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Spears v. State, 337 So. 2d 977 (Fla. 1976)

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CASE COMMENT


A Wakulla County Sheriff’s deputy answered a disturbance call at Evan’s Pool Hall on October 26, 1975. Upon pulling into the area of the pool hall, he heard Blannie Mae Spears cursing “in a loud and angry manner.” He arrested her and charged her with publicly using “indecent or obscene language, to wit: SON OF A BITCH, BASTARD M.F. ETC, [sic] contrary to section 847.05, FLORIDA STATUTES.” The statute provided: “Any person who shall publicly use or utter any indecent or obscene language shall be guilty of a misdemeanor . . . .”

In Wakulla County Court Ms. Spears sought dismissal of the charge on the ground that the statute was an unconstitutional abridgment of the freedom of speech guaranteed by the first and fourteenth amendments to the United States Constitution. After the court rejected the motion, she pled nolo contendere to the charge of using obscene language. The court judged her guilty of “the offense of profanity” and fined her thirty-six dollars.

On direct appeal, the Florida Supreme Court reconsidered a previous decision upholding the constitutionality of section 847.05. Reexaming the statute in light of recent United States Supreme Court decisions, the Florida court found the statute in Spears “unconstitutional on its face, because it is overbroad at best.” Although Florida statutes regulating speech and conduct have been challenged on grounds of vagueness and overbreadth, Spears was apparently the first case in which the Florida Supreme Court invalidated such a statute exclusively on the ground of overbreadth.

Initially this comment will survey the general principles of vagueness and overbreadth as applied by the United States and Florida Supreme Courts. Next, the Florida court’s utilization of the doctrine

1. Transcript of trial at 3, Spears v. State, 337 So. 2d 977 (Fla. 1976).
3. FLA. STAT. § 847.05 (1977).
5. Id. at 4.
7. 337 So. 2d at 980 (footnote omitted).
of overbreadth as a sole ground for invalidating a statute will be analyzed. The comment will conclude with a discussion of the conflicting policies involved in declaring a statute unconstitutional and with a suggestion for future application of the overbreadth doctrine in Florida.

Both the Federal and Florida Constitutions protect speech. But free speech is not an absolute right. In 1919, for example, Justice Oliver Wendell Holmes wrote: "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic." The United States Supreme Court also has allowed states and municipalities to prohibit the use of words that tend to incite lawless action ("fighting words"), to libel or slander, or to be obscene. The restrictions of the Florida Supreme Court on speech parallel those of the United States Supreme Court.


There is a school of thought, led by former Justices Black and Douglas, that the first amendment is "absolute" in that no law which abridges the freedom of speech is constitutionally valid. The leading statements of this position may be found in their dissenting opinions in Times Film Corp. v. City of Chicago, 365 U.S. 43, 78 (1961); Roth v. United States, 354 U.S. 476, 508 (1957); Dennis v. United States, 341 U.S. 494, 579 (1951). See also Cahn, Justice Black and First Amendment "Absolutes": A Public Interview, 37 N.Y.U.L. REV. 549 (1962); Meiklejohn, Public Speech in the Burger Court: The Influence of Mr. Justice Black, 8 U. Tol. L. REV. 301 (1977); Reich, Mr. Justice Black and the Living Constitution, 76 HAV. L. REV. 673 (1963).


Although the Court has consistently held that obscene speech is not protected by the first amendment, the test for obscenity has changed. At common law, profanity, as such, was not an offense. But where the spoken vulgarity amounted to "[acts of gross and open indecency or obscenity, injurious to public morals," it was punishable as a common law crime. Winters v. New York, 333 U.S. 507, 515 (1948).

The standard for obscenity was set out by the Court in Roth. The Court said there that "sex and obscenity are not synonymous. Obscene material is material which deals with sex in a manner appealing to prurient interest." 354 U.S. at 487 (footnote omitted).

The Court modified the Roth test in Miller v. California, 413 U.S. 15 (1973). In Miller, the Court said the test for obscenity includes determining (1) whether the average person, applying contemporary community standards, would find that, when taken as a whole, the material appeals to the prurient interest, (2) whether the material depicts or describes, in a patently offensive way, sexual conduct specifically defined by applicable state law as written or construed, and (3) whether the material, taken as a whole, lacks serious literary, artistic, political or scientific value. Id. at 24.

As a result of Roth and Miller, speech that violates the three-part test may be regulated as obscene.

14. See, e.g., State v. Saunders, 339 So. 2d 641 (Fla. 1976) (fighting words or words like shouting "fire" in a crowded theatre); White v. State, 330 So. 2d 3 (Fla. 1976) (profanity in
Statutes regulating speech must be carefully drafted, for the government can regulate speech only with narrow specificity. Two tests may be used to measure the constitutionality of a statute regulating speech: vagueness and overbreadth.

To avoid being declared void for vagueness, a statute which forbids or requires the doing of an act must be clear and precise. Persons of common intelligence should not have to guess at the statute's meaning or differ as to its application. This basic doctrine is founded on the fifth and fourteenth amendments to the United States Constitution. Vague laws are unconstitutional because they "may trap the innocent by not providing fair warning," may allow arbitrary and discriminatory enforcement, and, as a result, may cause persons to alter their conduct and speech so as to avoid the questionable area.

Yet, however clearly and precisely a statute is drafted, it may still be declared unconstitutional on its face if it is overbroad. Overbreadth occurs when a statute regulating only spoken words can be construed to go beyond regulating unprotected speech. The danger in an overbroad statute is that it gives a police officer discretion to arrest a person for uttering words that are protected under the constitution. As a result, an overbroad statute has a "chilling effect" on speech: persons voluntarily restrict what they say for fear that what they say could, in the ears of a police officer, be considered illegal.

The United States Supreme Court has strictly applied the overbreadth doctrine. The Court has a much lower tolerance of statutes restricting speech alone than of statutes regulating speech and conduct. In Gooding v. Wilson, the Court said that a statute punishing spoken words could withstand attack upon its facial constitutionality "only if, as authoritatively construed by the [state] courts, it is not susceptible of application to speech, although vulgar or offensive, that is protected by the First and Fourteenth Amendments . . . ." The Georgia statute under attack in that case provided:

...
“Any person who shall, without provocation, use to or of another, and in his presence . . . opprobrious words or abusive language, tending to cause a breach of the peace . . . shall be guilty of a misdemeanor.” The Court declared the statute unconstitutional for overbreadth because state courts had not narrowed its reach to apply only to “fighting words”—words “which by their very utterance . . . tend to incite an immediate breach of the peace.”

A year after Gooding, the Court said that it would use a less rigorous test for overbreadth where speech and conduct were intertwined. In Broadrick v. Oklahoma, the Court said that before a statute could be declared unconstitutional on its face for overbreadth, the overbreadth “must not only be real, but substantial as well, judged in relation to the statute’s plainly legitimate sweep.” In Broadrick the Court upheld against an overbreadth challenge an Oklahoma merit system statute that prohibited state employees from soliciting political contributions or participating in the management of campaigns.

The more recent—and perhaps the more significant—applications of the doctrine of overbreadth by the Court have been to municipal ordinances. In Plummer v. City of Columbus, a cab driver cursed a woman passenger after she criticized him for driving past the address she wanted. He was convicted under an

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24. *Id.* at 519 (quoting *GA. CODE ANN.* § 26-6303). The Georgia Legislature in 1974 amended its abusive obscene language statute to make a person who commits the following act guilty of a misdemeanor:

Without provocation, uses to or of another, in his presence, opprobrious or abusive words which by their very utterance tend to incite to an immediate breach of the peace; that is to say, words which as a matter of common knowledge and under ordinary circumstances will, when used to or of another person in his presence, naturally tend to provoke violent resentment, that is, words commonly called fighting words.

*GA. CODE ANN.* § 26-2610 (Supp. 1976). A Georgia appellate court has sustained under the new statute the conviction of a bouncer who, without provocation, told a deputy sheriff to "[g]et your ass off before I throw it off." *Allen v. State*, 222 S.E.2d 856, 858 (Ga. App. 1975). But the new statute’s constitutionality has not been tested in a federal court.

25. 405 U.S. at 525 (quoting *Chaplinsky v. New Hampshire*, 315 U.S. at 572 (1942)).


27. *Id.* at 615.

In a dissenting opinion, Justice Brennan maintained that the Court was narrowing the doctrine by adding the word “substantial.” A requirement of substantial overbreadth was “already implicit in the doctrine,” he said. *Id.* at 630.

For a discussion of the procedural and substantive aspects of the overbreadth doctrine, see *Note, The First Amendment Overbreadth Doctrine*, 83 *HARV. L. REV.* 844 (1970). A recent collection of cases dealing with the overbreadth doctrine may be found in *Annot.*, 45 L. Ed. 2d 725 (1976).

28. 413 U.S. at 609-18.


30. *Id.* at 3 (Powell, J., dissenting).
ordinance which provided that "[n]o person shall abuse another by using menacing, insulting, slanderous, or profane language." The Court applied the Gooding test and found the ordinance vague as well as overbroad.\textsuperscript{32} In Lewis v. City of New Orleans,\textsuperscript{33} a woman who addressed officers as "you god damn m.f. police" after they arrested her son\textsuperscript{34} was convicted of violating an ordinance that made it unlawful for "any person wantonly to curse or revile or to use obscene or opprobrious language toward or with reference to any member of the city police while in the actual performance of his duty." The Court used the Gooding test in declaring the ordinance unconstitutionally overbroad.\textsuperscript{35}

The doctrines of vagueness and overbreadth are not always clearly differentiated by the Court.\textsuperscript{36} Vagueness deals with the precision of a statute, while overbreadth relates to the sweep of the statute. The overbreadth doctrine has been applied primarily in the first amendment area, while vagueness has been applied frequently to criminal statutes lacking clarity or precision.\textsuperscript{37} Both vague and overbroad statutes deter protected activity. But a statute may pass the test for vagueness (be clear and precise), yet fail the test for overbreadth (reach protected speech or activity).

Statutes that suffer from vagueness or overbreadth may be cured by restrictive interpretation.\textsuperscript{38} The construction given by the state court must, however, regulate only unprotected speech: words that could incite a breach of the public peace ("fighting words")\textsuperscript{40} or that could be slanderous or libelous.\textsuperscript{41} Where the state statute's construction has not been so narrowed, the United States Supreme Court will declare the statute overbroad and therefore unconstitutional on its face.\textsuperscript{42}

The Court signaled its approval of the application of the restrictive construction doctrine to a speech statute in 1942 in Chaplinsky

\textsuperscript{31} Id. at 2 (quoting Columbus, Ohio, City Code § 2327.03).
\textsuperscript{32} Id. at 2-3.
\textsuperscript{33} 415 U.S. 130 (1974).
\textsuperscript{34} Id. at 131 n.1.
\textsuperscript{35} Id. at 131-32 (quoting New Orleans, La., Ordinance 828 M.C.S. § 49-7).
\textsuperscript{36} 415 U.S. at 134.
\textsuperscript{37} See, e.g., Cox v. Louisiana, 379 U.S. 536 (1965).
\textsuperscript{38} For a recent compilation of cases on overbreadth, see Annot., 45 L. Ed. 2d 725, 738 (1976).
\textsuperscript{39} Shuttlesworth v. City of Birmingham, 382 U.S. 87, 91 (1966).
\textsuperscript{40} Only state courts have jurisdiction to provide the authoritative construction for a state statute. United States v. Thirty-seven Photographs, 402 U.S. 363, 369 (1971).
\textsuperscript{41} Chaplinsky v. New Hampshire, 315 U.S. 588 (1942).
\textsuperscript{42} Time, Inc. v. Hill, 385 U.S. 374 (1967).
v. New Hampshire. Chaplinsky was convicted of violating a New Hampshire statute that provided:

No person shall address any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name, nor make any noise or exclamation in his presence and hearing with intent to deride, offend or annoy him, or to prevent him from pursuing his lawful business or occupation.

Chaplinsky, on a public sidewalk near the entrance to the Rochester city hall, told the city marshal, " 'You are a God damned racketeer' and a 'damned Fascist and the whole government of Rochester are Fascists or agents of Fascists.' " The Supreme Court upheld Chaplinsky's conviction because the New Hampshire courts had restricted the statute to apply only to areas of unprotected speech: words likely to cause an average addressee to fight.

Spears v. State was the Florida Supreme Court's first use of the doctrine of overbreadth as an exclusive ground for striking down a speech statute as unconstitutional on its face. Florida statutes regulating speech and conduct have been challenged in the past as overbroad and vague, but the court has either refused to consider the issue or said that the statute was not overbroad. When faced with a constitutional challenge on grounds of vagueness and overbreadth,

43. 315 U.S. 568 (1942).
44. Id. at 569 (quoting Public Laws N.H. ch. 378, § 2 (1926)).
45. Id. at 569.
46. Id. at 573. The Court said that New Hampshire courts had required both (1) a face-to-face confrontation and (2) expression of the fighting words "plainly likely to cause a breach of the peace by the addressee" before a person could be convicted under the statute. Id.
47. On the other hand, where property rights were concerned, the Florida Supreme Court invalidated vague and broadly worded statutes on the ground they were an unconstitutional delegation of legislative power. In Sarasota County v. Barg, 302 So. 2d 737 (Fla. 1974), the court held invalid portions of a statute creating a conservation district that prohibited "undue or unreasonable dredging, filling or disturbance of submerged bottoms." The statute also banned "unreasonable destruction of natural vegetation." According to the court, the prohibitions were unconstitutional because the legislature failed to provide guidelines for their enforcement. Id. at 742. The court cited Conner v. Joe Hatton, Inc., 216 So. 2d 209 (Fla. 1968), for the rule:

When [a] statute is couched in vague and uncertain terms or is so broad in scope that no one can say with certainty, from the terms of the law itself, what would be deemed an infringement of the law, it must be held unconstitutional as attempting to grant to the administrative body the power to say what the law shall be. Id. at 211 (emphasis in original). In Conner, the Florida court invalidated sections of a statute that gave the agriculture commissioner power to remove trade barriers and to prohibit unfair trade practices. Id. at 213.
48. See, e.g., State v. Beasley, 317 So. 2d 750 (Fla. 1975) (restrictive construction); State v. Mayhew, 288 So. 2d 243 (Fla. 1974); City of St. Petersburg v. Waller, 261 So. 2d 151 (Fla.), cert. denied, 409 U.S. 989 (1972).
the court has taken one of four approaches: declared the statute void for vagueness, declared the statute unconstitutional as applied, restrictively construed the statute to fall within constitutional boundaries, or declared it constitutional.

The Florida test for vagueness was outlined in 1934 in *Brock v. Hardie*:

"Whether the words of the Florida statute are significantly explicit to inform those who are subject to its provisions what conduct on their part will render them liable to its penalties is the test by which the statute must stand or fall . . . ." It is not necessary, however, that the statute provide explicit details such as charts or specifications of the conduct forbidden for it to be unconstitutional.

The Florida Supreme Court has used the *Brock v. Hardie* vagueness test to declare unconstitutional, for example, the Florida "crimes against nature" statute as well as a statute forbidding

49. 154 So. 690 (Fla. 1934).
50. Id. at 694.
52. 154 So. 690, 694 (Fla. 1934).
53. In Franklin v. State, 257 So. 2d 21 (Fla. 1971), the court invalidated Fla. Stat. § 800.01 (1869), the sodomy law, which provided: "Whoever commits the abominable and detestable crime against nature, either with mankind or with beast, shall be punished by imprisonment in the state prison not exceeding twenty years." Act of Aug. 6, 1868, ch. 1, 637, sub-ch. 8, § 17, 1868 Fla. Laws 61 (repealed 1974). The court urged the legislature to review immediately other sex offense statutes to cure their vagueness. 257 So. 2d at 24.

The next year the court held that the Florida abortion statutes, sections 782.10 and 797.01 (1971), violated the United States and Florida Constitutions. State v. Barquet, 262 So. 2d 431 (Fla. 1972). The statutes provided:

782.10 Abortion.—Every person who shall administer to any woman pregnant with a quick child any medicine, drug or substance whatever, or shall use or employ any instrument or other means, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, or shall have been advised by two physicians to be necessary for such purpose, shall, in case the death of such child or of such mother be thereby produced, be deemed guilty of manslaughter.


797.01 Performing abortion; punishment.—Whoever with intent to procure miscarriage of any woman unlawfully administers to her, or advises or prescribes for her, or causes to be taken by her, any poison, drug, medicine or other noxious thing, or unlawfully uses any instrument or other means whatever with the like intent, or with intent aids or assists therein, shall, if the woman does not die in consequence thereof, be punished by imprisonment in the state prison not exceeding seven years, or by fine not exceeding one thousand dollars.

Id. sub-ch. 8, § 9 (repealed 1972).

The court cited *Franklin* and the vagueness test—a statute must inform the average person of common intelligence what is prohibited. The court said that the clause "unless the same shall have been necessary to preserve the life of such mother" is incapable of certain interpretation. The duty, and judgment of a physician, the necessity and welfare of the patient, and the rights of both, cannot be subjected to indefinite, uncertain, vague, or unreasonable legislation." 262 So. 2d at 438. Both statutes were so indefinite "as to afford no fair warning as to what conduct might trangress them." Id.
certain public officers or employees from accepting "other employment which might impair his independence of judgment in the performance of his public duties." 54

At times, the Florida court has avoided the issue of whether a statute was void for vagueness by declaring it unconstitutional as applied to a specific set of facts. In Gonzalez v. City of Belle Glade 55 the court said the Florida disorderly conduct statute 56 could not be used to convict protest marchers who used "an intemperate expletive or two" that annoyed bystanders. The court found no evidence of physical threats to police officers or of any violation of the statute. A violation "requires more than the creation of a mere annoyance." 56.1 The statute was unconstitutional as applied:

In order for the statute to be constitutionally applied, it must be proved that some act on the part of the accused either corrupted the public morals, outraged the sense of public decency, affected the peace and quiet of persons who witnessed the conduct of the accused, or that the accused engaged in brawling or fighting, or engaged in conduct constituting a breach of the peace or disorderly conduct. 57

In a dissenting opinion, Justice Boyd said the statute was facially vague and overbroad. 58

In In re Fuller, 59 a 16-year-old high school student was convicted

54. Fla. Stat. § 112.313(6) (1969) was struck down in State v. Llopis, 257 So. 2d 17 (Fla. 1971), on the same day the court issued Franklin v. State, 257 So. 2d 21. The statute provided: "No officer or employee of a state agency, or of a county, city or other political subdivision of the state, or any legislator or legislative employee shall accept other employment which might impair his independence of judgment in the performance of his public duties." Act of July 5, 1969, ch. 69-335, § 2, 1969 Fla. Laws 1167 (current version at Fla. Stat. § 112.313(7) (1977)).

55. D'Alemberte v. Anderson, 349 So. 2d 164 (Fla. 1977). In D'Alemberte the court found Fla. Stat. § 112.313(1) (Supp. 1974), unconstitutional. This statute provided:

ACCEPTANCE OF GIFTS PROHIBITED.—No officer or employee of a state agency or of a county, city, or other political subdivision of the state, legislator, or legislative employee shall accept any gift, favor, or service, of value to the recipient, that would cause a reasonably prudent person to be influenced in the discharge of official duties.

Act of June 12, 1974, ch. 74-177, § 3, 1974 Fla. Laws 467 (current version at Fla. Stat. § 112.313(2) (1977)). The court said that the phrase "that would cause a reasonably prudent person to be influenced in the discharge of official duties" suffered from vagueness.

55. 287 So. 2d 669 (Fla. 1973).


56.1. 287 So. 2d at 670.

57. Id.

58. Id. at 675.

59. 255 So. 2d 1 (Fla. 1971).
of disorderly conduct for using the phrase "mother f----" in an altercation over placement of a Negro History Week poster at North Fort Myers High School. Calling it a "tempest in a teapot," the court reversed the conviction. It was unclear whether the last half of the phrase "mother f----" was used by the youth. No one was "disturbed" within the meaning of the statute. Therefore, the court determined the statute to be unconstitutionally applied. In neither Gonzalez nor Fuller did the court reach the issue of whether the statute was unconstitutional on its face.

Where a statute has been deemed susceptible to an interpretation that would render it unconstitutionally vague, either by the Florida court's own analysis or by that of a federal court, the Florida court has felt obligated to use the restrictive construction doctrine to remedy the constitutional ill. In State v. Beasley, the Florida court held the state riot statute constitutional after outlining strict requirements to be met in proving a violation of the statute. After the United States Court of Appeals for the Fifth Circuit declared the Florida breach of the peace and disorderly conduct statute unconstitutional in Weigand v. Seaver, the Florida court held the statute constitutional subject to a limited construction set forth in White v. State.

We hold that mere words, used as a tool of communication, are constitutionally protected. The protection fails only when 1) by the manner of their use, the words invade the right of others to pursue their lawful activities, or 2) by their very utterance, they inflict injury or tend to incite an immediate breach of the peace.

White, his mother, and a friend had entered a police substation to provide bail for his father, who had been arrested and brought to

60. Id. at 4.
61. The doctrine, recognized by the United States Supreme Court in Shuttlesworth v. City of Birmingham, 382 U.S. 87, 91 (1965), is that a state court may construe a statute so as to bring it within constitutional limits. The Florida court outlined its view of the doctrine in State v. Beasley, 317 So. 2d 750 (Fla. 1975): "We have a responsibility to avoid a holding of unconstitutionality if a fair construction of the statute can be made within constitutional limits." Id. at 752.
62. 317 So. 2d 750 (Fla. 1975).
64. 317 So. 2d at 753.
66. 504 F.2d 303 (5th Cir. 1974).
67. 330 So. 2d 3 (Fla. 1976).
68. Id. at 7.
the substation earlier. White "demanded his father's immediate release on bail saying, 'I want to get my fucking father, and I come to get him right now.'" After he was told it would require fifteen to twenty minutes to complete the paperwork involved in the booking procedure, White "'went—almost—into a fit,' and . . . was 'screaming at the top of his lungs.' He continued 'screaming at the top of his lungs, using all sorts of language and calling' the officers 'mother-fucking pigs' for several minutes." After being asked repeatedly but unsuccessfully to modify his conduct, was arrested. He resisted and was charged with disorderly conduct and resisting arrest with violence.69

The Florida court said the problem in White was not with the substance of the speech. "It is the degree of loudness and the circumstances in which [the words] are uttered, which takes them out of the constitutionally protected area. Indeed, [White's] conduct would have been equally disorderly had he merely recited 'Mary had a little lamb' in the same tone and under similar circumstances."70 Because the trial court did not have the benefit of this restrictive construction when it tried White, the case was remanded for reconsideration in light of the court's test.

After the Florida Second District Court of Appeal found a St. Petersburg municipal ordinance prohibiting "verbal abuse" of police officers unconstitutionally overbroad,71 the Florida Supreme Court, in City of St. Petersburg v. Waller,72 upheld the ordinance as constitutional, construing the "verbal acts prohibited as strictly limited to words having a direct tendency to cause acts of violence . . . ."73 Waller, the leader of a black militant group, used a megaphone to call a policeman "Pig. White pig. Sooey, sooey." After the police arrested him, a scuffle broke out and Waller "continued cursing, yelling, spitting on the officers and yelling 'White M---- F-----', and similar obscenities."74 The court found the word "pig" to be a verbal brickbat, a fighting word, hurled through Waller's megaphone.75

A statute similar to the one at issue in Spears was restrictively construed by the Florida Supreme Court in State v. Mayhew.76 The Florida statute provided: "Whoever, having arrived at the age of

69. Id. at 4-5.
70. Id. at 7.
72. 261 So. 2d 151 (Fla.), cert. denied, 409 U.S. 989 (1972).
73. Id. at 158.
74. Id. at 153.
75. Id. at 159.
76. 288 So. 2d 243 (Fla. 1974).
discretion, uses profane, vulgar and indecent language, in any public place; or upon the private premises of another, or so near thereto as to be heard by another, shall be guilty of a misdemeanor.

A lower court had found the statute impermissibly vague and unconstitutional for overbreadth. The Florida Supreme Court said the language sought to be proscribed by the statute is "that which would necessarily incite a breach of the peace." These included "'fighting words'—words that could include a breach of the peace. Profane and obscene revilings are included in this category." Since the context in which Mayhew had used the words "mother f-----" was not known, the court could not determine if his language was proscribed by the statute.

The Florida Supreme Court has strained to uphold statutes requiring decent speech and conduct. In Cheseborough v. State, the court upheld the constitutionality of a statute making it a crime to commit any "lewd and lascivious act" in the presence of a child under the age of 14. The court sustained the conviction of a man and wife who performed intercourse in front of their child to demonstrate how adults reproduce. The court said that the words "lewd" and "lascivious" had been defined in the past with sufficient explicitness that an ordinary person would know what conduct was prohibited. In Bell v. State, the Florida Supreme Court upheld the constitutionality of Florida statutes making it a crime for any person to commit "any unnatural and lascivious act with another person" or to cause a minor under eighteen years to become a delinquent or dependent child. The state's disorderly conduct statute was held constitutional in State v. Magee. The court said that the test of common understanding was met by the statute's language:

78. 288 So. 2d at 251.
79. Id.
80. Id.
81. 255 So. 2d 675 (Fla. 1971).
82. Id. at 677-78.
83. 289 So. 2d 388 (Fla. 1973).
85. Id. § 957 (repealed 1974).
86. Id. § 1147 (codified at Fla. Stat. § 877.03 (1977)).
87. 259 So. 2d 139 (Fla. 1972).

The Florida court used the Magee decision as part of its basis for upholding the conviction of two women charged with violating the statute by sunbathing topless on a public beach. The women had attacked the disorderly conduct doctrine statute as unconstitutionally vague. Moffett v. State, 340 So. 2d 1155 (Fla. 1976).
Whoever commits such acts as are of a nature or corrupt the public morals, or outrage the sense of public decency, or affect the peace and quiet of persons who may witness them, or engages in brawling or fighting, or engages in such conduct as to constitute a breach of the peace or disorderly conduct, shall be guilty of a misdemeanor ... 88

The court reversed the trial court's dismissal of charges against Coleen Magee for "lying on front seat of car with her pants down and her buttocks exposed" and Michael Nunziata for "lying on front seat of car with his pants pulled down and his penis in plain view from exterior of car . . . ." 89 The court said that "[s]uch exposure before the public is clearly calculated to corrupt the public morals and outrage the sense of public decency which is prohibited by the statute and any person of common intelligence would be perfectly aware that it was." 90

The Florida Legislature may have been filled with such a "sense of public decency" when it enacted the following law on January 24, 1881:

Any person who shall publicly use or utter any indecent or obscene language shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in a sum not to exceed twenty-five dollars, or be imprisoned in the county jail not exceeding thirty days, in the discretion of the court. 91

Except for modifications of the penalty, the law remained in effect for more than ninety-five years. 92

The law, which eventually became section 847.05 of the Florida Statutes, was untested 93 before its constitutionality was challenged in 1974 before the Florida Supreme Court in Jones v. State. 94 Jones was arrested for after using the words "G-- D---- Mother F-----, F----- Pigs and Son of a B----" in addressing police officers. 95

89. 259 So. 2d at 141.
90. Id.
91. Act of Jan. 24, 1881, ch. 3284, 1881 Fla. Laws 87 (current version at Fla. Stat. § 847.05 (1977)).
92. Whether it was the result of inflation or an increased "sense of public decency" by the Florida Legislature, the penalty increased over those 95 years from a maximum fine of $25 or a jail term of up to 30 days in 1881 to a maximum fine of $500 or a jail term of up to 60 days in 1976. Fla. Stat. §§ 775.082(4)(b), .083(1)(e) (1977).
93. The Florida Supreme Court had not directly confronted the issue of the constitutionality of § 847.05 until Jones v. State, 293 So. 2d 33 (Fla. 1974).
94. Id.
95. Id.
Following the initial arrest for indecent language, Jones was arrested for resisting arrest with violence and for possession of less than five grams of marijuana. At the trial, Jones challenged the statute under which he was initially arrested—section 847.05—and the search and seizure of marijuana that resulted.

The trial court upheld the constitutionality of the indecent language statute, but Jones was convicted of possession of marijuana alone. On appeal, he challenged section 847.05 as being overbroad, citing Gooding and Chaplinsky. Writing for the court, Justice McCain ignored the doctrine of overbreadth in upholding the statute's constitutionality. "No distortion of the Constitution (State or United States) should prevent our Legislature from keeping its people free from obscene and foul language." The court used the test for vagueness in determining whether the statute was overbroad, concluding that it was "not void for overbreadth, but to the contrary, contains language sufficient to convey to a person of common understanding its prohibition." The court's application of the vagueness test to the issue of overbreadth—whether a statute is susceptible of application to protected speech—created additional confusion in Florida law.

In a dissenting opinion, Justice Ervin correctly criticized his colleagues for ignoring the United States Supreme Court's Gooding test—whether the statute was carefully drawn or authoritatively construed to punish only unprotected speech and was not susceptible of application to protected expression. Justice Ervin chided his colleagues: "Actually, the majority opinion is little more than a parochial ipse dixit conclusion expressing personal prejudice that indecent language spoken in public in and of itself is a crime, and may be condemned by vague legislation." Ervin said the statute should have been narrowed by restricting it to references to sexual acts of a prurient nature, or indicating any clear and present danger of harm to others.

96. Id.
98. 315 U.S. 568 (1942).
99. 293 So. 2d at 34.
100. Id.
101. Id. Justice Ervin was supported in his Jones dissent by at least one other Florida judge. Chief Judge Robert Mann of the Florida Second District Court of Appeal called the Jones v. State decision "clearly and directly contrary to Gooding v. Wilson." Canney v. State, 298 So. 2d 495, 502 (Fla. 2d Dist. Ct. App. 1974) (Mann, C.J., dissenting from denial of rehearing).
102. 293 So. 2d at 35.
The United States Supreme Court dismissed Jones' appeal103 "for want of properly presented federal question."104 However, Justice Brennan, joined by Justices Douglas and Marshall, dissented, saying that the statute should be declared unconstitutional on its face because it violated the Gooding test; that is, it was not limited in its application "to punish[ing] only unprotected speech" but was "susceptible of application to protected expression."105 In Spears, the Florida Supreme Court acknowledged the recent history of Jones106 and Bucolo v. State107 and said that a reconsideration of the constitutionality of section 847.05 was necessary.108 The court used the Gooding test to declare section 847.05 unconstitutional on its face for overbreadth.109 Justice Hatchett, writing for the court, said this action was necessary because the statute, by failing to articulate a clear boundary between protected and unprotected speech, prohibited conduct which was protected under the United States

104. Id. In his dissent to the dismissal of appeal, Justice Brennan interpreted the majority's view to be that the federal question was not properly before the Court "because appellant was convicted not for violating § 847.05 but on the marihuana charge." 419 U.S. at 1083-84. In Brennan's view, the appeal could be dismissed only "if the federal claim had not been raised in a proper and timely manner in the state courts." Id. at 1083 (citations omitted). Jones raised the issue of the speech statute's constitutionality "at every level in the state proceedings." Id.
105. Id. at 1082 (quoting Gooding v. Wilson, 405 U.S. 518, 522 (1972)).
William Bucolo, Ronald Simpson, and James Agut were convicted in Palm Beach County Circuit Court for publishing certain comic strips and pictures in violation of the Florida obscenity statute, Fla. Stat. § 847.011 (1977). Bucolo and the others challenged the obscenity statute as unconstitutional. But the Florida Supreme Court, in a five-paragraph per curiam opinion, upheld the statute and the convictions on Oct. 16, 1974. 303 So. 2d at 330.
The United States Supreme Court took even less space to grant certiorari and reverse the convictions. Bucolo v. Florida, 421 U.S. 927 (1975). The Court cited two cases as the basis for its decision: Jenkins v. Georgia, 418 U.S. 153 (1974), and Kois v. Wisconsin, 408 U.S. 229 (1972).
Shortly after Bucolo v. Florida, the Florida Supreme Court, in Bucolo v. State, 316 So. 2d 551 (Fla. 1975), remanded Bucolo to the trial court for application of the obscenity test in Miller v. California, which is set out in note 13 supra.
But Bucolo and his codefendants did not want a retrial. They applied to the United States Supreme Court for a writ of mandamus, claiming that they had been denied the exoneration to which they were entitled under Bucolo v. Florida. In Bucolo v. Adkins, 424 U.S. 641 (1976), "the Court left no doubt that its unanimous decision in Bucolo v. Florida . . . rested on the ground that [the Florida Supreme] Court had erroneously upheld a conviction for constitutionally protected activity, which fell within the purview of Section 847.011, Florida Statutes (1975)." Spears v. State, 337 So. 2d 977, 979 n.4 (Fla. 1976).
With this footnote in Spears, the Florida Supreme Court indicated that the Bucolo decisions had prompted it to examine speech and conduct statutes more carefully to determine if they reached constitutionally protected activity.
108. 337 So. 2d 977, 979 (Fla. 1976).
109. Id. at 980.
Constitution's first and fourteenth amendments.\textsuperscript{110}

Although the Florida court reached a correct result in \textit{Spears}, its opinion was more cryptic than necessary. By following an intricate line of reasoning, the court diplomatically reversed its recent holding in \textit{Jones}. It considered—and rejected—the restrictive construction doctrine. Because the statute was already unconstitutionally overbroad, the court did not have to consider the vagueness issue.\textsuperscript{111} And, since the United States Supreme Court in \textit{Bucolo} had declared unconstitutional similar words—"indecent" and "obscene"—in a related section in chapter 847, the words "indecent and obscene" in section 847.05 were likewise unconstitutional.

It appeared that the court used either a form of stare decisis or, the statutory construction doctrine of in pari materia in defining the words "indecent" and "obscene" in section 847.05. Under the doctrine of in pari materia the court can look to the judicial interpretation of similar terms within the same or related statutes for aid in determining the meaning of the terms under scrutiny.\textsuperscript{112} This method of judicial construction enables the court to clarify a vague or overbroad statute rather than to strike it.

In \textit{Spears} the court was very careful to point out that section 847.011, the statute attacked in \textit{Bucolo}, appeared in the same chapter as section 847.05.\textsuperscript{113} Moreover, section 847.011 contained the words "indecent" and "obscene." When \textit{Bucolo} invalidated 847.011, it invalidated section 847.05 as well.\textsuperscript{114} There was no viable distinction between \textit{Bucolo} and \textit{Jones}. Since \textit{Bucolo} was decided in 1975, a year after \textit{Jones}, the court found a formal—and very valid—excuse for reexamining its holding in \textit{Jones}. Such intricate reasoning allowed the court to overrule a decision of an earlier court without the embarrassment of highlighting the error of the earlier tribunal.

The court explained that the restrictive construction doctrine could not be used because the \textit{Jones} court in 1974 expressly ruled the statute constitutionally sound. Since the court must abide by the authoritative construction at the time of the offense, it reasoned that it could not have saved the statute by a retroactive restrictive construction.\textsuperscript{115} Such a narrowing would have created an ex post

\textsuperscript{110} Id. at 980-81.
\textsuperscript{111} Id. at 980 n.5.
\textsuperscript{112} Under the doctrine of in pari materia, statutes that relate to the same or a closely allied subject may be compared with each other to the extent that an understanding of one will aid in the interpretation of the other. \textit{SEE} Golstein v. Acme Concrete Corp., 103 So. 2d 202, 204 (Fla. 1958); \textit{State ex rel. McClure v. Sullivan}, 43 So. 2d 438, 441 (Fla. 1949). \textit{See} generally 2A C. \textit{SANDS, SUTHERLAND STATUTORY CONSTRUCTION} § 51 (4th ed. 1973).
\textsuperscript{113} 337 So. 2d at 979.
\textsuperscript{114} Id.
\textsuperscript{115} Id.
The court concluded, somewhat cryptically, that it could not narrow the reach of section 847.05 in Spears.

The court, in effect, rejected arguments made by the Florida Attorney General that the court should read the Jones v. State decision in light of State v. Mayhew, which restrictively construed a statute similar to section 847.05 to cover only "fighting words." Because Mayhew preceded Jones, and because the Mayhew decision limited section 847.04, the state argued that Spears could have fairly anticipated that section 847.05 would be similarly limited to "fighting words." The court could authoritatively construe section 847.05 in the Spears case to mean fighting words and apply it to Spears without engaging in retroactive lawmaking, the state contended.7

The court also took the position that it was unnecessary to consider the vagueness issue since the statute was unconstitutional even if it were not vague.8 The court made no mention of prior Florida decisions on vagueness. However, it did cite several United States Supreme Court cases which demanded that statutes regulating speech alone meet a higher standard of exactness and clarity.9

In Spears the court implied that if the person challenging the statute could hypothesize a situation in which the statute could restrict protected speech, the statute would be overbroad. The court enunciated the following strict rule for speech statutes: "Consistently with the United States Supreme Court's decisions, nobody can be punished under a statute purporting to outlaw spoken words, if the statute would be unconstitutional as applied to anybody.1120 The statute is unconstitutional even though it is not overbroad as applied to the individual before the court.

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117. The State cited in its Spears brief the United States Supreme Court decision of Rose v. Locke, 423 U.S. 48 (1975), for the proposition that a "foreseeable" judicial construction does not constitute "retroactive lawmaking" and thereby a denial of due process. Locke, who forced a female neighbor at knifepoint to submit to his twice performing cunnilingus on her, was convicted of having committed a "crime against nature" in violation of the Tennessee Code. Brief for Appellee at 3, Spears v. State, 337 So. 2d 977 (Fla. 1976). The Court upheld the Tennessee "crime against nature" statute against an attack of vagueness because a Tennessee court had indicated in a previous decision that the statute was to be given a broad meaning. The Tennessee statute did not specifically proscribe forced cunnilingus nor had the Tennessee courts directly considered the question. The Court said it was enough that the Tennessee court previously had included fellatio within the meaning of the statute and hinted that cunnilingus might also be proscribed. Id. at 52-53.

However, the Florida Supreme Court may not have been persuaded by this argument because the Florida "crimes against nature" statute was declared unconstitutionally vague in Franklin v. State, 257 So. 2d 21 (Fla. 1971).
118. 337 So. 2d at 979, 980.
119. Id.
120. Id. (emphasis added).
This rule was not adopted because the court condoned foul or profane speech. "[O]ur principal concern here is preservation of freedom of speech for all citizens. Overbroad statutes create the danger that a citizen will be punished as a criminal for exercising his right of free speech." The court recognized the deterrent effect of an overbroad statute declaring such a statute unconstitutional:

[The] mere existence of statutes and ordinances purporting to criminalize protected expression operates as a deterrent to the exercise of the rights of free expression, and deters most effectively the prudent, the cautious and the circumspect, the very persons whose advice we seem generally to be most in need of.

This explicit language should alert the Florida Legislature to the need for precision in construing statutes that will regulate spoken words.

Perhaps the major shortcoming of Spears is that the court did not offer any guidelines for the future application of the doctrine of overbreadth. Nor did the court state explicitly the order in which it will consider the issues of vagueness, overbreadth, or restrictive construction.

The history of the overbreadth doctrine in the Florida Supreme Court since Spears indicates that members of the court disagree as to when a statute involving first amendment freedoms should be restrictively construed and when it should be declared unconstitutional for overbreadth.

The Florida court imposed a restrictive construction on section 877.03 in State v. Saunders,

so that no words except "fighting words" or words like shouts of "fire" in a crowded theatre fall within its proscription, in order to avoid the constitutional problem of overbreadth and "the danger that a citizen will be punished as a criminal for exercising his right of free speech."

In Saunders an off-duty policeman sought to arrest Stephens, a newspaper hawker who appeared to be annoying passersby. Saunders intervened on behalf of the news peddler. Stephens was charged with a "supposed violation" of the Florida breach of the peace statute, section 877.03. Saunders was booked under section

121. Id.
122. Id.
123. 339 So. 2d 641 (Fla. 1976).
124. Id. at 644 (quoting Spears v. State, 337 So. 2d 977, 980 (Fla. 1976)).
125. Id. at 641. FLA. STAT. § 877.03 (1975), provided in pertinent part:
843.01 for interfering with Stephen's allegedly lawful arrest. The trial court granted a motion to dismiss the charge against Saunders because it was predicated on an unconstitutional statute. The supreme court affirmed the dismissal of charges against Saunders but held the breach of the peace statute constitutional, subject to the narrowing construction. Because attempts had been made earlier to construe section 877.03 restrictively in White v. State, the court felt obligated to limit the statute's reach even more. The court noted that the statute also suffered from a "problem of vagueness with respect to which acts are proscribed" by the statute. But the court said it would not decide the issue, reserving it for later case-by-case adjudication.

In State v. Simpson, the Florida Supreme Court restrictively construed the unlawful assembly statute, section 870.02, which pro-

Whoever commits such acts as are of a nature to corrupt the public morals, or outrage the sense of public decency, or affect the peace and quiet of persons who may witness them, or engages in brawling or fighting, or engages in such conduct as to constitute a breach of the peace or disorderly conduct, shall be guilty of a misdemeanor . . .

126. 339 So. 2d at 641. Fla. Stat. § 843.01 (1975), provided:

Whoever knowingly and willfully resists, obstructs, or opposes any sheriff, deputy sheriff, officer of the Florida Highway Patrol, municipal police officer, beverage enforcement agent, officer of the Game and Fresh Water Fish Commission, officer of the Department of Natural Resources, any member of the Florida Parole and Probation Commission or any administrative aide or supervisor employed by said commission, any county probation officer or any personnel or representative of the Department of [Criminal] Law Enforcement or other person legally authorized to execute process, in the execution of legal process or in the lawful execution of any legal duty, by offering or doing violence to the person of such officer or legally authorized person, shall be guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

127. 339 So. 2d at 641.
128. Id. at 644.
129. 330 So. 2d 3 (Fla. 1976).
130. 339 So. 2d at 643-44.
131. Id. at 644 (emphasis in original).
132. Id.
133. 347 So. 2d 414 (Fla. 1977). In McCall v. State, 354 So. 2d 869 (Fla. 1978), the Florida Supreme Court held unconstitutional Fla. Stat. § 231.07 (1975) (repealed, Act of June 18, 1976, ch. 76-168, § 3, 1976 Fla. Laws 295, effective July 1, 1982; presently codified at Fla. Stat. § 231.07 (1977)), which makes one criminally liable "who upbraids, abuses, or insults any member of the instructional staff on school property or in the presence of pupils at a school activity." Mrs. McCall, upon being told by her daughter that she had been struck by her teacher, immediately went to the school and confronted the teacher. "This confrontation became a profane verbal attack upon the instructor and took place in the presence of at least 50 students." 354 So. 2d at 870. Mrs. McCall was charged with a violation of the statute. The court, speaking through Justice Hatchett, said that while "[t]he interests sought to be protected are worthy," the statute could not stand because it was not "narrowly tailored to further the state's legitimate interests," and encompassed "speech protected by the First and Fourteenth Amendments." Id. at 872. The court cited Spears as well as federal cases as a basis for its decision.
vides: "If three or more persons meet together to commit a breach of the peace, or to do any other unlawful act, each of them shall be guilty of a misdemeanor . . . ." Four members of the court interpreted the statute to prohibit "(1) an assembly of three or more persons who, (2) having a common unlawful purpose, (3) assemble in such a manner as to give rational, firm, and courageous persons in the neighborhood of the assembly a well-grounded fear of a breach of the peace." A fifth member of the court, Justice Sundberg, concurred, saying that he believed that the words "or to do any other unlawful act," [in section 870.02] may not be constitutionally prohibited due to the overbreadth inherent in such phrase and consequent infringement on the protected freedom of speech and assembly." But Justice Sundberg would have preferred that the opinion explicitly state such a holding.

In a dissenting opinion, Justice Boyd said he would have declared the entire statute facially unconstitutional for overbreadth. "As the statute is now drafted and construed, constitutionally protected speech and association could be criminally punished." Justice Hatchett, who wrote the Spears opinion, did not explain his dissent in Simpson. However, because of his strong view in Spears that a statute would be unconstitutional if it could be used to reach any protected speech, it may be fairly presumed that he felt section 870.02 was unconstitutional on its face.

The Florida Supreme Court declared section 847.04 unconstitutional in Brown v. State. In Brown, police answered a call to Mark Brown's father's house. Upon arrival, Brown got into the patrol car. When requested by a patrolman to leave the car, Brown "replied he was 'tired of the mother-f-----' cause they weren't doing him right.' Apparently [Brown] was referring to his by-standing father. After the officer asked [Brown] to 'hold down the profane language,' Brown enunciated similar distasteful comments about his father, again in the presence of the patrolman. Brown's comments were not directed to anyone in particular, but he was arrested and charged with "open profanity" because the policeman "figured he shouldn't be out there in public using words like that.' Brown entered a plea of nolo contendere in Polk County Court,

135. 347 So. 2d at 415.
136. Id. at 416.
137. Id. at 417.
141. Id.
reserving the right to appeal the denial of his motion to dismiss. But he was found guilty, sentenced to time served (three days), and fined twenty-five dollars.

On appeal, the Florida Supreme Court reversed State v. Mayhew, the earlier decision upholding the constitutionality of section 847.04. In Mayhew the court held that the statute was "neither impermissibly vague nor unnecessarily overbroad." But the court restricted the reach of the statute to language "which would necessarily incite a breach of the peace." The court in effect adopted the view of Justice Ervin in Mayhew:

There are no saving words in our statute upon which this Court can honestly state it is inoffensive to the First and Fourteenth amendments. There was such a basis in the New Hampshire and Georgia statutes. Only by a bald judicial amendment similar to a legislative enactment can the statute be said not to violate freedom of speech. There is nothing in the statute to indicate it is limited to "fighting" words.

The Brown court said that it would not try to rewrite a statute which "in no way suggests a saving construction" because "[t]he Florida Constitution requires a certain precision defined by the legislature, not legislation articulated by the judiciary." The court cited two reasons for this constitutional mandate:

First, if legislative intent is not apparent from the statutory language, judicial reconstruction of vague or overbroad statutes could frustrate the true legislative intent. Second, in some circumstances, doubts about judicial competence to authoritatively construe legislation are warranted. Often a court has neither the legislative fact-finding machinery nor experience with the particular statutory subject matter to enable it to authoritatively construe a stat-

142. 288 So. 2d 243 (Fla. 1974).
143. Id. at 246.
144. No. 50,559, slip op. at 5-6 (Fla. April 5, 1978).
145. Id. at 7 (quoting State v. Mayhew, 288 So. 2d 243, 252 (Fla. 1974) (Ervin, J., dissenting)).
146. No. 50,559, slip op. at 8 (Fla. April 5, 1978) (citation omitted).
The judicial body might question with justification whether its interpretation is workable or whether it is consistent with legislative policy which is, as yet, undetermined.\textsuperscript{147}

In a separate opinion, Justice Boyd agreed with the majority's decision but said they should not have overruled Mayhew. Instead, he argued that the court should have applied Mayhew as restrictively construed to the facts of Brown to find that the language used did not breach the peace.\textsuperscript{148}

The uncertainty of the Florida Supreme Court in evaluating speech statutes challenged on first amendment grounds is understandable given the competing choices. Different policy considerations are implicit in each of the alternatives—restrictively construing the statute, declaring it unconstitutional as applied, or striking it as unconstitutional on its face.

Restrictive construction is a device to draw an otherwise unconstitutional statute in such a way as to make it constitutional. To save an overbroad statute, the United States Supreme Court will define it to reach only unprotected speech: "fighting words," libel or slander, and obscene speech. But in restricting the range of a statute, the court may be straying from the intent of the legislature. Judicial restructuring may defeat a plainly expressed legislative intent. The judiciary formulates its decisions without the legislative fact-finding mechanism.

\textsuperscript{147} Id. (citation omitted).

\textsuperscript{148} No. 50,559, slip op. at 9 (Fla. Feb. 9, 1978) (Boyd, J., concurring in part and dissenting in part). Justices Overton and Adkins agreed with Justice Boyd. Although all three dissented from the court's second opinion, no dissenting opinion was filed.

Since § 847.04 has been declared unconstitutional, the Florida Legislature may want to consider drafting a statute similar to Georgia's new abusive or obscene language statute, Ga. Code Ann. § 26-2610 (Supp. 1976), discussed in note 24 supra.

A three-judge federal district court panel in Tampa earlier refused to declare § 847.04 unconstitutional on grounds of vagueness and overbreadth. Stecher v. Askew, 432 F. Supp. 997 (M.D. Fla. 1977). In an opinion written by Circuit Judge Roney, the court refused to grant injunctive relief to Stecher:

So long as the statute under consideration can be interpreted consistently with the First Amendment, there is no prospect of injury to plaintiff that calls for the use of injunctive powers. The statute before us is readily subject to a narrowing construction. Plaintiff is free to urge that construction on the Florida courts at any point during a prosecution under the Open Profanity Law.

432 F. Supp. at 1001. The court said that the Florida statute was not like the Georgia statute declared unconstitutional in Gooding v. Wilson because the Florida statute had been restrictively construed only once by the Florida Supreme Court. And, in that interpreting decision, State v. Mayhew, 288 So. 2d 243 (Fla. 1973), the Florida court construed § 847.04 to apply only to words that are not constitutionally protected, that is, to fighting words.

Such action was in line with the traditional abstention doctrine, which prescribes that a federal court decline to adjudicate a statute's validity if there is a reasonable "possibility of limiting interpretation," Harrison v. NAACP, 360 U.S. 167, 177 (1959), quoted in Note, The First Amendment Overbreadth Doctrine, 83 Harvard Law Review 844, 901 (1970).
Furthermore, by restrictively construing the statute, the court is leaving the existing language of the overbroad statute in the statutes. If a substantially overbroad statute has the “chilling” effect on those “whose advice we need,” then restrictive construction would not cure the overbreadth problem in the first amendment area, insofar as individuals and law enforcement officers rely on the literal statutory language without further guidance. Restrictive construction is weak medicine for the substantially overbroad statute.

So too is the “as applied” method. With this approach the court evaluates the facts of the case to determine whether the individual’s speech or conduct should be exempt from the prohibitions of the statute in question. The court evaluates the specific activity using these criteria: the potential infringement of the freedom of others; the potential threat to widely held social, political, or moral values; and the potential stifling of the free flow of an individual’s ideas.

In contrast to the “as applied” method, which is a specific cure designed to correct a bad application of the law, the restrictive construction doctrine is a general cure designed to correct uncertain words. The “as applied” method reaffirms the language of the statute as constitutionally sound but attempts to repair constitutionally infirm language by engrafting a more precise meaning onto ambiguous words.

The weaknesses of the “as applied” method are greater than those of the restrictive construction doctrine. Under restrictive construction, the statute’s breadth can be narrowed on an abstract level. With the “as applied” method, the court determines whether the claimant’s speech or conduct should be privileged. But the statute itself remains intact, a possible trap for the unwary or uninformed.

In contrast, when the court dismantles a statute because it is facially overbroad, it forces the legislature to focus on the harm which the statute was designed to prevent. If the legislature wishes to try again, it must employ means less damaging to first amendment interests in remedying the perceived harm.

There can be no usurpation of the legislative drafting authority if the legislature, rather than the judiciary, rewrites the statute to conform to the constitutional mold. Access to the legislature may be less expensive to the public than the cost of hiring a skilled attorney to argue against the reach of an overbroad statute. Those citizens who can least afford legal services may also be the ones to benefit from the legislature’s wisdom.

149. See 337 So. 2d at 980.
150. See generally The First Amendment Overbreadth Doctrine, supra note 148.
151. Id. at 916.
Each of these theories has its place in constitutional adjudication. It would be to the advantage of the courts, the people, and the legislature if the court would evolve a thoughtful and consistent approach to their use. The foregoing considerations suggest the following conclusions.

If the statute requires only minor changes, the court should restrictively construe it. Minor constructions of a statute could do little harm to the legislative intent. And if the legislature is displeased with the court's interpretation, it can enact a new statute.

If more than minor surgery is required to bring the statute within constitutional bounds, the court should declare it unconstitutional on its face for overbreadth. The legislature should be forced to focus on what conduct or speech it wishes to prohibit.

The Florida Supreme Court has boldly used the doctrine of overbreadth to strike down a statute regulating speech. If the doctrine is applied in a similar manner to other statutes, the Florida Legislature may find itself writing new laws to regulate speech and conduct. While the Florida Supreme Court has introduced the concept of overbreadth into Florida case law, it has left the guidelines of that concept to be divined from its future writings and from those of the United States Supreme Court.

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