IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1970

DENNIS COATES, ET AL., Appellants	)	
vs	)	No. 117
CITY OF CINCINNATI, Appellees	)	

The above-entitled matter came on for argument at 1:14 o'clock p.m. on Monday, January 11, 1971.

BEFORE:

WARREN E. BURGER, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice

APPEARANCES:

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in Number 117, Coates against the City of Cincinnati.

Mr. Lavercome you may proceed whenever you are ready.

MR. LAVERCOMBE: Thank you, sir.

ORAL ARGUMENT BY ROBERT R. LAVERCOMBE, ESQ.

ON BEHALF OF APPELLANTS

MR. LAVERCOMBE: Mr. Chief Justice and may it please the Court:

This appeal concerns a Cincinnati ordinance, which is called a loitering ordinance, but this is really an unlawful assembly-type piece of legislation.

The ordinance provides that when in the company of two or more other people one so conducts himself as to annoy persons passing by, a crime is committed unless that combat takes place at a public meeting of citizens, in which case it is not a crime.

Hamilton County, Ohio includes Cincinnati and a number of other municipalities and several of them have also had ordinances using similar language. In 1940 the Common Pleas Court for Hamilton County which has county-wide jurisdiction, held that the language used made the legislation unconstitutional. All over Ohio the courts reached the same conclusion through the years and in 1968 the Appeals Court for

the Cleveland area wrote in detail at length, and with emphasis, how the ascertainable standards made the annoyance test in the Cleveland ordinance cause it to represent an unconstitutional exercise of the police power and it was therefore void for vagueness.

That opinion is quoted at pages 5 and 6 in our jurisdictional statement. It was written by the same judge who, in 1970 wrote so strongly to the opposite effect in a 4 to 3 decision of the Ohio Supreme Court in this case of Coates versus Cincinnati.

At least between 1940 and 1968 the annoyance test was considered to be void for vagueness; indeed, the 1962 Supreme Court of Ohio held that a dog barking ordinance which used the annoyance test was void for vagueness. But, in 1967, during the summer, Cincinnati, along with many other areas, had racial disturbances and the police and perhaps more significantly, all city officials frequently found themselves irritated or provoked, annoyed, by the conduct of those who complained those disturbed. And members of the city government, including police, were not able to charge any of those who irritated them with tresspass or assault and battery or profanity or disorderly conduct so the officials and the police who were beset by annoyance which Webster's Collegiate Dictionary in the 7th Edition, defines as: "a wearing on the nerves by persistent petty unpleasantness. They arrested those who provoked them

and hauled them away and that ended the annoyance for a very short time. Because that use of that legislative language making annoyance a crime directly results in contempt for our system of law and order. Or I think, more properly, law and order with justice.

Q Well, was there a convictionin this case?

A Yes, sir.

Q And was there a trial?

A Yes, sir; there was a trial --

Q How about the evidence in the trial?

A At the trial --

Q Is that in the record or not?

A No. There is no evidence of the type Your Honor refers to, presented. The case did not come up on the facts. I believe -- Mr. Nichols could -- and I believe the facts -- I have to correct myself -- I believe the facts were presented to the trial court to some degree, but no effort was made to incorporate them in a bill of --

Q And certainly evidence must have been presented by the state to --

A Yes; that's why I had to correct myself. I was addressing myself to what we have here and he had not come up on any facts, if Your Honor please.

Q So we don't know what conduct the Appellants were found guilty of?

A That is correct.

Q And wouldn't you suggest that there are some facts in the world that anybody would realize might be covered by this statute or really is covered by the statute?

A I certainly do, but I maintain this statute is so broad and I have attempted to cite the cases that illustrated that, the decisions of this Court. I maintain that that "annoyance" is so broad that even though there may be factual circumstances which could properly be used for a valid conviction, we can't take a chance on that. It's too dangerous to allow this annoyance thing. On the other hand --

Q What if your clients were guilty of precisely that conduct which any fool would know would violate the statute?

A If I understand you correctly, then they should have been charged with it, whether it be obscene discourse or disorderly conduct or assault and battery or --

Q Well, they were charged under the statute and let's assume the evidence at the trial showed conduct which anybody would know was covered by this statute. There couldn't be much doubt about it.

A I would have to disagree, Your Honor --

Q Well, I didn't --

A I don't see how anybody can define what annoyance is. I am sure you and I --

Q So your answer really is because nothing, no conduct that you could think of that would be annoying?

A I think we have to apply a certain degree of reason and I am sure that you and I or anyone in this room could designate certain conduct as annoying.

Q Well, let's assume your clients gathered on the street and engaged in precisely that conduct.

A Right. That conduct would then have also been, as I understand the basic idea of --

Q Well, I know --

A -- anyplace else which has legislation, are crimes.

Q Well, I agree, but that conduct may have violated some other statutes, but the question is whether it violated this one.

A Right.

Q And that conduct you concede anybody would say it was annoying.

A Right.

Q And so there wouldn't be any doubt in the minds of someone engaging in that conduct that it was the kind of conduct that was clearly proscribed by this statute?

A Right. I agree with that, but I say that that does not, of itself -- granting what Your Honor says --

Q But that -- go ahead.

A Granting what Your Honor says, I submit it's too dangerous to allow that broad, general characterization of conduct to be a tool in the hands, if you will, of the lazy policeman --

Q Well, that's different. I understand that argument. What you are really saying is that even if, even if this defendant knew precisely and had plenty of notice that his conduct was covered by this statute, nevertheless, the contours of annoyance are so vague or general that the statute should be stricken down and the state should not even be able to prosecute under this statute those people whose conduct is clearly covered by it?

A I think that I would agree completely with what you just said. And in that connection there are a number of decisions of this Court over the years which go in two different areas; one is the area that you have just alluded to and the other is the area that it is a permissible interpretation. And those cases are far more sophisticated than the argument I'm attempting to present here.

I'm trying to state the simplest --

Q Well, why doesn't the record have the facts in it?

A I find that a very difficult question which I have been anticipating for some months. It's easy for me to say, Your Honor, that I didn't get hold of this case until the

Supreme Court of Ohio had decided it, but candor compels me to indicate that I have -- it seems to me that if this ordinance -- not statute, these are ordinances -- if this ordinance was ever to get any authoritative interpretation it had to come up on the law alone and not on the facts, because for years the local officials have been running people in, holding them and turning them loose and the lower courts have been finding them not guilty on the facts.

The perfect example is the Lathan Johnson case which is in the appendix to my brief here and it's a very short opinion and that's the one that started all of this. It arose out of a 1967 racial disturbance and I tried that case and the State Court of Appeals said, when they reversed, they said: "This is probably unconstitutional, this ordinance, but we don't have to decide that." And you see by doing that --

Q Because the ordinance didn't reach the conduct in that case?

A No. we had the facts. They just said there weren't any facts to support the conviction.

Q Right.

A We tried that case -- it came up on a full bill of exceptions. But, you see that's the pernicious part of this thing, by having that weapon and having lower court juries who are disposed to leave that there; everyone knows as a practical matter that after this fellow is hauled away from

the area where he is annoying somebody, he's either going to get dismissed in police court the following morning or if he is more worried about a full trial he's going to get dismissed eventually or if the trial court judge is so imbued with this ultra-strictness that pervaded our community at the time that the decisions were coming down, then the Court of Appeals is going to reverse.

And the only way this case ever got to the Supreme Court of Ohio, which to our intense surprise, it was held constitutional, was by not having any facts. I'm bothered that that's the answer I must give you. I don't like it but that's the way it is --

Q Do you think the state court's opinion reflects on the -- of the fact that it had no facts before it?

A The Supreme Court's opinion, the majority of the four-judge decision, complains, I would say, rather bitterly, Your Honor, about that.

The dissenting opinion says they don't need any facts; they said it's solely a constitutional question -- it's a four-to-three decision there.

I hereby address myself to your question.

Q Mr. Lavercombe, let me ask, try to get at it in a backward manner. There is a statement of facts in the brief filed by the City in the Ohio Court of Appeals. My question is: so far as you are concerned, is that a correct and

acceptable statement of facts?

A I am embarrassed to say I don't know the source of the matter -- but the only facts I have attempted to present are that Appellant Coates was a student demonstrator and the other Appellants were pickets in a labor dispute.

Q Let me go farther: was traffic flow actually impeded?

A There is some reference to that in my appendix that the judge, in passing sentence, referred to that -- in the brown appendix, Your Honor -- in tryingto reach a conclusion. He said there may have been traffic flow impeded, but if there was they could have charged him under the act. I must say I cannot answer you with --

Q Well, you are really here without knowing what the facts of your case are?

A Deliberately, sir; deliberately.

Q Well, let's assume that and let's assume then that in this case --

A Excuse me; if I may, there is a very important -- on the same assumption of the minority of judges in the Supreme Court of Ohio, Mr. Justice Blackmun.

Q Let's assume for the moment that the gathering in this case was in the middle of the street in the rush hour; it did impede traffic and they were charged under this particular ordinance --

A I have been handling cases for so long that I have disciplined myself not to speak outside of the record. Of course I know what happened, Your Honor. K know that [illegible] Coates was marching up and down Main Street in the City ofCincinnati with a bunch of student demonstrators. They were very unkempt, unshaven, Antioch College demonstrators. I know that. [illegible]

And I know the rest of the Appellants. I have never met them, but obviously I made inquiry, and I know that they were in a labor dispute which I am quite sure was the General Electric plant out in the suburbs of Cincinnati and many of the people got mad at them and had them arrested for loitering.

I'm sorry, Your Honor, I have difficulty transposing what's on the record and what's not on the record. And none of this is on the record and we didn't intend it to be on the record.

Q But on the assumption there was a plain obstruction of traffic and they were charged and convicted under this ordinance you would -- and if those facts were in the record, you would still be making precisely the same argument you make?

A Yes, yes.

Q That even though this was an ordinance and everybody knew it, nevertheless, you can't use this particular

ordinance against this kind of --

A Well, Mr. Justice, not unless there is a more clearly defined -- if blocking traffic should be a crime, then let's say it is a crime and let's pass an ordinance prohibiting prohibiting the blocking of traffic.

Q Well, they have said it that it's annoyance. Everybody knows it's annoyance.

A Were not the penalty added it is --

Q No; that's not what your argument is.

A All right; I don't -- I just don't agree with you. I think the ordinance is so vague, as I have already said --

Q You don't have to -- you certainly don't lose your case just because you say or concede, even if you would, that blocking traffic is an annoyance and any fool would know it.

A Well, I thought you were approaching it on a more broad basis. I understood you to say "anything." Let's agree that some set of circumstances is annoyance and anybody will agree to that.

Q Well, then tell me why can't a man who engages in that conduct be convicted under this statute?

A Because he knows that a particular policeman or a particular police court judge is going to decide --

Q In some other case?

A Yes.

Q Not this one.

A Since you and I have already stipulated that these facts areso atrocious that everybody would be annoyed, I would have to say yes; right.

Q So, it's in some other cases.

A Yes, sir.

Q And that's enough as it were that you think the ordinance should be stricken down on its face?

A Right; and I think I cited precedents for that in this Court's opinions.

Q What is different about the situation you just alluded to; that is what some policeman evaluates at a particular time in this context, and a policeman who stops a person for speeding and it's his opinion or the version of the speed against the driver's; or he arrests him for weaving in traffic and changing lanes. Is there anything -- is there any difference on this key thing that he emphasized, mainly that he comes down to what annoys a policeman and why is that any different from what a policeman is weaving in traffic or speeding?

Surely, because what annoys a policeman is not susceptible to the same definitionfor all policemen; but when the speed in traffic is 35 miles an hour or 38 miles an hour, that is susceptible to be an exact definition, and weaving, I

submit to you is virtually the same --

Q Quite true, the definition; but I am talking about the evaluation process that leads the policeman to make the arrest and almost invariably then in turn, leads to a conviction because there are only two witnesses: the driver and the policeman.

Now, doesn't all this in any area come down to a very large amount of judgment on the part of the arresting officer?

A I believe so and I think I have to answer you by saying: we have to look to our courts to tell us; there has got to be a dividing line somewhere and that's what we're here for is for you to decide whether this is on one side or the other of the dividing line.

I am urging that annoyance is too far, too far from the center or too far from a clearly-definable dividing line within the context of the attempt I'm making to answer our question.

I think annoyance is just too vague and I have attempted to cite some authorities to that effect.

Q Would you agree or not, that in shaping ordinances of this kind, this general area of behavior which can't be precisely defined, if the public authority, the legislative body is trying to make an accommodation between having conduct which is identified as subject to a penalty in

order to prevent the victims, in this case the persons annoyed or upset, or aggravated, from taking the law into their own hands and engaging in a street riot to respond.

A I think that would be the broad purpose of the legislature to do that; yes, sir.

Q It's better for a public authority to make that decision than to let, let us say for example, a group of working men on the one hand, or students on the other, annoy and aggravate each other.

A Now, I'm leaving you now, Your Honor. It's not appropriate --

Q Well, then you don't agree with the basic principle that this is a matter of accommodation and balance?

A I'm very strongly in favor, both emotionally and in this case, with the principle of accommodation and balance. I do not think that this test is, this annoyance test, is properly within a good will application of that concept, for want of a well-thought-out phrase.

I don't think the legislature can, or the courts should approve an attempt to accommodate that leaves that much up to guesswork. Whowould know in advance -- Mr. Justice White was asking me about this atrocious event. Well, for a minute let's get away from this atrocious event. Let's get to one that's almost as atrocious.

Now, who knows in advance when he's going down the

street whether if you are a policeman whether you are going to find that annoying whereas a different policeman who had a different set of circumstances when he left home that morning or a different degree of comfort, would be equally annoyed. That's the area that I perceive is in danger here. And by doing that, you see, that leads me to what is one of the most important points here. That leads me

That leads me to what I concede to be this contempt -- this thing --

Q Well, suppose some people deliberately blocked traffic, would there be any doubt that they deliberately were doing an act that was annoying to the people in those cars?

A I would certainly consider it annoying, and I think that we would all agree that would be annoying. Only they should be charged with blocking traffic.

Q But suppose you don't -- do you have a blocking traffic --

A I don't think so, Your Honor.

Q You don't think? We ought to have some facts here. All we have is an ordinance. We don't have anything else.

A That's correct. And I think under the decisions of this Court I think that ordinance is so broad it must not be permitted to stand, and that's the argument --

Q Well, what is a case in this court where all we had was the ordinance?

A I beg your pardon, sir?

Q Which case was it that all this Court had was the ordinance and no record at all?

A Maybe I can refer to one quickly here. I think I am going to have to search longer than I can just --

Q Well, in a case like Cramp against the Board of Board of Public Instruction in Florida, what we have is the language of the state statute. That involved a so-called loyalty oath which people refused to take. All we had there wasthe language of the statute.

Another case that comes to mind in quite a different area, the First Amendment area, is Times Film against Chicago, where again counsel deliberately kept all the facts away from the courts, all the way through, including this Court we just had the language of the statute. That involved prior restraint of a motion picture film.

So there have been cases.

A I hesitate to guess, Your Honor, and thank you for the citations you just threw out. I am confident that what I am saying is --

Q Why is that all we have here?

A I -- another attorney and not I handled this case up to the Supreme Court of Ohio and I am -- I believe that

he felt so strongly about this that with his client's permission he was permitted to bring this thing up on a legal question only.

Q Was there evidence and was there a fine imposed?

A I think the prosecutor relented in one of the cases and one of them had a relatively small fine, Your Honor.

Q How much; do you know?

A $30 I believe.

Q One of them had a $30 fine.

A I believe so, sir.

Q And it was based on evidence?

A My understanding is that it was; yes, sir.

Q Well, why shouldn't we have that to determine what the court was deciding was annoyance?

A I will be most happy for you to have it, but I think the answer to that is that I never expected this case to get to the Supreme Court of the United States. We expected an intermediate court in Ohio to strike this down, as all other intermediate courts have done on similar language in the 20 years between 1930 and 1968.

Q That was just on the language of the statute, but I presume you would agree that if the Supreme Court of Ohio should give a narrowing definition to the word "annoyance" so that it concluded nothing except somebody

standing on the street and blocking people from passing by on the street, that that would make the statute valid; wouldn't it? If the court limited it to that?

A I think under the decisions of this Court, thatwould be correct. That would be historic development of the point; yes, sir. I believe so.

Q What I'm worried about is how do we know that that wasn't here?

A I think the only answer which suggests itself to me immediately, and that is that the Supreme Court of Ohio had an equal burden with us to make you aware of that if that was the case.

Their opinion says that they didn't have any facts. So, to your precise question that's not involved here--

Q They didn't undertake to give a narrowing construction?

A No, sir; they did not attempt to.

Q They just said annoying was --

A In the dissenting opinion they did say that there --

Q Is there a trial record actually in existence?

A I'm not aware --

Q One thatshows the evidence?

A I'm not aware of this, sir; no. I am sure

the -- I know a record was taken and if we could get the short-hand reporter, we could get her original notes, if that --

Q Except, Mr. Lavercombe, under Ohio practice, unless it's changed, you made up as your bill of exceptions only that part of the record that you wanted the reviewing court to consider; isn't that correct? And that's all that the courts -- in fact that's the only record that has been before any of the reviewing courts.

A That's why I had the difficulty with His Honor's question over here when I said sure, I know what the facts are, but they have not properly, in my opinion, been presented to any court.

Q Well, if they had been, as I understood it, blocking the sidewalk and hit people passing by, I presume that would be sufficient to hold that the statute's valid as applied to those facts, whether the Court said it was narrowed or not.

A Well, I don't think that situation will arise, Your Honor, because I think that it would have been assault and battery or some other type of arrest.

Q It might not have been. I presume that the state could --

A Yes.

Q -- make that a crime of loitering or blocking the streets like they had it here.

A I think that I would agree with that; yes,

sir. And you're saying that --

Q Well, that's what bothers me; why shouldn't we have some knowledge of what the evidence is to see what we are construing the statute applied to so as to make it valid.

A Well, I can only answer that I would be delighted to have this Court have a full record; but the method in which this case arose is that it was just never anticipated and it was deliberately anticipated the other way because as I attempted to explain earlier, because up until this case no Ohio court has ever upheld a conviction under this language. They either found it was unconstitutional or reversed on the facts.

Q Is the total amount involved in this case $30?

Q $50, I think.

Q $50 --

Q I think the judge fined at least one of them $50.

A Yes, sir, and then remitted in all but one of them.

Q Remitted in all but one?

A I believe that's correct, Mr. Justice.

Q I suppose an eccentric prosecutor, if he chose, could let's say, three or four people stood on a street corner and proceeded to commit first degree murder. I suppose

he couldhave proceeded under the statute, couldn't he? That would be quite annoying.

A Yes, sir, and of course and the other side that has a pernicious event, how about the American Legion convention where there are no restrictions at all and the people who were the day before arrested for annoyance under this in some rather innocuous set of circumstances, see that no attempt is made to enforce this as opposed to a rowdy convention, for example, a group of less offensive people.

Q But sometimes American Legionnaires do get arrested under these circumstances, too; don't they?

A I don't think they get arrested under the Cincinnati loitering ordinance, Your Honor.

Q The problem is we don't know in this case, really, I mean, just as a matter of absurd theory, perhaps, that these people didn't commit the equivalent of first degree murder.

A No, you don't; and surely -- I am sure that none of us would then attempt to say that this ordinance can be used for all crimes, because if it is, then we can throw all our other ordinances out. This would be the only one we would need then. They could do away with the murder and the speeding and all the other type of ordinances.

Q But I imagine the state wouldn't let that work very long.

A I'm sorry, sir?

Q I imagine the state wouldn't let that work very long because somebody would be pleading forma jeopardy on murder.

A Right; right. But, I think just the reverse is true. I think this is, this permits sloppy, ill-defined -- sloppy work and ill-defined charges and I think it tends to deteriorate the system because people gain disrespect for a system which is so subject to the whims of a particular policeman or an individual judge.

Q The thing that bothers me in the argument is that you agree, and I think rightly, that a statute can be construed on its face and as applied to the facts. And there were some facts here that they had and we don't know what they were.

A Well, I think the Supreme Court of Ohio should have said that too, Your Honor. I think -- they didn't

Q But, I suppose maybe the Appellant should have it somewhere; shouldn't they? Who appealed?

A Sir?

Q Who appealed?

A All these people. This is a straight appeal all the way. There has been no reversal anywhere on this thing. The appeal was to the state --

Q I understood you, you have told us at the

outset of your argument your side of this case, whether you or not, deliberately made the choice to abandon the facts and gambling on getting a holding of this Court that this statute is void on its face for vagueness.

A Not this Court. The local Court of Appeals in Ohio to follow up at that time; there was a long line of Ohio decisions that it was void for vagueness and unconstitutional.

Q I think you said at the outset that you committed yourself for the whole course of the litigation and when it came here, it came here on no facts at all. That's correct; isn't it? That's correct.

A I do not want to dispute that even though there is a little bit of the factual situation in my filing, in my papers filed here. I think a direct approach to your question is: yes; right.

Q Well, perhaps the most unfortunate part of there not being any facts is we can't even tell whether this is a speech case or it isn't a speech case; whether it's in the area of communications or not. And there are decisions of the Court that say that defendants have standing to challenge the application of statutes instead of people in themselves in speech cases.

But the law is quite the contrary in nonspeech cases.

A Yes, sir; and this narrowing definition which several of Your Honors have referred to is -- occurs frequently through the decisions of this Court but there are also some cases where they are just so broad. I took a chance when I took a direct appeal rather than a motion. I guess my partner took a chance when he came up on the thing. I believe, and I believe emphatically that annoyance is too broad by any definition of annoyance and I have to rely on this.

Q So you are talking vagueness, not overbreadth; is that what you are talking about? Because --

A As I understand the cases I have to assert that I am talking both of them, Your Honor.

Q Because on vagueness it seems to me it's easy to imagine things that anybody would agree was annoying.

A It's clear that I am emphasizing vagueness; there is no question about that.

I think a man ought to be able to tell in advance when his conduct is going to be a crime and you can't tell it when annoyance is the test. That's the real --

Q Well, you can in some applications. You know that --

A But "some," isn't enough. It's got to be all in a criminal case, Your Honor.

Q Except perhaps for the fellow who's committing that -- conduct.

A He's going to be judged and he's going to be judged by the police court judge the following morning on this very ill-defined, erroneous(?) standard, so I have to say that's not enough. At least my argument, for what it's worth, is that any annoyance is too broad.

MR. CHIEF JUSTICE BURGER: Mr. Nichols.

ORAL ARGUMENT BY A. DAVID NICHOLS, ESQ.

ON BEHALF OF APPELLEE

MR. NICHOLS: Mr. Chief Justice and Members of the Court:

The failure of the Appellant here to present facts has been a problem for us as well in this matter, and with the permission of the Court very briefly, the broad statement that Mr. Lavercombe made with regard to the activity involved is correct.

What happened was: on December 7, 1967 with regard to the Defendant Coates, he and several confederates gathered outside the United States Federal Building in downtown Cincinnati, which is directly across Main Street from the Post Office and Courthouse, and there Coates and his companions were demonstrating against the Vietnamese War and the Selective Service System. The demonstration went so far as to block the doors to the Federal Building so that --

Q Are you reciting the facts in this case?

A -- to assist the Court with regard to this

matter because there were several questions with regard to the facts, which Your Honors --

Q But they are not in the record.

A That's correct, Your Honor. This is, as I indicated, Your Honor, this is one of the problems that we, as Appellees have had with regard to this case.

On the face of the ordinance, which is the complaint that brings this case to this Court, we don't think that Section 901-L6 of the Cincinnati Code of Ordinances is vague nor is it overbroad. Speaking to that point --

Q Do you have a disorderly conduct ordinance?

A Yes, we do, Your Honor.

Q What's the difference between that ordinance and this one?

A Well, the language is different in that the disorderly conduct ordinance of the City of Cincinnati, provides that it shall be unlawful for an individual to conduct himself in a noisy, rude, boisterous and inaulting manner within the City of Cincinnati.

Q And that's different from this one?

A Different in the sense that it is one individual; different in the language that is used.

Q This requires a group; doesn't it?

A This requires -- this might be classified, if it please Your Honors, as perhaps a group disorderly conduct

ordinance.

Q Couldn't three people simultaneously on the same corner be guilty of disorderly conduct?

A I think they could, Your Honor.

Q Now, what's the difference between the statutes? The reason I'm saying it is because this looks to me like a catchall for whatever might be missed; is that what it is?

A Your Honor, I --

Q Is this less than disorderly conduct?

A I think it's conduct which is troubling, annoying, vexatious; conduct blocks the street, blocks commerce, stops pedestrians --

Q Is there a situation where three people on the same corner could violate both ordinances at the same time?

A Both ordinances at the same time? I think there are those situations.

Q Well, could you prosecute them for both?

A I would suggest that as a practical matter that would not happen.

Q But could you?

A I think we probably could, Your Honor.

Q Why could you?

A Pardon me?

Q Why could you? For the same conduct and they

had been tried or convicted or acquitted of it?

A Well --

Q Then you could try it again by giving it a different name?

A Well, I don't think we could do that, Your Honor, in the sense that we stack up the charges one after the other and shotgun the case. No; I don't think that's at all correct.

Q I took you perhaps to be responding that you could charge them under either.

A That is correct.

Q But not both.

A I don't think so. I don't think we can try -- I don't think we can set a defendant up and shoot him down like that, if you will, with a variety of charges such as we oftentimes find in the traffic area where overzealous police officers, quite candidly, set somebody up with driving under the influence of alcohol, reckless operation and a myriad of other things. This is totally wrong.

I don't think in this case that we could charge, nor could we try individuals engaged in that conduct for both disorderly conduct and loitering.

If I may respond just a bit further with regard to this ordinance, this ordinance was drafted and passed on September 3, 1856. That's about 125 years ago. At the time

this ordinance was passed, of course, our constitutionwas 67 years old. This ordinance, historically seems to be the compilation of Blackstone and Hawkins approach to unlawful assembly which I think Mr. Lavercombe alluded to.

Now, there were people gathering on the street so as to put fear in the hearts of fairly stout individuals within the community. This was the opportunity for the community to protect itself against unlawful conduct; conduct which was annoying, because this was a river town. This was a town where you had a lot of individuals coming down the Ohio and becoming sometimes irresponsible inour community.

This was -- this is an ordinance which has continued, since its passage and to the best of my knowledge this is the first time that it's reached, certainly this Court and this is the first time to the best of my knowledge that I think it's been tested in the Supreme Court of the State of Ohio.

I don't think there is anything difficult about the term "annoying," as used in the ordinance which Mr. Labercome and his clients make their initial thrust against. They say "annoying," we don't understand what that means. Examination of dictionaries used as high schools, colleges, grammar schools, indicates that annoying means to trouble, to vex, to impede, to incommode. This is the same definition that the Ohio Supreme Court applied.

Q Well, suppose three people are standing outside the house of some ecologist who just despises smoking and they are smoking cigarettes. That would be annoying; would it not?

A No.

Q You say it wouldn't?

A Is your question if three people stood outside a house and smoked cigarettes and the person inside determined that it was annoying with the -- in this ordinance?

Q Yes.

A I don't think so, Your Honor, because --

Q Well, it would be annoying; wouldn't it?

A If it may please the Court: based upon the common sense approach to the resolution of these cases as in People versus Harvey from the State of New York and the matter of the Unitad States versus Wilbert(?) we're not talking about the peculiar susceptibilities of some individuals to annoyance. What we're --

Q Well, doesn't the statute say "annoying"to the people in the house?

A Yes; that's correct.

Q Annoying to persons passing by occupants of adjacent buildings.

A That is correct.

Q That's what the statute says.

A That is correct.

Q So that if you are smoking cigarettes outside of somebody's house who is opposed to smoking cigarettes and he's against smog and everything you would be annoying him; wouldn't you?

A Well, Your Honor may interpret it as annoying and I don't, I don't interpret it the same way because I think as you are setting up a situation there you are appealing to a particular susceptitude or attitude of the individual involved.

What we're talking about with regard to this law or any law, Your Honor, is: common sense approach to the law. I don't think that this ordinance or a statute or any law or any regulation with regard to the control of conduct, should be drafted so that you have to be a student of the Harvard Law School before you understood what was involved. And I don't think that this ordinance requires that. I think that's an ordinance drawn in --

Q Well, don't restrict your answer to Harvard, but take any school and tell me what annoying means. Any school; take any one.

A Annoying --

Q "I, as a citizen know the limits of annoying. This is annoying; this is not," to how many people do you have in Cincinnati?

A About a half a million.

Q To a half a million people, because this is to the people in their individual house. Now, if I am standing on the corner here and I don't know who lives in that house how could I possibly know what would annoy them?

A Well, Mr. Justice Marshall, I don't know if you would know what an individual inside that house would consider to be annoying, but I do know this:

Q But there are some things that we all agree --

A I know; that is correct. And respectfully --

Q So you have got to agree that it's speculative.

A Well, that is precisely why we are fortunate enough to have courts such as this one and trial courts. We're here three or four courts removed from the trial court. I would like to think that, as I started to say, that ordinances are drawn and statutes are drawn so that the common man in the street understands what's involved. I think this is one of those statutes. I think that under the circumstances that we have to reach down and redefine annoying, and then we come up with a definition of annoying and then that has to be redefined, and then we come back to the court to redefine that. Pretty soon "annoying," which is a perfectly good term to describe conduct, is no longer understandable because it's been

defined four or five times. And now people are at a total loss at to what annoying really means.

Q Does the city have any chance or any, could it have gone to court anyway and put the facts in here so that we could know what they were? What they had held was annoying?

A Respectfully, Your Honor,as I recollect this case, a record was made. However, only a portion of the record came up on appeal.

Q Well, couldn't the City have brought up the other? Suppose it had made a motion to include the facts in the record. Could it not do so under city law?

A I think we could have, Your Honor.

Q You could have?

A Could have; yes.

Q Well, then both of you are to blame for not having the facts here.

A Well, I will have to concede perhaps that's true.

Q Ordinarily the responsibility for the state of the record when it gets to an appellate court is the responsibility of the person who brings the case here.

A That's correct.

Q It's ordinarily true, but we frequently have the other side make motions to amend the record, and supplement

it. I'm not trying to impose any liability on the city that shouldn't be there. What we have is a case where it seems that both sides admit that a statute may be held constitutional on its face, or constitutional as applied.

Here you find that there are some things that could be annoying, that could make the statute valid; some things that some people would feel annoyed at; others wouldn't. But the court would hold didn't make it valid.

And so we are here without any chance to determine whether or not the statute is valid as applied; aren't we?

A That is correct, Your Honor,and based upon the posture of the case as it appears before you it's my request that you affirm the court below.

Q Well,the other people request we --

Q The state seems to have been willing to have the statute judged on its face without any records of the facts since you never recalled the facts; you never certified them to the state courts and you were quite willing to have the decision made about the validity of the statute based just on its face.

A That's correct, Your Honor.

Q And I take it that you are not only willing to have that done here, but you want the Supreme Court of Ohio affirmed.

A That is correct, Your Honor.

Q On the face of the statute.

A We think that the statute on its face is not vague nor overbroad or it does not suffer from any constitutional infirmity.

Q You don't concede at all that in some applications somebody might have some real doubt about whether he was annoying somebody?

A Your Honor, I concede that in all human events we all must make judgments and have some doubt about what our position may be. But I further suggest to this Court that from the State of New York in the case of People versus Harvey to the State of California in a case of Fernandez versus Klingler(?) nobody has any trouble with "annoyed." Maybe they do in Cincinnati, but in those cases the term "annoy" was specifically under consideration and in Fernandez versus Klingler this Court denied certiorari in 1966.

In that case the Court said the -- the highest court in the State of California, said with regard to the term "annoy," and the citation is 346 Fed. Reporter 2nd on page 212: "the words 'molest,' or 'annoy,' have accepted community meanings and are appropriate standards for a criminal statute.

In People versus Harvey --

Q What was that citation? 346 Fed 2nd --

A That is correct, Your Honor.

Q And that isn't cited in your brief either?

A No, it's not, Your Honor. People versus Harvey 307 New York 588, 1954.

Q Thanks.

Q I understand this in part a labor dispute --

A Actually there are five defendants; one of whom is a demonstrator against the Vietnamese War and the other four for a picket line at a manufacturing company in Cincinnati.

Q I'm sure the picketing was annoying to the employer.

A Well, the picketing was such that they blocked the public sidewalk; they blocked the street and driveways; they did not allow --

Q We don't have that.

A That is correct, Your Honor.

Q Let me ask you this question on the matter of vagueness. I suppose as long as you have got a half a million people down in Cincinnati they must have an ordinance about changing lanes in traffic so as to endanger the flow of traffic or changing lanes so as to create conditions for an accident.

Do you think that informs the drivers any more or any less than this ordinance informs people?

A Responding to Your Honor's first question, Mr. Chief Justice: yes, we have such an ordinance and I think

that ordinance, like this ordinance, says to the operator of an automobile or one who wishes to harrangue his brothers on the street: "You must do so as a reasonable man. You must operate within the limits of your demonstration; you must operate within the limits of the reasonable man using due care with what you're about."

I don't know if I have totally responded to Your Honor's question, Mr. Chief Justice, other than to say: throughout the law there are those areas which can't be uniformly and minutely defined because when that happens then nobody knows what the law is. Judge White, who was sitting as a District Judge and in the Northern District of Ohio, Western Division, rendered a decision on December 18, 1970 which I think carries some very good language with regard to what we're about here today.

And in that case, which is Steinberg versus Rhodes, which has not been recorded yet, but is case number C-70 278, December 18, 1970. The case involved construction of language with regard to an abortion statute in the State of Ohio.

Judge White said with regard to the approach of the plaintiffs in this case, he says that "It appears to us that the vagueness which disturbs the plaintiffs herein results from their own strained construction of the language used, coupled with a modern notion among Law Review writers that

anything that is not couched in numerous paragraphs of fine strong legal terminology, is too imprecise to support a criminal conviction."

He went on to say the words in this particular case, "have, over a long period of years, proven entirely adequate to inform the public, both lay and professional what is forbidden."

We think both of those --

Q Was that, if you remember, a three-judge court?

A That is correct, Your Honor.

Q In the Northern District of Ohio.

A Western Division; yes, Your Honor. He was sitting as one of a three-judge court.

We think that language has some significance, because all through the law is common sense; and common sense says that you shall not annoy your neighbor.

Common sense also says: your neighbor should not be so critical that he's going to apply an impossible standard. That's our whole judicial system.

Q You're not claiming in your argument that a law would be good that made it a crime for one man to annoy his neighbor?

A I'm sorry, Your Honor, I didn't --

Q You're not claiming are you that it would be

a valid crime if it said nothing in the world except that "It shall be a crime in this state for one man to annoy his neighbor?"

A No; I'm not suggesting that it should just be what we can codify annoyance clearly as a crime.

Q What you have here is a case where the word could have a good meaning.

A Correct.

Q And could make the statute valid under the rules, but you don't have the facts. And the problem is: what do we do in a case like that?

A Well, I humbly suggest that it was the Appellants' decision to come the road that they did and that we have responded and that this Court at this point should affirm the Court of Ohio, the Supreme Court of Ohio.

Q Should it affirm it or dismiss it?

A Well, dismiss the case or affirm. I think that this Court should affirm the court below.

Q On what basis?

A That the statute is not vague nor overbroad on its face.

Q That's the only issue presented here; isn't it on this appeal?

A Correct. Yes it is, Mr. Chief Justice.

Q Is it so that this is the first court in Ohio

that's upheld this statute?

A I didn't hear Your Honor.

Q I said: I thought your adversary said this was the first time that any Ohio Court has upheld this statute.

A This is the first time the highest court in the state, the Supreme Court of Ohio, has ruled on this or any similar ordinance of its particular type. There was one other case -- that's Bucher versus Colubus, which was the loud dog barking case which did come up and the court in that case held it unconstitutional because it didn't establish a vicinity of annoyance; that you could have a barking dog on the east side of Columbus and somebody on the west side could get an affidavit that was totally unworkable.

That's not our case. We defined the area in which the activity was determined to be criminal, with specificity.

Q But not the activity.

A Your Honor, respectfully, I would say that the activity is defined as it relates to the relationship of one human being to another. That --

Q Three or four human beings.

A Two plus one other; yes.

Q Three or more it has to be, before there can be any offense at all.

A That is correct. Judgment, I think is perhaps an element here and this Court, Judge Holmes, in the

matter of Nash versus the United States, which is not in our brief, but a case I ran across in preparing for argument here. That's reported in 229 US 373, a 1913 anti-trust criminal case. In that case this Court was faced with a determination as to whether the term "unduly" was a term that was so broad and vague that a man could act to his peril and face imprisonment because his activities were such that unduly restraint plays.

And Justice Holmes said, "The law is full of instances where a man's fate depends upon his judgment." And he went on to say that "a man must estimate rightly, correctly, and that is as the jury subsequently estimates that conduct. And that if that individual fails in judging his conduct by contemporary standards, he may not only suffer a fine or imprisonment, but he may lose his life."

What we are talking about here is the judgment of an individual in the intercourse of social activity within his community based upon contemporary standards. And I submit that if we constantly have to redefine each and every term which is a term of, I think, common understanding as the Court in Fernandez versus Klinger and People versus Harvey thought it was, then you will have even more problems across this land, because people will say: does the law really mean what Webster says, or does it mean something else or what's it all about?

Q Suppose it means exactly what Webster says. Do you think that all things that would annoy people, two or

three people, to be a crime? Suppose it meant exactly what Webster says.

A Your question is: do I think that everything that I might consider to be annoying would be a crime?

Q Yes.

No.

Q Then you finally get back to a --

A But, based upon contemporary standards as to what a reasonable man who would be law abiding, with common intelligence, would consider, I think is the issue. And --

Q There are a lot of reasonable men -- I think are reasonable, throughout the country, who, to take my Brother Marshall's suggestion, who are very much annoyed at people smoking cigarettes in their presence. Could that be made a crime?

A I think if the ordinance or statute were drafted in that manner; yes. I think under the contemporary standards --

Q Just the word "annoyed," would be enough?

A Pardon me?

Q Just the word "annoyed," would be enough?

A No; I don't think just the word "annoyed," but if one were to draw an ordinance --

Q You're talking now about as applied.

A That is correct.

Q But many cities do have ordinances which make it a criminal act to smoke in a restaurant or an elevator or a store or a public building. But saying that the direct act isn't cast in terms of annoying; is it?

A That is right.

Q We have had one in my home city of St. Paul for 25 years, and --

Q That's a definite statement referring to the conduct as a crime --

Q A definite statute and quite --

Q Mr. Nichols, how loud would I have to be talking on your corner with two others of us before I would annoy you? Under this statute.

A Respectfully, Your Honor, loudness at the decibel level which you would have to reach, I think, would again, based upon the reasonable man test, would depend on where you lived. If you were at the ball park and --

Q No; mine is on your pavement in front of your house.

A Yes.

Q And wouldn't that decibel level be different right across the street?

A Not if across the street was a residential -- I'm not sure I understand your question.

Q This is a neighborhood of people, all middle

class people living side-by-side; some people are deaf and they can turn their hearing aid off and the others are so sensible that any sound will awaken them. Wouldn't each one of them have a different level of annoyance under this statute?

A I think it's conceivable that there could be people within the neighborhood you describe who would have a different tolerance for annoyance, but that doesn't mean that because their tolerance is at one level or another that the activity isn't --

Q Assume that I'm sitting as a trial judge in Cincinnati; how would I decide whether it was too loud or not loud enough?

A I think, Your Honor --

Q There is no yardstick; you would have to agree on that; there is no yardstick, but once you agree that there is no yardstick as to how loud in order to be annoying; aren't you getting in trouble?

That's my only point.

A Well, I would say this, that there is no yardstick with regard to the decibel level outside your house in that neighborhood, nor if I lived across the street, outside my house.

Q I suppose that, in the words of the statute, that if a person would pass by or a person who is an occupant of an adjacent building, simply testified that these three

defendants assembled on a sidewalk or street corner or vacant lot, or mouth of an alley adjacent to the building where I live or in the vicinity where I pass by, and annoyed me, the defendants would be guilty; wouldn't they?

A I certainly would think so.

Q It wouldn't be up to the Court to consider decibel level or anything else, but only that the sworn statement of this passer-by or occupant of an adjacent building that he was annoyed. That would be an act leading to a conviction; wouldn't it?

A No, I don't believe so.

Q Why? That's what the ordinance says.

A Not just to that degree, because if your position was that my mere walking by and if I had -- the clicking of my heels was annoying to you I think that's totally out of character.

Q If it is going to be a violation there would have to be three people.

A That is correct.

Q Three defendants. And then the passerby says those defendants were standing on the street corner when I passed by and they annoyed me. Now, that's the end of case. $50 fine; isn't it under the way the statute is written?

A No; I don't think that's the test, because if that were the test that's exactly the problem we're having here.

Q The statute --

A Yes. But the mere -- respectfully, if I may please Your Honor, I think we have to have some more facts than just that you were merely annoyed. I don't think that that conclusion reaches the conviction.

This case is --

(Inaudible)

A That's our feeling, Your Honor. That's all we are asking you to do. We're asking you to rule on the face, on the ordinance on the face of it, Your Honor.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 2:15 o'clock p.m. the argument in the above-entitled matter was concluded)