (3) (2) (C).

This proposition has been continuously adhered to by the Washington Supreme Court. For example, in State v. Dixon, 78 Wn.2d 796, 479 P.2d 931 (1971), the court held that Washington's unlawful assembly statute which, like the new campus disorder statute, makes no mention of the requisite mens rea, was *malum in se* and, therefore, required a guilty mind. The court held the law would not extend to innocent bystanders or those ignorant of the assembly's unlawful character.

8. *See, e.g.,* WASH. REV. CODE § 9.75.010 (1956).

9. Carter Drug Co. v. Maryland Cas. Co., 181 Wash. 146, 42 P.2d 37 (1935), State v. Massey 274 Mo. 578, 204 S.W. 541 (1918), Williams v. Commonwealth, 20 Ky. L. Rptr. 1850, 50 S.W. 240 (Ky. Ct. App. 1899).

10. Williams v. Commonwealth, 20 Ky. L. Rptr. 1850, 50 S.W. 240 (Ky. Ct. App. 1899); Terry v. National Surety Co., 164 Miss. 394, 145 So. 111 (1933); Bowling v. Commonwealth, 253 S.W.2d 21 (Ky. 1952).

order statute, any person making noise and using obscene language in a demonstration would not be criminally responsible even though his expression may interfere with or intimidate an administrator, student, or faculty member; the effort he exerts in talking and marching is analogous to the exertion used by the pickpocket in removing the goods from the victim's pocket. However, if the actor was to assault a student, faculty member, or administrator or directly attack one of them, he would be criminally responsible under the new law. By using the term "force or violence," the legislature substantially limited the class of cases in which the new law is applicable.

In addition to overt manifestations of force or violence, the new statute makes unlawful any conduct or expression which "intimidates by threat of force or violence" an administrator, faculty member, or student. This clause requires that three elements be present before punishment under the law is justified. First, there must be a threat. The term "threat" has a sinister meaning and has been defined by the Washington Supreme Court as the "declaration of one's purpose or intention to work injury to the person, property or rights of another."[11] To constitute a threat, a statement must tend to "incite mental apprehension and be coercive in nature."[12] Advisory statements,[13] vulgar and abusive epithets,[14] and warnings that one will defend himself if attacked by another[15] have all been held to lack the sinister qualities required for a threat. Moreover, a statement will constitute a threat only if it is given under circumstances which create a reasonable apprehension that the speaker will perform the threatened act.[16]

Second, in addition to requiring a threat, the statute requires that the threat must be of force or violence. Third, the law requires that

11. State v. Cushing, 17 Wash. 544, 555, 50 P. 512, 515 (1897).
12. State v. Hamre, 247 Ore. 359, 429 P.2d 804 (1967).
13. People v. Randazzio, 184 N.Y. 147, 87 N.E. 112 (1909) (police official did not threaten the accused by insisting that he tell the truth).
14. Brooker v. Silverthorne, 111 S.C. 553, 99 S.E. 350, 351 (1919) (defendant did not threaten operator by saying "If I were there, I would break your God damned neck.").
15. State v. Cushing, 17 Wash. 544, 50 P. 512 (1897).
16. Watts v. United States, 394 U.S. 705, 708 (1969). Therein the Court stated in holding that the petitioner did not threaten the President of the United States when he said, "If they ever make me carry a rifle, the first man I want to get in my sights is L.B.J."

> The language of the political arena, like the language used in labor disputes [and for that matter campus demonstrations] is often vituperative, abusive, and inexact. We agree with petitioner that his only offense was a very crude offensive method of stating a political opposition to the President.

the force or violence threatened must actually intimidate an administrator, faculty member, or student. The law does not forbid the intimidation of a campus visitor, a campus vagrant,[17] or a student, faculty member or administrator not peacefully discharging his duties. Moreover, intimidation may be difficult to prove, since it is defined by the criminal law as "putting in fear."[18] Even though the actor's conduct may annoy or perturb some, punishment under the statute would not be justified without a showing of actual interference or a "putting in fear."

Thus, Washington's campus disorder statute is useful in only a narrow range of situations.[19] To justify punishment the prosecutor must prove that the actor had criminal intent. In addition, the prosecutor must either show that the actor's conduct was forceful or violent or that the quality of his conduct was sufficient to create reasonable apprehension and actually did arouse such fear in an administrator, teacher, or student. These limitations will probably save the statute from constitutional attack.

Today, students and faculty at public institutions possess the constitutional rights of free speech and assembly and do not "shed these rights at the school house gate."[20] Criminal statutes which potentially interfere with these first amendment freedoms are popular targets for constitutional challenges of vagueness and overbreadth.[21] These doctrines have been consistently asserted in school disruption cases.[22]

17. WASH. REV. CODE § 9.87.010 (1963) defines a campus vagrant as one who "loiters" about a school "without a lawful purpose."

18. Armstrong v. Ellington, 312 F. Supp. 1119 (W.D. Tenn. 1970); Shehany v. Lowry, 170 Ga. 70, 152 S.E. 114 (1930).

19. Other recent cases narrowly construing the phrase "intimidation by threats" include Armstrong v. Ellington, 312 F. Supp. 1119 (W.D. Tenn. 1970) and Landry v. Daley, 280 F. Supp. 938 (N.D. Ill. 1968), *rev'd on other grounds sub nom.* Boyle v. Landry, 401 U.S. 77 (1971).

20. Tinker v. Des Moines Community School Dist., 393 U.S. 503 (1969). *See also* Wright, *The Constitution on the Campus*, 22 VAND. L. REV. 1027 (1969).

21. *See* Note, *The Void-For-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 75 (1960). The writer thoroughly reviews the Supreme Court cases involving the doctrine and concludes:

> The doctrine of unconstitutional indefiniteness has been used by the Supreme Court almost invariably for the creation of an insulating buffer zone of added protection of the peripheries of several of the Bill of Rights freedoms.

22. For example, both defenses were asserted in: State v. Zwicker, 41 Wis. 2d 497, 164 N.W. 2d 512 (1969) (accused was convicted under a disorderly conduct statute for using signs at a campus demonstration); State v. Wiggins, 272 N.C. 147, 158 S.E.2d 37, *cert. denied* 390 U.S. 1028 (1968) (accused was convicted under a statute making it unlawful for any person "to willfully interrupt or disturb any public or private school"); *In re* Bacon, 240 Cal. App.2d 34, 49 Cal Rptr. 322 (Dist. Ct. App. 1966) (accused was con-

Vagueness and overbreadth have been defined as follows:[23]

> 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 those who wish to avoid its penalties and to apprise the judge and jury of standards for determination of guilt. . . .
>
> The concept of overbreath, on the other hand, rests on the principle of substantive due process which forbids the prohibition of certain individual freedoms. The primary issue is not reasonable notice or adequate standards. 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.

The conduct proscribed by the campus disorder statute is to "interfere by force or violence with" or "intimidate by threat of force or violence," any school administrator, teacher, or student.[24] Case authority suggests this language is not "so vague that men of common intelligence must necessarily guess as to its meaning and differ as to its application,"[25] nor is it overly broad.

Courts have had little difficulty in upholding as sufficiently definite statutes which make it unlawful to "interfere" with another.[26] The word "intimidate," accepted in criminal law as synonymous with "putting in fear" at common law,[27] has also been upheld against attacks of vagueness when the method of intimidation is proscribed.[28] Moreover, since both the words "interference" and "intimidation" are followed

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victed under statute making it unlawful to remain at a place of unlawful assembly after being warned to disperse); State v. Dixon, 78 Wn. 2d 796, 479 P.2d 931 (1971); State v. Oyen, 78 Wn.2d 909, 480 P.2d 766 (1971).

23. Landry v. Daley, 280 F. Supp. 938, 951 (N.D. Ill. 1968), *rev'd on other grounds sub nom.* Boyle v. Landry, 401 U.S. 77 (1971).

24. WASH. REV. CODE §§ 28B.10.510.573 (1970).

25. Conally v. General Const. Co., 269 U.S. 385, 391 (1926) (Sutherland, J.). *See* International Harvester Co. v. Kentucky, 234 U.S. 216 (1914).

26. *See, e.g.,* State v. Furino, 85 N.J. Super. 345, 204 A.2d 718 (App. Div. 1964). For a collection of the cases which have held that statutes prohibiting obstruction, interference, and annoyance were not unconstitutionally vague, see Annot., 12 A.L.R.3d 1448 (1967).

27. *See* note 18, *supra.*

28. *See, e.g.,* Armstrong v. Ellington, 312 F. Supp. 1119 (W.D. Tenn. 1970). But the three-judge district court held that a statute prohibiting "intimidation," but not specifying the method of "intimidation," would be subject to a vagueness attack.

in the statute by the more definite phrase "force or violence," the entire statute takes on a greater clarity and specificity.[29]

Recent Supreme Court and Washington decisions further support the conclusion that the statute is not unconstitutionally vague. In *Heard v. Rizzo*,[30] the United States Supreme Court affirmed the lower court's finding that a Pennsylvania statute declaring it unlawful to make "any loud noise or disturbance to the annoyance of the peaceable residents" was not unconstitutionally vague. The Washington Supreme Court, in *State v. Dixon*,[31] upheld, against an attack based on vagueness, Washington's unlawful assembly statute, which makes it unlawful for three or more persons to "disturb the public peace;" the court declared that a statute is presumed constitutional, that it will be so construed even though subject to more than one interpretation, and that to be declared void the statute must appear unconstitutional beyond a reasonable doubt.[32] It appears that the new campus disorder statute goes further in setting adjudicative standards and "apprising the man of common intelligence what conduct is punishable" than either of the statutes upheld in *Heard* and *Dixon*. Although the legislature may have severely limited the application of the campus disorder statute by employing the term "force or violence," this terminology sufficiently apprises the common man of what conduct is punishable.

Surviving an attack on grounds of vagueness, the Washington statute might still be attacked as overly broad. Although the concept of overbreadth has been criticized as being too harsh,[33] the doctrine is firmly rooted in constitutional jurisprudence.[34] If a statute purports to

29. In Shub v. Simpson, 196 Md. 177, 76 A.2d 332, *appeal dismissed* 340 U.S. 881 (1950), the court regarded the terms "force or violence" as providing the requisite specificity to save the constitutionality of a Maryland statute. *See* Gerende v. Board of Supervisors, 341 U.S. 56 (1951) (same interpretation of the same statute).

30. 392 U.S. 646 (1968).

31. 78 Wn.2d 796, 479 P.2d 931 (1971).

32. In State v. Oyen, 78 Wn.2d 909, 480 P.2d 766 (1971), the Washington Supreme Court enumerated the same principles in upholding WASH. REV. CODE § 9.87.010 (1971) which makes it unlawful for one to "willfully loiter" about a school "without a lawful purpose."

33. *See* Wright, *supra* note 22, at 1066. Therein the author states:

> This rule [overbreadth doctrine], that one who has violated a clear statute by conduct not constitutionally protected may nevertheless have the statute declared void on its face if it also purports to reach other behavior that is protected by the first amendment, has always seemed to me an exorbitant price to pay to avoid the "chilling effect" it is feared the overbroad statute will have on protected expression.

34. Zwickler v. Koota, 389 U.S. 241 (1967); Cox v. State of Louisiana, 379 U.S. 536 (1965); Edwards v. South Carolina, 372 U.S. 229 (1963).

outlaw behavior protected by the first amendment, it will be rendered void and unenforceable even against one whose conduct falls outside the first amendment.[35] In order to determine if the statute is overly broad, it is necessary to determine if the conduct proscribed infringes upon the expression protected by the first amendment.[36]

It cannot be seriously argued that acts of force or violence directed at another are protected by the first amendment. The courts have long recognized the state's critical interests in protecting the safety of its citizens by holding that expression through acts of force or violence falls outside the protection of the first amendment.[37] Nor would it appear that the statutory prohibition of "intimidation by threat of force or violence" is constitutionally suspect. Although a threat is a statement and, in form, speech, the courts have held that actual threats of force or violence are unreasonable menaces and not protected by the first amendment.[38]

In attempting to determine the impact the campus disorder statute will have in furthering the objectives of the criminal law, several initial observations should be made. First, this statute leaves no doubt that the legislature intends the criminal law to be used in punishing those who resort to force or violence on the campus.[39] Second, the new law adds nothing to the scope of conduct punishable under other Washington law.[40] Washington's riot statute[41] already makes it un-

35. Thornhill v. Alabama, 310 U.S. 88 (1940).

36. For a discussion of the problems posed by attempting to determine whether a statute is overly broad, see T. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT (1966); Wright, *supra* note 22.

37. *See* Feiner v. New York, 340 U.S. 315 (1951). *See also* Note, *Regulation of Demonstrations*, 80 HARV. L. REV. 1773, 1774-75 (1967).

38. Watts v. United States, 394 U.S. 705 (1969); Armstrong v. Ellington, 312 F. Supp. 1119 (W.D. Tenn. 1970); Gurein v. State, 209 Ark. 1082, 193 S.W.2d 997 (1946).

In *Watts*, the Court held that a statute prohibiting "threats" to the health of the President was constitutional. The Court specifically excluded threats from first amendment protection, stating that a "threat must be distinguished from what is constitutionally protected speech." *Watts*, 394 U.S. at 707.

Statutes prohibiting intimidation, but not specifying the means of intimidation, may be deemed unconstitutionally broad. In *Armstrong*, the court pointed out that a statute prohibiting "intimidation" curtails expression.

39. *See* note 47 and accompanying text, *infra*.

40. WASH. REV. CODE § 9.27.060 (1956) (unlawful assembly); § 9.87.010 (1971) (loitering on school property without a lawful purpose); § 9.27.040 (1959) (rioting); § 9.33.060 (1959) (coercion); § 9.11.010-.050 (1956) (assault); § 9.27.080 (1959) (destruction of any dwelling or other building while unlawfully assembled); § 9.83.080 (1971) (entering a public building without license or privilege); § 28A.87.010 (1969) (insulting a teacher); § 28A. 87.060 (1969) (disrupting school meetings).

41. *Id.* § 9.27.040 (1959).

lawful for three or more persons to use force or violence in disturbing the public peace, threatening to disturb the public peace, or doing any unlawful act, and Washington's assault[42] and coercion[43] statutes adequately cover the class of cases where force or violence is exerted or threatened by less than three. However, whether a new statute adds to or duplicates existing legislation is by no means the sole criterion in determining its worth. In the final analysis, the true test must be the extent to which the new law furthers the purposes of the criminal law.

Deterrence is still one of the primary goals of the criminal law.[44] The value of deterrence rests on the assumption that the citizen will have knowledge of a criminal prohibition, will think before he acts, and will base his actions on a careful calculation of the gains and losses involved.[45] Arguably, the new statute could promote the deterrent function in three ways. First, it strengthens the possibility that the community will have knowledge of a criminal prohibition against the use of force or violence on campus. Second, if school administrators and law enforcement officials demonstrate that they are willing to enforce a statute tailor-made for the campus, then the threat of punishment to the potential criminal will be greater. Third, the statute may have a "moralizing" effect[46] on the community by promoting the idea that the campus is a place where there should be open, controversial discussion free from the threat of force and violence.

Although these observations might support the new law, the more persuasive arguments suggest the new statute will not significantly deter disruptive behavior. It is doubtful that the new statute will be of much informational value. Most citizens are aware that it is unlawful to forcibly or violently interfere with another. Any reluctance on the part of school officials to use the criminal law has probably not been a result of their distaste for the existing law, but rather has been due to a general reluctance to use *any* criminal law in the campus situation.[47]

42. *Id.* §§ 9.11.010-.050 (1959).
43. *Id.* § 9.33.060 (1959). If one, intending to compel another to do or not do an act, attempts "to intimidate such person by threats or force," he could be found guilty of coercion.
44. *See* B. WOOTTON, CRIME CONTROL AND THE COMMON LAW 97-103 (1963).
45. *See generally* Gardiner, *The Purposes of Criminal Punishment*, 21 MODERN L. REV. 117, 122-25 (1958).
46. The "moralizing" effect of the criminal law is deterring conduct by strengthening the moral inhibitions against the conduct. Andenaes, *General Prevention—Illusion or Reality?* 43 J. CRIM. L.C. & P.S. 176, 179-81 (1952).
47. Just how sympathetic faculty members are to student unrest was indicated by a

Furthermore, many campus incidents of violence are a result of political and quasi-political activities in which demonstrators advocate martyrdom and seek confrontation;[48] there can be little doubt that participants in the 1970 demonstrations at the University of Washington knew that it was against the law to destroy property, physically abuse other students, and drastically interrupt the operation of the school.[49] Also, it must be remembered that campus disruptions are often a result of the dissatisfaction of students, faculty members, and others with existing social conditions. Therefore, increased enactment and enforcement of penal statutes aimed directly at the campus may have a boomerang effect by increasing hostility and the possibility of more disruptions.

In addition to failing to effect deterrence, it is difficult to see how the statute will further other goals of the criminal law. Incarceration and retribution are well recognized functions[50] of the criminal law. Neither purpose is enhanced by the new law, however, because the statute has not expanded the scope of conduct which is punishable. Nor in all likelihood will the statute help society rehabilitate[51] disruptive students. Since disorderly students are motivated by a dislike for present society, jail sentences and monetary fines are unlikely to change their attitudes.

The Washington Legislature obviously felt a need to demonstrate to the people of Washington its general concern for campus disruptions occurring prior to the 1970 legislature. The campus disorder statute was enacted to satisfy this pressing need. It is a law which appears not to be unconstitutional but which is applicable in only a very narrow range of cases and will probably not significantly further the general functions of the criminal law. It is a law which is consistent

survey conducted by the American Council on Education during 1967-68. The survey indicated that faculty members were involved in the planning of over half the student protests and that faculty bodies passed resolutions approving over two-thirds of the protests. REPORT OF THE PRESIDENT'S COMMISSION ON CAMPUS UNREST 81 (1970).

48. *See* REPORT OF THE PRESIDENT'S COMMISSION ON CAMPUS UNREST (1970), and Comment, *Recent California Campus Disorder Legislation*, 8 HARV. J. LEGIS. 310 (1971).

49. For a detailed description of the events on the University of Washington campus in May, 1970 which were precipitated by the Cambodian invasion and the Kent State tragedy, see JOINT COMMITTEE ON HIGHER EDUCATION, WASHINGTON STATE LEGISLATURE, STUDENT UNREST IN WASHINGTON 40-57 (1971).

50. *See* S. KADISH & M. PAULSEN, CRIMINAL LAW AND ITS PROCESSES 125-27 (2d. ed. 1969).

51. *Id.*

with the recommendations of the President's Commission on Campus Unrest and the Joint Committee on Higher Education of the Washington State Legislature in that it denounces campus violence, but leaves control of nonviolent campus disruptions with the university, an institution which is more flexible than the criminal law and better equipped to deal with campus problems.

Other campus disruption bills, including a bill which appears to be more restrictive than any other state disruption statute, have been recently introduced into the Washington Legislature,[52] but have not met with approval. The present statute is still the legislature's answer to campus disruptions. Hopefully, it is the final answer.

52. Of the many campus disruption bills drafted last year by Washington legislators, the Guess Bill was certainly one of the most restrictive bills drafted. Its provisions included expulsion of students for possession of fire crackers or violation of campus traffic regulations, and termination of a faculty member's salary upon the filing of a complaint by a legislator. Wash. S. Bill 518, Reg. Sess., [1971].