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Hanley: Statutes--Vagueness of Phrase "Contributing to Delinquency of a M

tions which are primarily pervaded by intimate social relationships[31] The external impact of exclusion from these organizations is largely confined to exclusion of persons from sharing in these relationships, traditionally a matter of only private concern.

It would appear, however, that the judicial trend with regard to the problem of exclusion from membership is to view the facts of each case individually, concentrating on the type of organization and its purpose, the extent of control which it exercises and the efffect on other individuals and the public.

Charles Blaine Myers, Jr.

[31] Kronen v. Pacific Coast Soc'y of Orthodontists, 237 Cal. App. 2d 289, 46 Cal. Rptr. 808 (1965), *cert. denied,* 384 U.S. 905 (1966); Kurk v. Medical Soc'y, 260 N.Y.S.2d 520 (Sup. Ct. 1965). Note, *Judicially Compelled Admission to Medical Societies,* 75 HARV. L. REV. 1186 (1962).

Statutes — Vagueness of Phrase "Contributing to Delinquency of a Minor"

The defendant, Ralph Hodges, was convicted of contributing to the delinquency of a minor in the state of Oregon. He appealed his conviction, contending that the statute under which he was indicted violated the due process clause of the fourteenth amendment. *Held,* reversed and remanded. The statute was unconstitutionally vague and thus did not give adequate notice of what conduct was proscribed and consequently the judge and jury were allowed so much leeway in its application that the law-making (legislative) function was effectively delegated to them. *State v. Hodges,* 457 P.2d 491 (Ore. 1969).

The challenged section of the Oregon statute stated that "any person who does any act which manifestly tends to cause any child to become a delinquent child shall be punished upon conviction. . . ."[1] "Delinquent child" is defined in a separate section of the

[1] When a child is a delinquent child as defined by any statute of this state, any person responsible for, or by any act encouraging, causing or contributing to the delinquency of such a child, or any person who by threats, command or persuasion, endeavors to induce any child to perform any act or follow any course of conduct which would cause it to become a delinquent child, or any person who does any act which manifestly tends to cause any child to become a delinquent child, shall be punished upon conviction by a fine of not more than $1,000, or by imprisonment in the county jail for a period not exceeding one year or both, or by imprisonment in the penitentiary for a period not exceeding five years.

ORE REV. STAT. § 167.210 (1967).

statute as a person whose conduct or condition is such as to fall within the provisions of certain named paragraphs.[2] The relevant paragraph used by the court in defining "delinquent child" states that a child is delinquent if he is subject to the jurisdiction of the junvenile court because his "behavior, condition or circumstances are such as to endanger his own welfare or the welfare of others. . . ."[3] By inserting this particular definition of "delinquent child" into the contributing to the delinquency statute, the language tested for vagueness as applied to the case then reads: "[O]r any person who does any act which manifestly tends to cause any child to become. . . . a child subject to the jurisdiction of the juvenile court because his "behavior, condition or circumstances are such as to endanger his own welfare or the welfare of others. . ."[4]

The majority of the court felt that the statute failed to place persons on notice of the law's demands and lent itself to an unconstitutional delegation of legislative power to the judge and jury by permitting the jury to decide the meaning of the law. The law was thus too vague to satisfy the requirements of due process of law and was declared void. Although three judges specially concurred with the majority decision, they did not concur on the question of the constitutionality of the statute.[5] Judge Holman in his specially

[2] 'Child delinquency,' 'delinquent child,' 'child dependency' and 'dependent child' mean a person under 18 years of age whose conduct or condition is such as to fall within the provisions of paragraphs (a) to (e) of subsection (1) of ORS 419.476." ORE. STAT. § 418.205 (1967).

> (1) The juvenile court has exclusive original jurisdiction in any case involving a person who is under 18 years of age and:
> (a) Who has committed an act which is a violation, or which if done by an adult would constitute a violation, of a law or ordinance of the United States or a state, county or city; or
> (b) who is beyond the control of his parents, guardian or other person having his custody; or
> (c) Whose behavior, condition or circumstances are such as to endanger his own welfare or the welfare of others; or
> (d) Who is dependent for care and support on a public or private child-caring agency that needs the services of the court in planning for his best interests; or
> (e) Either his parents or any other person having his custody have abandoned him, failed to provide him with the support or education required by law, subjected him to cruelty or depravity or failed to provide care, guidance and protection necessary for his physical, mental or emotional well-being. . . .

ORE. REV. STAT. § 419.476 (1967).

[3] ORE. REV. STAT. § 419.476 (1) (c) (1967).

[4] ORE. REV. STAT. § 167.210 (1967), ORE. REV. STAT. § 419.467 (1) (c) (1967).

[5] The indictment returned against the defendant charged that he exposed and manipulated his private parts in the presence of a ten-year-old girl. The specially concurring opinion reached the same conclusion as the majority because

Hanley: Statutes--Vagueness of Phrase "Contributing to Delinquency of a M

concurring opinion felt that there was no trap to the unwary or undiscriminating citizen because of the alleged vagueness with which the conduct was described. He felt that the statute as construed by previous cases[6] proscribed only those acts which were commonly recognized by everyone as tending to produce delinquency. Therefore, Judge Holman argued that the statute was constitutional because reasonable men would know what was prohibited.

If a law is so vague and indefinite that it leaves the public uncertain as to the conduct it prohibits, and leaves judges and jurors free to decide what it prohibits, it fails to meet the requirements of due process.[7] It is a question of degree as to whether a statute will be declared void on the grounds of vagueness, or whether it lends itself to a construction limiting its application to an identifiable factual situation. Many courts, including Oregon's have narrowed the construction of criminal statutes where the law was not found void on its face.[8] This question of degree of vagueness varies according to the rights involved and the nature of the statute. Where a statute infringes on first amendment rights the test for vagueness will be very strict and little effort will be made to save such a statute by narrowing its application.[9] When considering criminal laws some vagueness can be tolerated if the laws do not trespass on first amendment freedoms. The Constitution does not require im-

as a matter of law the judges felt that the acts done by the defendant were not such as would tend to cause delinquency in a minor. State v. Hodges, 457 P.2d 491 (Ore. 1969) (specially concurirng opinion).

[6] State v. Casson, 223 Ore. 421, 354 P.2d 815 (1960); State v. Peebler, 200 Ore. 321, 265 P.2d 1081 (1954).

[7] *See* Giaccio v. Pennsylvania, 382 U.S. 399 (1966); Baggett v. Bullitt, 377 U.S. 360 (1964); Lanzetta v. New Jersey, 306 U.S. 451 (1939).

[8] *E.g.,* United States v. National Dairy Products Corp., 372 U.S. 29 (1963); Brockmuller v. State, 86 Ariz. 82, 340 P.2d 992 (1959); State v. Barone, 124 So.2d 490 (Fla. 1960); State v. Casson, 223 Ore. 421, 354 P.2d 815 (1960); State v. Peebler, 200 Ore. 321, 265 P.2d 1081 (1954).

[9] *See* Winters v. New York, 333 U.S. 507 (1948); Thornhill v. Alabama, 310 U.S. 88 (1940). The courts have felt that if a law is vague, and first amendment freedoms are involved, the vagueness could inhibit persons from exercising their constitutional rights for fear that they might violate the statute. The vagueness of the statute would therefore have a chilling effect on the exercise of first amendment rights even though it does not actually prohibit these rights. Where the vagueness of a statute does not infringe on first amendment rights the vagueness might inhibit some other lawful acts. The courts, however, balance the social utility of the acts that might be inhibited against the vagueness of the statute in determining whether they should move to protect these rights. First amendment rights are almost always protected by the courts therefore little effort will be expended to save a statute by construing it narrowly if it creates a chilling effefct on these basic freedoms.

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West Virginia Law Review, Vol. 72, Iss. 4 [1970], Art. 9

possible standards. Lack of precision in criminal statutes is not in itself offensive to the requirements of due process. All that is necessary is that the language convey a sufficiently definite warning with regard to the proscribed conduct when measured by common understanding and practices.[10]

In litigating the constitutionality of similar contributing-to-delinquency statutes other states have reached a decision different than Oregon's.[11] In applying the test for vagueness these courts have indicated that the scope of the subject forbids an exact definition of what constitutes the crime. They have also considered the apparent impossibility of detailing all of the acts which could conceivably fall within the condemnation of the statute. The courts have stated that the common sense of the community, as well as the sense of decency, propriety, and morality which most people entertain, is sufficient to permit the statute to be applied on a case by case basis.[12] Also, such statutes have a long history of common law interpretation which renders much language sufficiently clear and meaningful which might otherwise be vague and uncertain.[13] Because of this long history of interpretation, and the sense of propriety which people in a community entertain, the courts have held the statutes sufficiently certain and definite to apprise men of ordinary intelligence of the conduct prohibited by them.

West Virginia has a contributing delinquency statute similar to Oregon's.[14] Unlike the Oregon statute, the crime in West Virginia includes contributing to the "neglect" of any child, as well as to his "delinquency". The section of the West Virginia statute similar to that tested for vagueness in Oregon reads: "A person who by any act or omission contributes to, encourages or tends to cause the delinquency or neglect of any child, shall be guility of a mis-

[10] *See* Roth v. United States, 354 U.S. 476 (1957); United States v. Petrillo, 332 U.S. 1 (1947).

[11] *See, e.g.*, Brockmueller v. State, 86 Ariz. 82, 340 P.2d 992 (1959); McDonald v. Commonwealth, 331 S.W.2d 716 (Ky. 1960); State v. Montalbo, 33 N.J. Super. 462, 110 A.2d 572 (1954); Commonwealth v. Randall, 183 Pa. Super. 603, 133 A.2d 276 (1957).

[12] *See, e.g.*, State v. Millard, 18 Vt. 574, 46 Am. Dec. 170 (1845).

[13] *E.g.*, Brockmueller v. State, 86 Ariz. 82, 340 P.2d 992 (1959).

[14] A person who by any act or omission contributes to, encourages or tends to cause the delinquency or neglect of any child, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined not to exceed five hundred dollars, or imprisoned in the county jail for a period not exceeding one year, or both.

W. VA. CODE ch. 49, art. 7, § 7 (Michie 1966).

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demeanor. . . ."[15] The terms delinquent child and neglected child are also defined in the statute.[16] These definitions must be read in conjunction with the contributing to delinquency statute to understand what is prohibited. It is here that the question of vagueness arises. Subsection (9) of the West Virginia statute defining "delinquent child" is similar to the section used by the Oregon court in declaring their statute unconstitutional.[17] It states that a delinquent child is a person under eighteen years of age who "[d]eports himself so as to wilfully injure or endanger the morals or health of himself or others."[18] This definition when read with the contributing to delinquency statute results in substantially the same words as were declared vague by the Oregon court.

Subsection (7) of the West Virginia statute defining "delinquent child" seems even more susceptible to an argument of vagueness.[19] It states that a delinquent child is a person under the age of eighteen years who "[a]ssociates with immoral or vicious persons. . . ."[20] The contributing to delinquency statute under this definition would read: "A person who by any act or omission con-

[15] *Id.*

[16] "Delinquent child" means a person under the age of eighteen years who:
(1) Violates a law or municipal ordinance;
(2) Commits an act which if committed by an adult would be a crime not punishable by death or life imprisonment;
(3) Is incorrigible, ungovernable, or habitually disobedient and beyond the control of his parent, guardian, or other custodian;
(4) Is habitually truant;
(5) Without just cause and without the consent of his parent, guardian, or other custodian, repeatedly deserts his home or other place of abode;
(6) Engages in an occupation which is in violation of law;
(7) Associates with immoral or vicious persons;
(8) Frequents a place the existence of which is in violation of law;
(9) Deports himself so as to wilfully injure or endanger the morals or health of himself or others.

W. VA. CODE ch. 49, art. 1, § 4 (Michie 1966).

"Neglected child" means a child under the age of eighteen years who:
(1) Is destitute, homeless, or abandoned.
(2) Has not proper parental care or guardianship.
(3) Habitually begs or receives alms.
(4) By reason of neglect, cruelty, or disrepute on the part of parents, guardians, or other persons in whose care the child may be, is living in an improper place.
(5) Is in an environment warranting the appointment of a guardian under this article.

W. VA. CODE ch. 49, art. 1, § 3 (Michie 1966).

[17] W. VA. CODE ch. 49, art. 1, § 4(9) (Michie 1966).

[18] *Id.*

[19] W. VA. CODE ch. 49, art. 1, § 4(7) (Michie 1966).

[20] *Id.*

tributes to, encourages or tends to cause . . ." a child under the age of eighteen years to associate "with immoral or vicious persons. . . ."[21] The test for vagueness would be whether the meaning of an "immoral or vicious person" is definite enough so that men of ordinary intelligence would be apprised of the conduct prohibited by the statute.

In determining the outcome of future attacks on the constitutionality of contributing to delinquency statutes, the test for vagueness must be applied separately in each situation. While it is true that the statutes of some states, including West Virginia, contain words or phrases that seem to be vague and indefinite, it is difficult to determine how the test for vagueness will be applied by the various courts. The standards for determining vagueness where first amendment freedoms are not violated seem as vague and indefinite as the laws to which these standards might be applicable. It is therefore by no means certain whether the *Hodges* case will be followed or whether the courts will narrow the construction of the existing statutes and thereby save their constitutionality.

Steven C. Hanley

[21] W. VA. CODE ch. 49, art. 7, § 7 (Michie 1966);
W. VA. CODE ch. 49, art. 1, § 4(7) (Michie 1966).