

1989

# Logan City v. Ralph Lowell Huber : Brief of Respondent

Utah Court of Appeals

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**UTAH COURT OF APPEALS  
BRIEF**

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DOCKET NO. 89-0093

IN THE UTAH COURT OF APPEALS

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LOGAN CITY,	)	
Plaintiff-Respondent,	)	No. 890093-CA
vs.	)	CASE TYPE: APPEAL
RALPH LOWELL HUBER,	)	PRIORITY NUMBER 2
Defendant-Appellant.	)	

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BRIEF OF RESPONDENT

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Appeal from the First Circuit Court  
Cache County, State of Utah, Logan City Department  
The Honorable Burton H. Harris, Presiding

---

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IN THE UTAH COURT OF APPEALS

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LOGAN CITY,	)	
Plaintiff-Respondent,	)	No. 6890093-CA
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BRIEF OF RESPONDENT

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TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES.....	ii, iii, iv
STATEMENT OF NATURE OF PROCEEDINGS.....	1
STATEMENT OF ISSUES PRESENTED.....	1
STATEMENT OF FACTS.....	2
SUMMARY OF ARGUMENTS.....	6
ARGUMENTS	
1 - THE LOGAN CITY DISORDERLY CONDUCT ORDINANCE PROPERLY CONSTRUED DOES NOT VIOLATE ARTICLE I SECTION 15 OF THE UTAH STATE CONSTITUTION OF THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION.....	7
2 - LOGAN CITY DISORDERLY CONDUCT ORDINANCE IS NOT OVERBROAD NOR CONSTITUTIONALLY VAGUE AS APPLIED TO THIS DEFENDANT.....	18
3 - THE JURY WAS PROPERLY AND ADEQUATELY INSTRUCTED BY THE COURT.....	25
4 - THE COURT PROPERLY CHARGED THE JURY WITH THE ELEMENTS OF DISORDERLY CONDUCT.....	27
5 - COURT PROPERLY ADMONISHED APPELLANT NOT TO MAKE GESTURES IN THE PRESENCE OF THE JURY.....	28
CONCLUSION.....	31
ADDENDUM.....	32
CERTIFICATE OF SERVICE.....	33

# TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<u>CHAPLINSKY v. NEW HAMPSHIRE</u> 315 U.S. 568, 62 S. Ct. 766, 86 L. Ed 1031 (1942).....	11, 12, 16, 17, 22, 24, 28
<u>COHEN v. CALIFORNIA</u> 403 U.S. 15, 29 L. Ed 2d 284, 91 S. Ct 1780 (1971).....	13
<u>COTTAGE GROVE v. FARR</u> 42 OR. App. 21, 599 P.2d 472 (1979).....	17, 20
<u>GOODING v. WILSON</u> 405 U.S. 518, 92 S. Ct. 1103, 31 L. Ed. 2d 408 (1972).....	13
<u>GREAVES v. STATE</u> 528 P.2d 805 (Utah 1974).....	7, 8, 18, 19
<u>IN RE A CRIMINAL INVESTIGATION SEVENTH DISTRICT COURT NUMBER CS-1</u> 754 P. 2d633 (Utah 1988).....	9, 18
<u>LANDMARK COMMUNICATIONS INC v. COMMONWEALTH OF VIRGINIA</u> 435 U.S. 829, 98 S.Ct. 1535, 56 L. Ed. 2d 1 (1978).....	10
<u>LEWIS v. CITY OF NEW ORLEANS</u> 415 U.S. 130, 93 S. Ct. 970, 39 L. Ed. 2d 214 (1974).....	22
<u>MILLER v. STATE</u> 462 P.2d 421 (Alaska 1969).....	7, 18
<u>NORWELL v. CINCINNATI</u> 414 U.S. 14, 94 S. Ct. 187, 38 L. Ed. 2d 170 (1973).....	24
<u>ORATOWSKI v. CIVIL SERVICE COMMISSION</u> 3 Ill. App. 2d 551, 123 N.E. 2d 146 (1954).....	23
<u>PAPISH v. BOARD OF CURATORS OF THE UNIVERSITY OF MISSOURI</u> 410 U.S. 667, 93 S. Ct. 1197, 35 L. Ed. 2d 618; Annot., 39 L. Ed. 2d 925 (1976).....	24
<u>PROVO CITY CORP. v. WILLDEN</u> 100 Utah Adv. Rep 7 (1989).....	9
<u>SAIA v. NEW YORK</u> 334 US 558 571, 68 S. Ct 1148, 92 L. Ed 1574, (1948).....	24
<u>STATE v. CHIMA</u> 23 Utah 2d 360, 463 P. 2d 802 (1970).....	14

TABLE OF AUTHORITIES CONTINUED

CONSTITUTIONAL PROVISIONS

Utah Constitution, Articles 1 and 15.....	1
United States Constitution, First Amendment.....	1

AUTHORITIES CITED

Am. Jur. 2d, Criminal Law §17.....	19
------------------------------------	----

### STATEMENT OF NATURE OF PROCEEDINGS

This is an appeal from a jury verdict finding Appellant guilty of disorderly conduct contrary to Logan City Ordinance 12/8/9. The appeal is taken to the Utah Court of Appeals from the Second Circuit Court, Cache County, Logan City Department pursuant to Rule 26 of the Utah Code of Criminal Procedure title 77, chapter 35.

### STATEMENT OF ISSUES PRESENTED

1) Whether or not Logan City Ordinance 12/8/9 violates Article 1 § 15 of the Constitution of the State of Utah and the First Amendment to the Constitution of the United States of America.

2) Whether or not Logan City Ordinance 12/8/9 is unconstitutional vague as applied.

3) Whether or not the Court properly and adequately instructed the jury.

4) Whether or not the Court in admonishing the Appellant before the jury committed harmless error.

## STATEMENT OF FACTS

On December 11, 1988 at approximately 1:30 am (T.25 ln 24-35, T. 26 ln. 1-5), officers observed a small car make a wide turn and start to side slip in some small pea gravel then accelerate very rapidly to a speed estimated to be between thirty-five to thirty-eight miles per hour (T.32 ln 4-9). When within a position about ten to fifteen feet in front of the police vehicle, the suspect vehicle braked and stopped at a traffic semaphore on Third North and Main Street in Logan City. The officers pulled their car behind the suspect vehicle and followed it through the semaphore. At which time, the officers activated their lights and suspect vehicle pulled over into a parking lot of a local business (T. 27-28). The officers pulled behind the suspect vehicle; and the Appellant exited his vehicle and walked up to the door of the business. One of the officers called to Appellant indicating that they needed to talk with him (T. 38-39). Another officer asked how the Appellant was and the Appellant responded, "Not very good" (T. 40 ln A). The officer then inquired what the problem was. The Appellant responded, "You guys are on my private property, you have no reason for being here, you're trespassing" (T. 40 ln 13-14). Appellant stepped toward the officer and said, "Now git". The officer then asked Appellant for his driver's



license, and Defendant responded, "Fuck you, I'm not going to give it to you" (T. 40 ln 24-25). All the officer wanted was Appellant's drivers license and registration, and to talk with him for a minute about his driving. The officer was trying to determine if he had been drinking or not (T. 41 ln 7-11).

The officer continued to ask for Appellant's license with Appellant responding, "Fuck you" and "This is bull-shit". Appellant continued to refuse to get his drivers license.

The situation got progressively worse and was deteriorating. It was becoming a fight (T. 82 ln 16-25). Appellant was yelling at the officer face-to-face with the officer backing away trying to disfuse the situation. Appellant was becoming violent. The officer was in danger (T. 84 ln 9-12).

The following is a transcript of part of the conversation that ensued between the officers and Appellant introduced into evidence at trial as Exhibit D-1 (T. 85-93)

Huber: ... You're two blocks down the road.

Monroe: We weren't two blocks down the road.

Huber: You were clear the hell down by Taco Time.

Monroe: Do you want to know where we really were? When you came around the corner, when you came around the corner awfully fast, right at the road here, we were parked just off the road. But we do need to see your driver's license.

Huber: ...This is my property and your on it without my permission and that's it that's what it boils down to. If it ... I'm tired of being harrassed.

Monroe: We need to see your registration too please.

Huber: Bullshit! How you're on my property this is my building, I haven't done anything wrong, I want to be left alone. I'm get tired of this harrassment, because I come out of my bar and you guys start harrassing, and I don't want it.

Monroe: We need to see your driver's license, and the registration.

Huber: The registration is current it's on the back, you're going to run it through the radio, you can find out just as quick as I can.

Monroe: Look, Mr. Huber, we are trying to be decent here.

Huber: No, you're not, why you pull me over.

Monroe: As we said, you're going too fast.

Huber: No it's because, what time is it, because you have nothing else to do. And that's it.

Monroe: In just about 2 seconds, we're not going to be decent okay. We need to see the registration.

Huber: Fine, fine, fine. Get your lights out...

Monroe: We'll be with you in just a second.

Huber: This is a bunch of crap, you know the car it it's mine, it's always here. Get your fuckin' light out of my car, goddamnit. You guys piss me right off.

Monroe: Here's the deal Mr. Huber, you are under arrest for disorderly conduct. We are going to jail. Put your hands behind your back. Turn around and put your hands behind your back.

Huber: What is the deal here?

Monroe: You're under arrest.

Huber: For what? For what? Hold your horses let me put my keys in my pocket.

Monroe: Okay we'll do that.

Huber: ...turn my car off, can I turn my car off.

Monroe: Not now.

Huber: Wait a minute, can I call my attorney right now? This is stupider than hell. You guys really wanna go for this....You wit around there and ... my car for no reason what so ever.

Roper: Are they too tight

Huber: That one's way too tight

Roper: Would you like me to loosen them a little bit for ya.

Huber: I'd like not to be wearing them...hello can you explain to me why these guys are pulling this stunt.

Geier: I don't know yet, but I'll find out. Mr. Huber you're under arrest for...

Huber: I'm on my own property, ...I get mad at them because...in my car, there is absolutely no reason for this... my own private property, this is my property, you agree you're on my property.....he knows me personally.

Roper: I don't know you.

Huber: Well he does.

Monroe: Mr. Huber, I've seen you one time okay. (To Geier-away from Huber)...he was going 20-25 mph going around the corner, visually between 35-38 mph coming down the road here. He thinks we're clear up the road, here, we were sitting right here watching the house. He comes around the corner visually 35-38 mph we stopped him, he jumps out and just goes bananas. He won't give us the drivers license he's telling us, fuck you, goddamn you, fuck you, and all this so we...I don't smell nothing.

Geier: Sounds good to me.

Monroe: Yea, he's going to jail.

Geier: Would you like your car left here on your own personal property?

Huber: Yes, I'd like me left here.

Defendant was arrested for disorderly conduct and transported to jail.

#### SUMMARY OF ARGUMENT

1. THE LOGAN CITY DISORDERLY CONDUCT ORDINANCE PROPERLY CONSTRUED DOES NOT VIOLATE ARTICLE I SECTION 15 OF THE UTAH STATE CONSTITUTION OF THE UNITED STATES CONSTITUTION.
2. LOGAN CITY DISORDERLY CONDUCT ORDINANCE IS NOT OVERBROAD NOR CONSTITUTIONALLY VAGUE AS APPLIED TO THIS DEFENDANT.
3. THE JURY WAS PROPERLY AND ADEQUATELY INSTRUCTED BY THE COURT.
4. THE COURT PROPERLY CHARGED THE JURY WITH THE ELEMENTS OF DISORDERLY CONDUCT.
5. THE COURT PROPERLY ADMONISHED APPELLANT NOT TO MAKE GESTURES IN THE PRESENCE OF THE JURY.

## ARGUMENT

### 1

THE LOGAN CITY DISORDERLY CONDUCT ORDINANCE  
PROPERLY CONSTRUED DOES NOT VIOLATE ARTICLE I  
SECTION 15 OF THE UTAH STATE CONSTITUTION OR  
THE FIRST AMENDMENT OF THE  
UNITED STATES CONSTITUTION

The Appellant alleging the unconstitutionality of the Logan City Disorderly Conduct Statute must overcome three hurdles:

1) The ordinance is presumed to be valid and in conformity with the Constitution.

Trade Commission v. Skaggs Drug Centers, Inc. 21 Utah 2d 431, 446 P.2d 958 (1968); Greaves v. State 528 P.2d 805 (Utah 1974).

2) The statute or ordinance should not be invalid unless it is shown beyond a reasonable doubt to be incompatible with some particular constitutional provision Miller v. State, 462 P.2d 421 (Alaska 1969).

3) The burden of showing invalidity of the ordinance is upon the Appellant.

In State v. Packard, 122 Utah 369, 373, 250 P.2d 561, 563 (1952), it was recognized

that statutes should not be declared unconstitutional if there is any reasonable basis upon which they may be sustained as falling within the constitutional framework, and that a statute will not be held void for uncertainty if any sort of sensible, practical effect may be given.

In fact, it is the established policy of the Utah Supreme Court to construe statutory provisions whenever possible in a way to avoid invalidating them on constitutional grounds. Greaves v. State, supra.

For example, in State v. Lafferty, 749 P.2d 1239, 1260 (Utah 1988), the Utah Supreme Court imposed the requirement that juries be instructed to find that previous crimes of the defendant which have not resulted in convictions, introduced at a penalty phase, be proven beyond a reasonable doubt.

In State v. Wood, 648 P.2d 71, 83-84 (Utah), cert. denied, 459 US 988, 103 S. Ct 341, 74 L. Ed 2d 383 (1982), the Utah Supreme Court construed Utah Code Annotated (1953 as amended) §76-3-207 to require proof beyond a reasonable doubt at the penalty phase of a capital case that the aggravating circumstances outweighed the mitigating circumstances, even though no specific burden of persuasion was provided in the statute.

In Re Criminal Investigation, 7th District Court No. Cs-1, 754 P.2d 633, 640-41 (Utah 1988), the Utah Supreme Court went to great lengths to save the constitutionality of the Subpoena Powers Act by reading into it a host of new provisions which simply were next put in by the Legislature.

However, in Provo City Corporation v. Willden, 100 Utah Adv. Rep. 7 (1989), the Utah Supreme Court found Provo City's soliciting sexual conduct ordinance unconstitutional as a violation of the freedom of speech clause of the first amendment to the United States Constitution. The Court noted that the city might have forbid the Defendant's conduct therein by a properly worded ordinance.

In fact, State v. Jordan, 665 P.2d 1280 Utah (1983), the Utah Supreme Court held that a Utah statute prohibiting production of visual recordings depicting minors engaging in sexual or simulated sexual conduct was not subject to attack on First Amendment grounds, in that conduct prohibited was not pure speech.

Our fundamental interest in free speech demands the existence of a compelling government interest to justify legislative restriction upon it.

For example, in Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 89 S. Ct 733, 21 L. Ed 2d 731 (1969), students wore black armbands to school to

publicize their objections to the Vietnam War despite the fact that they were aware that the school authorities a few days previously had adopted a policy or regulation any student wearing an armband to school would be asked to remove it, and if he refused would be suspended until he returned without the armband. The authorities had no reason to anticipate that the wearing of the armbands would substantially interfere with the work of the school or impinge upon the rights of other students. It was held that the wearing of armbands in the circumstances of the case was entirely divorced from actually or potentially disruptive conduct by those participating in it, and as such was closely akin to "pure speech" which was entitled to protection under the First Amendment.

Landmark Communications, Inc. v. Commonwealth of Virginia, 435 US 829, 98 S. Ct 1535, 56 L. Ed 2d 1 (1978) held that the First Amendment guarantees of freedom of speech and press did not permit the criminal punishment of the news media, who were nonparticipants in the commission's confidential proceedings. Although the Virginia criminal statute did not violate the Constitution, it could not constitutionally be extended to punish a newspaper.



In Village of Hoffman Estates v. Flipside Hoffman Estates, Inc., 455 U.S. 489, 102 S. Ct 2023 (1982), the ordinance was expressly directed at commercial activity promoting or encouraging illegal drug use. If that activity is deemed "speech", then it is speech proposing an illegal transaction which a government may regulate or ban entirely.

A compelling government interest has been found to exist in the prohibition of fighting words - words which by their very utterance inflict injury or tend to incite an immediate breach of the peace do not enjoy constitutional protection. Chaplinsky vs. New Hampshire, 315 US 568, 62 S. Ct 766, 86 L. Ed 1031 (1942).

There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words - those which by their very utterance induce injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly out weighed by the social interest in order, and morality. Chaplinsky, supra at 571-572.

In order to uphold the constitutionality of a state statute or ordinance under which the prosecution attempts to

punish the utterance of "fighting words", such statute or ordinance must, by its own terms or as construed by the state's court, be limited in its application to "fighting words" and must not be susceptible of application to speech that is protected by the First and Fourteenth Amendments to the Constitution. Chaplinsky v. New Hampshire, supra.

Affirming the defendant's conviction under a state statute prohibiting any person from addressing "any offensive, devisive or annoying words to any other person lawfully in any street or other public place, for calling a police officer a "Goddamned rackateer" and a "dammed fascist", the United States Supreme Court in Chaplinsky v. New Hampshire, supra, rejected the defendant's contention that the statute deprived him of his right of freedom of speech guaranteed by the United States Constitution. Noting that the statute, as construed by the state's highest court, merely prohibited face-to-face words plainly likely to cause a breach of the peace and did not contravene the constitutional right of free expression. The statute was narrowly drawn and limited to define and punish specific conduct lying within the domain of state power, namely, the use in a public place of words likely to cause a breach of the peace. A statute punishing verbal acts, carefully drawn so as not unduly to impair liberty of expression is not too vague for a criminal law.

In Cohen v. California, 403 U.S. 15, 91 S. Ct 1780, 29 L. Ed 2d 284 (1971), it was held that merely offensive or vulgar language alone could not be punished. In this case, the defendant did not engage in nor threaten to engage in, nor did anyone as the result of his conduct in fact commit or threaten to commit any act of violence. The defendant did not make any loud or unusual noise, nor was there any evidence that he uttered any sound prior to his arrest, Defendant just wore a jacket bearing the words "Fuck the Draft".

Later, in Gooding v. Wilson, 405 US 518, 92 S. Ct 1103, 31 L. Ed 2d 408 (1972), the Supreme Court defined the necessary characteristics of statutes or ordinances proscribing the use of offensive words in public if such legislation is to pass constitutional muster. Enactments punishing the use of words or language must be carefully drawn or authoritatively construed to punish only unprotected speech and must not be susceptible of application to speech protected by the First and Fourteenth Amendments.

Thus, a state's attempt to proscribe behavior amounting to a breach of the peace or disorderly conduct must punish "fighting words" and must do so in such a way as to avoid infringing at the same time upon constitutionally protected speech.

The important underlying aspect of these cases goes really to the function of law in preserving ordered liberty. Civilized people refrain from "taking the law into their own hands".

It is a little over a century since men use to carry guns constantly because the law did not afford protection. In that setting, words directed toward such an armed civilian, could well have led to death or serious bodily injury. When we undermine the general belief that the law will give protection against fighting words and profane and abusive language such as the utterances involved in the case at hand, we take steps to return to law of jungle. In short, we erode public confidence in the law - that subtle but indispensable ingredient of ordered liberty.

In State v. Chima, 23 Utah 2d 360, 463 P. 2d 802 (1970), a statute providing that every person who, without authority of law, wilfully disturbs or breaks up any assembly or meeting, not unlawful in its character, is not unconstitutional. The fact that a speaker at a public meeting shouted back at defendants did not render unconstitutional the application to defendant of the statute. In this case, defendants claimed their right of free speech took precedence over another's right to free assembly.

The Logan City Disorderly Conduct ordinances provides:

A person is guilty of disorderly conduct if:

(1) He refuses to comply with the lawful order of the police to move from a public place, or knowingly creates a hazardous or physically offensive condition, by any act which serves no legitimate purpose; or

(2) Intending to cause public inconvenience, annoyance, or alarm, or recklessly creating a risk thereof:

(A) He engages in fighting or in violent, tumultuous,

or threatening behavior; or

(B) He makes unreasonable noises in a public place; or

(C) He makes unreasonable noises in a private place

which can be heard in a public place; or

(D) He engages in abuse or obscene language or makes obscene gestures in a public place; or

(E) He obstructs vehicular or pedestrian traffic.

(b) "Public place", for the purpose of this section, means any place to which the public or a substantial group of the public has access and includes but is not limited to streets, highways, and the common areas of schools, hospitals, apartment houses, office buildings, transport facilities and shops.

(c) Disorderly conduct is a class C misdemeanor if the offense continues after a request by a person to desist. Otherwise it is an infraction."

Disorderly conduct as defined by the Ordinance is not necessarily verbal alone. However, the information herein alleged that Appellant violated the above statute as follows:

"COUNT 1: That the Defendant did intend to cause public inconvenience, annoyance, or alarm, or recklessly created a risk thereof by engaging in abusive or obscene language or made obscene gestures in a public place."

The exception to First Amendment protection recognized in Chaplinsky, supra, is not limited to words whose mere utterance entails a high probability of an outbreak of physical violence. It also extends to the willful use of language calculated to offend the sensibilities of an unwilling audience.

In Williams v. District of Columbia, 419 F. 2d 638, 646, (CA DC 1969), this issue was explicitly addressed:

Apart from punishing profane or obscene words which are spoken in circumstances which create a threat of violence, the State may also have a legitimate interest in stopping one person from inflicting injury on others by verbally assaulting them with language which is grossly offensive because of its profane or obscene character. The fact that a person may constitutionally indulge his taste for obscenities in private does not mean that he is free to intrude them upon the attentions of others. ...a breach of the peace is threatened either because the language creates a substantial risk of provoking violence, or because it is, under "contemporary community standards," so grossly offensive to members of the public who actually overhear it as to amount to nuisance.

Clearly the Logan City ordinance can be construed as constitutional under such reasoning.

Furthermore, in the present situation, the Appellant was stopped and asked to produce his driver's license (T. 40 ln 22-23). Appellant responded, "Fuck you, I'm not going to give it to you" (T. 40 ln 25). Appellant continued yelling and shouting at the officers, "Fuck you"; "This is bullshit" and the like (T. 41 ln. 18). The officer was facing the Appellant with the Appellant moving closer to the officer and the officer backing away (T. 42 ln 3-12). The situation was becoming violent and a fight was imminent (T. 84 ln 9-12).

At the very least, these are fighting words under Chaplinsky, supra, especially in light of Appellant's non verbal as well as verbal conduct. The conduct of the Appellant clearly was not constitutionally protected. Furthermore, the actions of the Appellant clearly were not constitutionally protected.

An ordinance similar to the one herein was found to be constitutional in Cottage Grove v. Farr, 42 OR. App. 21, 599 P. 2d 472 (1979). The ordinance read in part as follows:

"A person commits the crime of disorderly conduct if, with intent to cause public convenience, annoyance or alarm, he:

"\* \* \*

(c) Uses abusive or obscene language, or makes an obscene gesture, in a public place; or

" \* \* \*

(h) Created a hazardous or physically offensive condition by any act which he is not licensed or privileged to do."

Id at 473.

LOGAN CITY DISORDERLY CONDUCT ORDINANCE IS NOT OVERBROAD NOR  
CONSTITUTIONALLY VAGUE AS APPLIED TO THIS DEFENDANT

In construing the constitutionality of a statute or ordinance, a court should construe law so as to carry out the legislative intent while avoiding constitutional conflicts. In Re A Criminal Investigation Seventh District Court Number CS-1, 754 P.2d 633 (Utah 1988) An ordinance or statute will not be declared unconstitutional on account of vagueness if under any sensible interpretation of its language it can be given practical effect. Greaves v. State, 528 P.2d 803 (Utah 1974).

In ascertaining the constitutionality of a statute or ordinance as previously noted, the following rules of construction should be applied:

1) A Legislative enactment is presumed to be valid and in conformity with the constitution. Trade Commission v. Skaggs Drug Centers, Inc. 21 Utah 2d 431, 446 P.2d 958 (1968); Greaves v. State, supra.

2) The statute or ordinance should not be invalid unless it is shown beyond a reasonable doubt to be incompatible with some particular constitutional provision Miller v. State, 462 P.2d 421 (Alaska 1969).



3) The burden of showing invalidity of an ordinance or statute is upon the one who makes the challenge Trade Commission v. Skaggs Drug Centers, supra.

In State v. Packard, 122 Utah 369, 373, 250 P.2d 561, 563 (1952), it was recognized

that statutes should not be declared unconstitutional if there is any reasonable basis upon which they may be sustained as falling within the constitutional framework, and that a statute will not be held void for uncertainty if any sort of sensible, practical effect may be given.

In determining whether or not a statute or ordinance is vague, it must be sufficiently definite

(1) To inform persons of ordinary intelligence, who would be law abiding, what their conduct must be to conform to its requirements,

(2) To advise a defendant accused of violating it just what constitutes the offense with which he or she is charged, and

(3) To be susceptible of uniform interpretation and application by those charged with responsibility of apply and enforcing it. State v. Packard, supra, Greaves v. State, supra, State v. Owens, 638 P.2d 1182 (Utah, 1981).

On the other hand, a criminal statute is not rendered unconstitutional by the fact that its application may be uncertain in exceptional cases, so long as the general area of conduct against which legislation is directed is made plain. See 21 Am Jur. 2d, Criminal Law §17.

The ordinance herein states with sufficient clarity and conciseness the elements necessary to constitute a violation:

1) a defendant refuses to comply with the lawful order of the police to move from a public place, or knowingly creates a hazardous or physically offensive condition, by any act which serves no legitimate purpose; or

2) Defendant intends to cause a public inconvenience, annoyance, or alarm or recklessly creates a risk thereof:

a) engages in fighting or in violent, tumultuous or threatening behavior; or

b) makes unreasonable noises in a public place; or

c) engages in abusive or obscene language or makes obscene gestures in a public place.

Taking all the elements into account, the crime specifically defines the outer perimeters of conduct. In order to violate the ordinance, the above elements must exist.

In Cottage Grove v. Farr, 42 Or. App. 21, 599 P.2d 472, 473 (1979), a local ordinance similar to the ordinance in question declaring that

"A person commits the crime of disorderly conduct if, with intent to cause public inconvenience, annoyance or alarm, he:

"\* \* \*

(c) Uses abusive or obscene language,  
or makes an obscene gesture, in a public  
place; or

"\* \* \*

(h) Created a hazardous or physically  
offensive condition by any act which he  
is not licensed or privileged to do."

was found to be constitutional.

In State v. Theobald, 645 P.2d 50 (Utah 1982) the Utah Supreme Court found the Utah Statute prohibiting interfering with a public servant (Utah Code Annotated (1953) as amended) §76-8-301) not to be unconstitutionally vague. In this case, defendant was stopped at a road block and requested to produce his driver's license and vehicle registration. Defendant angrily asked why he had to go through the process because he had been stopped earlier that day. Defendant flashed the requested document at the officer, but the officer was unable to adequately review the documents so he then asked to see them again. Defendant refused, and defendant was then ordered out of his truck. Defendant got out and clenching his fists, made threatening moves toward the officer. Defendant was arrested then for interfering with a public servant.

Affirming defendant's conviction under a state statute prohibiting any person from addressing "any offensive, devisive or annoying words to any other person lawfully in any street or public place", for calling a police officer a "God damned racketeer" and a "damned fascist", the United

States Supreme Court in Chaplinsky v. New Hampshire, 315 US 563, 62 S. Ct 166, 86 L. Ed 1031, (1942), rejected the defendant's argument that the statute was so vague and indefinite as to render a conviction thereunder a violation of due process. The Court said that the statute was narrowly drawn and limited to define and punish specific conduct lying within the domain of state power, namely, the use in a public place of words likely to cause a breach of the peace. A statute punishing verbal acts, carefully drawn so as not unduly impair liberty of expression is not too vague for a criminal law.

Now look at the facts of the cases cited by Appellant in support of his argument.

Lewis v. City of New Orleans, 415 U. S. 130, 93 S. Ct 970, 39 L. Ed 2d 214 (1974) held an ordinance unconstitutional that made it unlawful as 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 " a city policemen while in the actual performance of his duties. It was held unconstitutional where the state courts had not construed the statute as being limited to "fighting words" which by their very utterance narrowly defined the words of the ordinance so as to limit its application to "fighting words". Arguably the statute would have been constitutionally upheld if the state courts had construed the statutes as being limited to "fighting words".

Oratowski v. Civil Service Commission of City of Chicago, 3 Ill App. 2d 551, 123 N.E. 2d 146 (1954), involved an administrative review of a police officer's action when after being called an "ignorant jerk" because a squad car was parked in a no parking zone, the officer arrested a indignant motorist who had just received a ticket for illegal parking for disorderly conduct. There was considerable evidence of physical injury to the motorist in the course of the arrest. This was probably been why the court noted that "an officer of the law must exercise the greatest degree of restraint in dealing with the public. He must not conceive that every threatening or insulting word, gesture, or motion amounts to disorderly conduct." Oratowski, supra, at 151. The present case is a criminal case not an administrative case, and there is no evidence of physical injury to the Appellant as a result of the arrest.

In State v. John W, 418 A2d 1097, 14 ALR 4th 1238 (Me. 1980), the defendant screamed at the officer, "Hey, turn around and come back here" and "Hey, you fucking pig, you fucking kangaroo." The officer then ordered defendant to get back into his car. Defendant yelled, "Fuck you". Then defendant was arrested for disorderly conduct. This case involved no face-to-face confrontation and only verbal conduct.

In fact, the court noted in State v. John W, supra at 1245 that the United States Supreme Court in Chaplinsky, supra, contemplated

"That courts enforcing disorderly conduct statutes must look at the actual situation in which the words were used, in order to punish only words which, when they were used were 'plainly likely' to cause a breach of the peace. In particular, the fact finder must consider those personal attributes of the addressee which reasonable apparent because those attributes are a part of the objective situation in which the conduct occurred (emphasis added).

Norwell v. Cincinnati, 414 US 14, 94 S. Ct 187, 38 L. Ed 2d 170, (1973) held application of the disorderly conduct ordinance violated Defendant's constitutionally protected right of speech because he had been arrested and convicted merely because of his verbal protest of the officer's treatment of him and not because of his physical acts.

Finally, Papish v. The Board of Curators of the University of Missouri, et al 410 US 667, 93 S. Ct 1197, 35 L. Ed 2d 618, ren den 411 US 960, 93 S. Ct 1921, 36 L. Ed 2d 419, (1973) involved the dismissal of a student by a university which is not the case herein.

As Justice Jackson dissenting in Saia v. New York, 334 US 558 571, 68 S. Ct 1148, 92 L. Ed 1574, (1948) warned of the pitfalls of the kind of constitutional analysis Appellant is requesting herein

But I did not suppose our function was that of a council of revision. The issue before us is whether what has been done has deprived this appellant of a constitutional right. It is the law as applied that we review, not the abstract, academic questions which it might raise in some more doubtful case. (Emphasis added)

In the instance case, the officer stopped Appellant based upon their observation of a vehicle making a wide turn, getting into some small pea gravel and starting to slide along with rapid acceleration (T. 28 ln 1-8). The officers were working on a specific detail, alcohol enforcement (T. 41 ln 9-11).

The Appellant was stopped and asked to produce his driver's license (T. 40 ln 22-23). Appellant responded, "Fuck you, I'm not going to give it to you" (T. 40 ln 25). Appellant continued yelling and shouting at the officers, "Fuck you"; "This is bullshit" and the like (T. 41 ln. 18). The officer was facing the Appellant with the Appellant moving closer to the officer and the officer backing away (T. 42 ln 3-12). Much of the conversation was recorded and is contined herein in the Statement of Facts. But just as important as the language of "Fuck you", "Bullshit", "God-damn", "Hell" and "Piss me off" (T. 97-100), is the manner in which Appellant spoke the words and his conduct. Officer Monroe testified that the situation was becoming so violent, he felt that there was going to be a fight, Officer Roper

was in danger (T. 84 ln 9-12). In addition there is reference to Appellant clenching his fists and struggling until the handcuffs were put on him (T. 115 ln 20-25 to T. 116 ln 1-3).

In light of the facts herein, Logan City Disorderly Conduct Ordinance is not overbroad nor unconstitutionally vague as applied to Appellant.

3

THE JURY WAS PROPERLY AND  
ADEQUATELY INSTRUCTED BY THE COURT

Appellant in his brief cites no authority for the proposition that the Court was bound upon giving jury instruction number 2 or 3 to modify or explain the instruction in light of the required elements of "fighting words" and "clear and present danger".

Furthermore, any error that may have occurred by failure of the Court to explain fighting words and clear and present danger was harmless error in light of the facts of this case. See cases on harmless error set forth in point 5 below.



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Appellant's words were definitely fighting words as defined in Chaplinsky, supra - words which by their very utterance inflict injury or tend to incite an immediate breach of peace, and there was a clear and present danger to officer Roper.

4

THE COURT PROPERLY CHARGED THE JURY WITH  
THE ELEMENTS OF DISORDERLY CONDUCT

Jury Instruction number 3 upon Appellant's timely objection was amended by the Court to delete that portion that dealt with obscene gestures to conform with the evidence (T. 155 ln 18-21) and the jury was left to decide the issue (T. 156 ln 15-16).

Rule 4 of the Utah Rules of Criminal Procedure, Utah Code Annotated (1953 as amended) §77-35-4 provides that an information shall set forth the offense "by using the name given to the offense by common law or by statutes by stating in concise terms the definition of the offense sufficient to give the defendant notice of the charge".

Any error that may have occurred by surplus verbage

from the ordinance contained in the instruction was harmless error. See cases on harmless error set forth in Point 5, below.

There was sufficient evidence from which the jury could have found the Defendant guilty of disorderly conduct. There was a face-to-face confrontation with Appellant yelling and shouting "fuck you", "bullshit", "Goddamn", "Hell" and "piss me off" at the officer. The officer was backing up to diffuse the situation (T. 92-100). As officer Monroe testified, it was becoming violent and he believed there was going to be a fight (T. 84 ln 9-12)

5

COURT PROPERLY ADMONISHED APPELLANT NOT TO  
MAKE GESTURES IN THE PRESENCE OF THE JURY

In the present case, the following exchange took place  
(T.61 ln 8 to 62 ln 5):

"Mr. Huber:	I'm having a hard time swallowing this
Mr. Brady:	Maybe he needs a drink.
The Court:	Well, I realize that, but I'm admonishing you, Mr. Huber, to not make any gestures in the presence of this jury.

Mr. Huber: Okay. I'm sorry, your Honor

The Court: You'll have your chance to testify when your turn comes, and I don't want you to shake your head one way or another. Just sit there and listen to the--

Mr. Lauritzen: Well, I object to that, your Honor. He can certainly do that, that's not testimony.

The Court: He's not going to do it in my Court, Mr. Lauritzen I want you to understand that.

Mr. Lauritzen: Well, I continue my objection, because I can't believe--

The Court: You may have your objection. You may proceed.

Mr. Lauritzen: Thank You."

Any prejudice that may have occurred was due to Appellant's own gestures and words, "I'm having a hard time swallowing this," not the action of the Court nor the prosecutor. In order to assure a fair trial, the Court properly admonished the Appellant not to make any more gestures in the presence of the Jury.

If any error occurred by such admonition, it was corrected by Jury Instruction 14 providing as follows:

If during the trial the Court has said or done anything which has suggested to you that it is inclined to favor the claims or position of either party, you will not permit yourselves to be influenced by any such suggestion.

The Court has not intended to indicate any opinion as to which witnesses are, or are not, worthy of belief, nor which party should prevail. If any expression has seemed to indicate an opinion relating to any of these matters, you should disregard it, because you are the exclusive judges of the facts.

At the very most, said admonition was harmless error.

Utah Code Annotated (1953 as amended) Section 77-35-30(a) provides "(a)ny error, defect, irregularity or variance which does not affect the substantial rights of a party shall be disregarded.

In State v. Knight, 734 P.2d 913, (Utah 1987), the Utah Supreme Court stated,

(W)e have ruled in several cases that Rule 30 phrase "affect the substnatial rights of a party" means that an error warrants reversal "only if a review of the record persuades the Court that without the error there was 'a reasonable likelihood of a more favorable result for the defendant.'" Id. at 919.

The Utah Supreme Court further defined what is meant by a "reasonable likelihood." "For an error to require reversal, the likelihood of a different outcome must be sufficiently high to undermine confidence in the verdict." Id. at 920. This is a case of face-to-face confrontation


with Appellant yelling and shouting "Fuck you", "Bullshit", "Goddamn", "Hell" and "Piss me off" at an officer. The officer backed up to diffuse the situation (T. 97-100). The situation was becoming violent and a fight was imminent (T. 84 ln 9-12).

Remember, also, the jury found Appellant not guilty of speeding (T. 192 ln 7-9).

#### CONCLUSION

The Logan City Disorderly Conduct ordinance should be construed as not violative of freedom of speech protections of the Utah Constitution and United States Constitution. Furthermore, the ordinance has been constitutionally applied to Appellant under the facts of this case and therefore, Appellant's conviction should be affirmed.

RESPECTFULLY SUBMITTED this 17 day of July, 1989.

  
Cheryl A. Russell  
Logan City Prosecutor

A D D E N D U M

12-8-9. Disorderly Conduct. (a) A Person is guilty of disorderly conduct if:

(1) He refuses to comply with the lawful order of the police to move from a public place, or knowingly creates a hazardous or physically offensive condition, by any act which serves no legitimate purpose; or

(2) Intending to cause public inconvenience, annoyance, or alarm, or recklessly creating a risk thereof:

(A) He engages in fighting or in violent, tumultuous, or threatening behavior; or

(B) He makes unreasonable noises in a public place; or

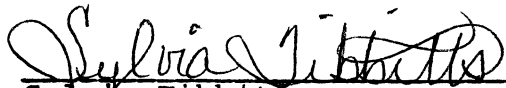
(C) He makes unreasonable noises in a private place which can be heard in a public place; or

(D) He engages in abusive or obscene language or makes obscene gestures in a public place; or

(E) He obstructs vehicular or pedestrian traffic.

CERTIFICATE OF MAILING

I hereby certify that on the 17 day of July, 1989, I mailed 4 true and correct copies of the foregoing Respondent's Brief to Arden W. Lauritzen, Attorney for Appellant, 326 North First East, P. O. Box 171, Logan, Utah 84321.

  
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Sylvia Tibbitts  
Secretary to Logan City  
Prosecutor