

## Always Check the Statute

By: Casey Arbenz; 2011

A competent lawyer might think that, because it's almost 2012, he or she can rely on the constitutionality of Washington statutes and municipal codes – especially ones that have been around for a long time. After all, wasn't Erwin Chemerinsky's Constitutional Law book the thickest one in law school? Wasn't it chock-full of Supreme Court cases striking down all sorts of statutes for being too vague or overbroad? Can't we, as lawyers, assume that the laws being used to prosecute our clients have withstood these constitutional challenges?

The reality is that, no, we cannot for one second assume that any actions on the part of the legislature, the police, or the courts are beyond reproach. Lawyers must treat every case as their most important case and thoroughly investigate every possible defense. Where a law is unclear or subject to varying interpretations, we must challenge it and make the governing body defend the merits and constitutionality of the statute.

I recently had a case where my client was prosecuted for Breach of the Public Peace, defined as follows:

A person shall be guilty of breach of the public peace if he or she makes, allows, continues or causes to be made or allowed or continued, any excessive unnecessary or unusually loud noise, or any noise which either annoys, disturbs, injures or endangers the comfort, repose, health, peace or safety of others.

For the purposes of anonymity, I won't state the municipality employing this statute, nor will I discuss the facts of my case because, quite frankly, the facts don't matter. The reality is that any type of "protest" speech could be considered criminal under this statute and both Tea Partiers and Occupy Wall Street protesters alike could easily be prosecuted – as could the rest of us for many different types of intentional and unintentional conduct.

Given the overbreadth of this statute, I did a quick Lexis search to see if it had ever been challenged in Washington. I could not find any appellate cases addressing this or similar statutes. However, because I assumed this statute was likely derived from a Model Penal Code, I checked to see if any other states had dealt with a similar ordinance.

As it turned out, no fewer than nine other states have addressed this statute or a similar one and determined that it is both vague and overbroad. Needless to say, a void for vague-

ness motion to dismiss was filed and I have been informed that the municipality is changing the wording of its Breach of the Peace statute and will not use it to prosecute my client.

Similarly, in State v. Immelt, NO. 83343-5 (October 27, 2011) a case recently decided by our state Supreme Court, the defendant was charged with violating a Snohomish County Code banning “sound that is a public disturbance noise.” Id. at 1. The code defined “public disturbance noise” to include, among other things, “[t]he sounding of vehicle horns for purposes other than public safety.” Id. The defendant was prosecuted under this statute for apparently repeatedly honking her car’s horn in an attempt to annoy her neighbors with whom she had a homeowner’s association dispute.

Our Supreme Court struck down the statute, calling it “overbroad.” Id. In reaching its conclusion, the Court first determined that, based on prior precedent, “conduct such as horn honking may rise to the level of [protected] speech.” Id. at 4. At that point, because the statute potentially limited a fundamental right, the majority – in contrast to Chief Justice Madsen’s dissent – held that the question before the court was not whether the defendant’s particular conduct was protected, but rather whether the statute was facially overbroad such that “threat of enforcement [of the law could] deter or ‘chill’ constitutionally protected speech.”

In other words, just as the statute in my case could be used to prosecute just about anybody, the Snohomish County ordinance, “on its face, prohibits legitimate expressions of speech conveyed by a horn honk.” The Court continued:

A moment’s reflection brings to mind numerous occasions in which a person honking a vehicle horn will be engaging in speech intended to communicate a message that will be understood in context. Examples might include: a driver of a carpool vehicle who toots a horn to let a coworker know it is time to go, a driver who enthusiastically responds to a sign that says “honk if you support our troops,” wedding guests who celebrate nuptials by sounding their horns, and a motorist who honks a horn in support of an individual picketing on a street corner.

Id. at 6.

Obviously, the Constitution was created to protect our rights and when a Constitutional right is restricted by government action, it is incumbent upon attorneys to challenge such injustice. Importantly, however, even in situations where your client’s conduct may not fall within a protected area, by simply reading the statute and considering what other type of “legal” conduct may be prohibited, you may be able to have the charges dismissed based upon vagueness or overbreadth of the statute.

End

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