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Addressing Vagueness, Ambiguity, and Other Uncertainty in American Criminal Laws

John F. Decker

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JOHN F. DECKER[†]

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† Professor of Law, DePaul University College of Law. The author wishes to acknowledge the excellent research assistance of DePaul law students Virginia B. Fuller and Rebecca C. Gee, Class of 2002.

INTRODUCTION

As a student, professor, and practitioner of criminal law for more decades than I care to admit, I have encountered a myriad of concepts, principles, rules, and abstractions, many of which are reasonably comprehensible and some of which make damn little sense. In some cases, such as in connection with my authorship of the "definitive" (or so my publishing company claims) work on Illinois criminal law, my goal is to sort out and explain the "elements" of criminal law theories of culpability (e.g., accountability principles), offenses (e.g., murder), and defenses (e.g., self defense). In the classroom, I face the constant challenge of developing the students' analytical minds by confronting them with critical queries about this or that case, hypothetical situation, principle, or law and, at other times, developing formulas for their benefit designed to simplify a bundle of confusing applications of law to facts (e.g., criminal attempt = a defendant's "substantial step" towards criminality + defendant's "specific intent" to achieve a criminal goal; constitutional death penalty = a defendant's commission of murder (not rape, etc.) + elements of aggravation (e.g., killed a cop) + consideration of *any* (not just some) mitigating circumstances). In the continuing legal education programs with which I am regularly involved, I strive to prepare a captivating lecture, a useful outline, or well researched written materials that will neither confuse nor bore the attendee. In the courtroom, I am to present the brief, the case precedent, or the argument that wins-over her honor. In each of these situations, the challenge is to analyze, synthesize, explain, reason, rationalize, and/or distinguish a legal concept. After examination and reexamination over the years, I believe (perhaps naively) that I understand quite well most criminal justice concepts, including the more complex that may confuse even the criminal court judges I lecture (e.g., Fourth Amendment). Others (e.g., what really separates the "legally" insane from those who are not) I never will.

In my opinion, one of the subjects that defies principled reasoning is the concept of *vagueness* in the criminal law. Past explaining the basics—criminal laws must give "fair notice"[1] and contain an "ascertainable standard of guilt"[2] that guide the arm of enforcement—most treatments of the subject, whether in treatises, commentary, or judicial opinion, provide the reader with no semblance of criteria, guidelines, or standards that might assist even the trained eye with the ability to predict

1. *See* Colautti v. Franklin, 439 U.S. 379, 390 (1979).
2. *See* Palmer v. City of Euclid, 402 U.S. 544, 545 (1971) (per curiam).

whether a given stricture challenged on vagueness grounds will survive constitutional attack. And, quite frankly, this is true because there exists no criteria, guidelines, or standards that provide a meaningful measuring stick for making such prediction. Vagueness analyses seem to me to be devoid of objective tests. Vagueness is a concept that appears heavily dependent on the "I know it when I see it"[3] test, where one begins with a conclusion and thereafter works backward for rational support. Vagueness challenges require a highly subjective mode of analysis that involves an unpredictable assortment of paths a court might take in arriving at a ruling.

Less confusing is another concern that can plague criminal legislation, namely, *ambiguity*. A relative of vagueness, ambiguity appears where otherwise understandable legislation lends itself to two or more *equally* plausible interpretations. When faced with ambiguity, the reviewing court will usually (although not necessarily) plug in a doctrine that gives the accused the advantage. In other words, whatever interpretation is most beneficial to the accused is the one that wins out. Having said that, however, does not mean that identifying an uncertainty in legislation as an ambiguity, as opposed to a problem of vagueness, is necessarily a simple task. For example, at what point is it permissible to conclude the legislation contains *sufficient specificity* that it can be described as ambiguous rather than vague? Or, at what point can there be agreement that the law in question lends itself to two *equally* possible interpretations?

Beyond vagueness and ambiguity, there exists what this article will simply call *uncertainty* in legislation. Here, a court is not entertaining a vagueness challenge nor convinced the legislation under consideration is ambiguous, because the law, at first blush, appears to carry one meaning that is more likely than any other. Instead, the court in its analysis of the somewhat uncertain law will struggle to clarify for the benefit of both the citizenry and law enforcement the actual scope of the law in question.

The purpose, then, of this article is not to offer a useful measuring stick for predicting the outcome of a vagueness claim in criminal law, but rather a description of the vehicles used by courts to *justify* their conclusions as to whether a defendant had "fair notice,"[4] or police, prosecutors, and juries had an "ascertainable standard of guilt"[5] that might avoid arbitrary and discriminatory enforcement. Similarly, it will attempt to identify, beyond simply referring to certain doctrinal rhetoric, how a court goes about addressing ambiguities. Finally, legislation not challenged on vagueness grounds nor considered ambiguous may neverthe-

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3. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).
4. *See Colautti*, 439 U.S. at 390.
5. *See Palmer*, 402 U.S. at 545.

less contain uncertain language that will require a court to seek out its true meaning. Again, this article will undertake an examination of a court's methods in such cases.

Part I examines the basics—the principle of legality and its corollary concerns of fair notice and avoidance of arbitrary or discriminatory enforcement. Part II examines the concept of ambiguity. Part III addresses the dichotomy between overbreadth and vagueness concerns that have often been confused in court opinions. Parts IV, V, and VI are designed to examine the concerns that may explain the ultimate conclusion that arises out of a vagueness dispute. Specifically, Part IV points out that a legislature's statutory inclusion of (1) a detailed listing of items or activities which a particular criminal measure seeks to restrict and (2) an element of *mens rea* in a criminal enactment, while certainly not outcome dispositive, may offer the court a basis for concluding the offense in question offered the necessary notice. Part V offers a number of possible *sources* of information that may provide instruction as to the meaning of language in a criminal proscription. Alternatively, examination of such sources may reveal a complete lack of consensus as to how certain words might be interpreted, thereby reinforcing a complainant's assertion that a particular criminal law failed to offer any direction to the citizenry as to the scope of questionable enactments or terminology within. Here, it will be pointed out that consultation of common dictionaries, for example, might provide a court with an "answer" as to whether the meaning of a law is clear or nebulous. Part VI offers a few rules of thumb that courts may employ to rationalize their position. For instance, it is obvious the courts will demand more specificity or precision of language if the law in question might implicate constitutional terrain than will be expected if it does not. Hopefully, this journey through the case law will contribute to a better understanding of these subjects, quite appropriately, called vagueness, ambiguity, and uncertainty.

I. THE PRINCIPLE OF LEGALITY

The most fundamental tenet of criminal law is the *principal of legality*,[6] which today means that criminal liability and punishment can only be predicated on a prior legislative enactment that states what is proscribed as an offense in a precise and clear manner.[7] This is a concept that is reliant on various doctrines, most significantly the "void for vagueness" doctrine and the doctrine of "strict construction."[8] The

6. HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 79-80 (1968).

7. PAUL H. ROBINSON, CRIMINAL LAW § 2.2, at 74-75 (1997).

8. PACKER, *supra* note 6, at 93. Two classic treatments of these subjects are Anthony Amsterdam, Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960), and John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189 (1985).

vagueness doctrine is directed toward providing an adequate definition of *what* behavior is criminal and to *whom* it applies.[9] The doctrine of strict construction of penal statutes, which has been described as the "junior version of the vagueness doctrine,"[10] requires resolution of differing interpretations of language in a criminal statute to the advantage of the accused.[11] If a criminal stricture is sufficiently nebulous that it fails to define that which is supposed to be illegal, then it suffers from the perils of *vagueness*.[12] If vague, it is *void*; it is unsalvageable. In contrast, if the criminal measure, cast in relatively clear language, lends itself to two or more *equally* plausible interpretations, then the enactment is merely *ambiguous*.[13] In this latter case, in steps the doctrine of strict construction. This doctrine, also called the rule of lenity, which serves as a "tie-breaker," insists the ambiguity be resolved against the government and to the advantage of the accused.[14] Thus, as a general matter, if the statute is deemed vague, the court has been unable to decipher where the legislature drew the line between illicit and licit behavior. It has thrown in the towel. Alternatively, if the statute is found to be ambiguous, the court is bent on making the determination as to where the legislature drew the line and, to that end, plugs in the rule of lenity to bring about resolution.

The Due Process Clauses of the Fifth and Fourteenth Amendments of the United States Constitution, which guarantee that "no person shall . . . be deprived of life, liberty, or property, without due process of law,"[15] have been construed as requiring that citizens have notice of what behavior is or is not illegal.[16] To preserve this guarantee, the courts have adopted the "void-for-vagueness doctrine."[17] This doctrine requires that:

> the terms of a penal statute . . . must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties . . . and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.[18]

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9. PACKER, *supra* note 6, at 93-94.

10. *Id.* at 95.

11. ROBINSON, *supra* note 7, at 76 (citing Rewis v. United States, 401 U.S. 808 (1971)).

12. *Id.*

13. *Id.*

14. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 5.04, at 47 (3d ed. 2001).

15. U.S. CONST. amend. V; *see* U.S. CONST. amend XIV.

16. *See* Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939) ("No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.").

17. Kolender v. Lawson, 461 U.S. 352, 357 (1983) (citing Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489 (1982)).

18. Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926) (citing Int'l Harvester Co. v. Kentucky, 234 U.S. 216, 221-22 (1914)); *see also* Collins v. Kentucky, 234 U.S. 634, 638 (1914)

The void-for-vagueness doctrine also requires that penal statutes be defined in a manner that does not encourage "arbitrary and discriminatory enforcement" bylaw enforcement authorities.[19]

In *Grayned v. City of Rockford*,[20] the United States Supreme Court articulated the critical policy considerations that are at the heart of the due process mandate requiring avoidance of statutory vagueness:

> Vague laws offend several important values. First, because [this Court] assume[s] that man is free to steer between lawful and unlawful conduct, [this Court] insist[s] that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory applications.[21]

Consequently, when a claim of unconstitutional vagueness is raised in a court of law, there are two basic questions to be asked when determining whether a statute is void because of its vagueness:

(1) Does this statute provide fair notice or warning to the citizens as far as what is and is not prohibited or required by the statute?[22]

(2) Does this statute provide an ascertainable standard of guilt so that it does not encourage arbitrary and discriminatory enforcement?[23]

If the answer to both of these questions is in the affirmative, then the statute will be upheld against a void-for-vagueness challenge.[24] How-

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(stating that the statute in *Int'l Harvester* presented no standard of conduct that was possible to know).

19. *Kolender*, 461 U.S. at 357.

20. 408 U.S. 104 (1972).

21. *Grayned*, 408 U.S. at 108-09.

22. *See, e.g.*, Kramer v. Price, 712 F.2d 174, 176 (5th Cir. 1983) ("Vague statutes fail to provide citizens with fair notice or warning of statutory prohibitions so that they may act in a lawful manner." (citing *Connally*, 269 U.S. at 391)), *aff'd on other grounds on reh'g*, 723 F.2d 1164 (5th Cir. 1984).

23. *See, e.g.*, *Kolender*, 461 U.S. at 358 ("Where the legislature fails to provide certain minimal guidelines, a criminal statute may permit 'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.'" (alteration in original) (quoting Smith v. Goguen, 415 U.S. 566, 575 (1974))).

24. *See, e.g.*, United States v. Powell, 423 U.S. 87, 92-93 (1975) (upholding a statute prohibiting mailing pistols and "other firearms capable of being concealed on the person" because it established a "reasonably ascertainable standard of conduct" and because it provided notice to the citizens as to what actions are proscribed by the statute).

ever, if a statute fails either part of the test, the statute is void because of its vagueness.[25]

It is important to understand from the outset that the pursuit of a void-for-vagueness finding is an uphill battle. An elementary, but critical, point in this type of challenge is that courts begin their analysis with the *presumption* that the statute under attack is valid.[26] Also, a court, *if* in fairness such is possible, must give a statute a *reasonable* construction or interpretation to avoid unconstitutional indefiniteness.[27]

A second fundamental point regarding any vagueness challenge is that a reviewing court is not restricted to an examination of the legislation on its face; rather, whether the statute provides fair notice and an ascertainable standard of guilt turns on *prior* judicial construction or interpretation.[28] An authoritative construction of a statute by a jurisdiction's highest court will be considered as interpretative of the "words in the statute as definitely as if it had been so amended by the legislature."[29] Thus, in some cases, a narrowing construction may save the enactment from a successful attack.[30] However, in other cases, a judicial "gloss" may narrow the scope of the act, but not enough to save it.[31] In yet other cases, what may appear is an unforeseeable and retroactive judicial expansion of narrow and precise statutory language that can only aggravate the integrity of the law.[32]

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25. *See, e.g.*, Cline v. Frink Dairy Co., 274 U.S. 445, 465 (1927) (finding that the Colorado Anti-trust Act is void because it fails to provide an ascertainable standard of guilt); *see also* People v. Monroe, 515 N.E.2d 42, 45 (Ill. 1987) (finding an Illinois drug paraphernalia prohibition void because it failed to afford fair notice of what conduct was prohibited and also lent itself to arbitrary enforcement).

26. *See, e.g.*, United States v. Nat'l Dairy Prods. Corp., 372 U.S. 29, 32 (1963) (finding that federal Robinson-Patman Act making it a crime to sell goods at "unreasonably low prices" in order to destroy competitors not vague and that a "strong presumptive validity . . . attaches to an Act of Congress").

27. United States v. Harriss, 347 U.S. 612, 618 n.6 (1954) (citing United States v. Del. & Hudson Co., 213 U.S. 366, 407-08 (1909), and finding the Federal Regulation of Lobbying Act not vague).

28. Wainwright v. Stone, 414 U.S. 21, 22 (1973) (noting that, in reviewing a claim of vagueness of a state statute, the United States Supreme Court must take the statute as though it read precisely as the highest court of the state has interpreted it).

29. Winters v. New York, 333 U.S. 507, 514 (1948).

30. *See, e.g.*, Watts v. United States, 394 U.S. 705, 707-08 (1969) (finding that the prohibition outlawing threats to the President of the United States requires proof of a "true threat" to the President's life or limb and, thus, the statute as construed is "certainly" not void on its face).

31. *See, e.g.*, *Winters*, 333 U.S. at 518-19 (holding that the state statute outlawing "obscene prints and articles" was not saved by New York Court of Appeals determination that statute only reached materials "so massed as to become vehicles for inciting violent and depraved crimes").

32. *See, e.g.*, Bouie v. Columbia, 378 U.S. 347, 352 (1964) (finding that the South Carolina Supreme Court violated the defendant's due process rights in applying its 1961 construction of state statute prohibiting *entry* of lands of another after notice not to enter as prohibiting the act of *remaining* on premises after being asked to leave, to affirm the conviction of the defendant, who in 1960 refused to leave luncheonette department of drug store after requested to leave).

A. *The "Fair Notice"*[33] *Requirement*

Providing adequate notice does not require that a defendant actually know that his conduct constitutes a violation of the law.[34] An *actual* notice requirement would run afoul of the principle that ignorance of the law is no excuse. Thus, as a practical matter, the requirement of "fair notice"[35] merely insists (although no court will admit it) that a defendant have *constructive* notice that his act is criminal; that is, that the defendant *could* have found out whether his conduct was prohibited by the statute.[36] A statute is void for vagueness if it fails to draw reasonably clear lines between lawful and unlawful conduct such that the defendant has no way to find out whether his conduct is controlled by the statute.[37] Vague statutes are constitutionally unacceptable because they fail to provide citizens with fair notice or warning of statutory prohibitions so that they may act in a lawful manner.[38]

On various occasions, the United States Supreme Court has struck down federal and state criminal statutes under the Due Process Clause for not being sufficiently explicit in informing those who were subject to the laws what conduct on their part would render them liable to criminal penalties.[39] In this connection, it has been pointed out that there are no mechanical standards to be rigidly applied to every case; rather, the degree of vagueness that may be tolerated depends on "the nature of the

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33. *See* Colautti v. Franklin, 439 U.S. 379, 390 (1979).

34. *See, e.g.*, WAYNE R. LAFAVE, CRIMINAL LAW § 5.1(d), at 441 (3d ed. 2000) (noting the fact that ignorance of the criminal law is not a defense is based upon the early notion that the law was "definite and knowable" and that everyone is presumed to know the law that is, of course, an "obvious fiction").

35. *Colautti*, 439 U.S. at 390 (finding stricture outlawing abortion of "viable" fetus vague for failing to provide "fair notice" regarding test for viability).

36. *Cf.* Rose v. Locke, 423 U.S. 48, 50, 53 (1975) ("Even trained lawyers may find it necessary to consult legal dictionaries, treatises, and judicial opinions before they may say with any certainty what some statutes may compel or forbid."); *see also Connally*, 269 U.S. at 393 ("The crime, and the elements constituting it, must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course it is lawful for him to pursue."); Columbia Natural Res., Inc., v. Tatum, 58 F.3d 1101, 1105 (6th Cir. 1995) (stating that the United States Supreme Court case law on vagueness "reflects the common sense understanding that the average citizen does not read, at his leisure, every federal, state, and local statute to which he is subject"), *cert. denied*, 516 U.S. 1158 (1996); Jeffries, *supra* note 8, at 207 ("[T]he kind of notice required is entirely formal. Publication of a statute's text always suffices; the government need made no further effort to apprise the people of the content of the law . . . . In short, the fair warning requirement of the vagueness doctrine is not structured to achieve actual notice of the content of the penal law.").

37. *See* Smith v. Goguen, 415 U.S. 566, 574 (finding that the Massachusetts flag misuse statute outlawing "contemptuous treatment of flag" was vague because the statute failed to delineate the kinds non-ceremonial treatment that is criminal and that which is not).

38. *See Connally*, 269 U.S. at 388 (finding that the Oklahoma statute requiring employees to be paid "not less than the current rate per diem wages in the locality" was vague).

39. *See* Bouie v. Columbia, 378 U.S. 347, 350-51 (1964) (discussing prior opinions where the Court employed the void-for-vagueness doctrine).

enactment."[40] First, the Court has suggested that the need for notice is greater when the statute imposes penalties on individual behavior than when it regulates the economic behavior of businesses inasmuch as the "subject matter" under regulation "is often more narrow . . . because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action," and because these entities "may have the ability to clarify the meaning of the regulation by [their] own inquiry, or by resort to an administrative process."[41] Second, greater latitude is given when the enactment is civil rather than criminal because "the consequences of imprecision are qualitatively less severe" given their differing penalty structures.[42] Third, statutes which involve a *scienter* requirement are more likely to withstand a claim of vagueness where they ensure that the law punishes only those who are aware that their conduct is unlawful.[43] Fourth, in cases where the statute under consideration may affect constitutionally protected conduct, particularly First Amendment speech, the reviewing court is less likely to find that constructive notice exists than in cases where the statute could not possibly infringe upon such constitutional freedoms.[44] A study of the case law in this area prompted one commentator to observe that *as a practical matter*, the courts actually measure vagueness claims by consideration of: (1) the significance of the legislative enactment, i.e., its importance in the larger social scheme;[45] (2) the necessity of the statutory ambiguity in achieving the underlying goal;[46] and (3) the impact of the legislation "on protected or desirable conduct."[47] Moreover, judges

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40. *See Vill. of Hoffman Estates*, 455 U.S. at 498.

41. *Id.* at 498.

42. *Id.* at 498-99.

43. *Id.* at 499. A requirement of specific intent that is interpreted as the intentional commission of an act which is (or just happens to be) criminal obviously does *not* give rise to a presumption of fair notice in the same way as where the specific intent is interpreted as the willful commission of an act *knowing the act to be wrong*. Screws v. United States, 325 U.S. 91, 101-02 (1945) (plurality opinion); *see also Colautti*, 439 U.S. at 394-95 (finding lack of criminal *mens rea* aggravated ambiguity in Pennsylvania Abortion Control Act); *Goguen*, 415 U.S. at 579-80 (finding Massachusetts flag misuse prohibition that outlawed treating the flag in a "contemptuous" manner did not clarify whether contempt had to be intentional or could be inadvertent and, as such, statute was vague).

44. *Vill. of Hoffman Estates*, 455 U.S. at 498-99. These decisions may be based on the assertion the statute is violative of due process. *E.g.*, *Goguen*, 415 U.S. at 566 (finding Massachusetts flag misuse prohibition that outlaws "contemptuous treatment" of the flag is void for vagueness in violation of due process). Other decisions are claimed to be a violation of the First Amendment. *See, e.g.*, NAACP v. Button, 371 U.S. 415, 432-33 (1963) (finding Virginia prohibition against solicitation of legal business which made it a crime for a person to advise another that his legal rights may have been infringed and to refer him to a particular attorney or group of attorneys was vague and in violation of the First Amendment).

45. *See* Robert Batey, *Vagueness and the Construction of Criminal Statutes—Balancing Acts*, 5 VA. J. SOC. POL'Y & L. 1, 10 (1997).

46. *See* Batey, *supra* note 45, at 2.

47. *Id.* at 2; *see also* Jeffries, *supra* note 8, at 215-16 (pointing out that the vagueness doctrine "is so often invoked against street cleaning statutes—local ordinances directed against some form of

"veil" these analytical considerations lest they appear less like judges and more like legislators.[48]

For example, in *Johnson v. Athens-Clarke County*,[49] the Georgia Supreme Court considered the constitutionality of a local anti-loitering statute. In that case, the defendant was arrested after being observed on the same street corner on which police had observed him four times over the two days prior to his arrest, and on all four previous occasions the defendant was told by the police to move along.[50] The defendant was prosecuted under a county municipal ordinance outlawing "loitering or prowling."[51]

Although in previous cases the Georgia Supreme Court had upheld the State's loitering statute against vagueness challenges,[52] the court was troubled with this particular municipal loitering ordinance because of the final clause of the ordinance, which proscribed as illegal a person's presence "under circumstances which cause a justifiable and reasonable alarm or immediate concern that such person is involved in unlawful drug activity."[53] The court noted that:

> an innocent person unfamiliar with the drug culture could stand or sit in a 'known drug area' without knowing the area had such a designation, and could return to the area for a legitimate reason, or for no reason at all, and, as the facts of this case show, be subject to arrest and conviction.[54]

The court found no language in the ordinance that would put an innocent person, such as the defendant, on notice that his behavior was forbidden.[55] The court distinguished this ordinance from the ordinance that it had previously reviewed in *Bell v. State*.[56] In *Bell*, the Georgia Supreme Court had upheld a State anti-loitering statute that prohibited conduct that created a "reasonable alarm or immediate concern for the safety of

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public nuisance, typically involving trivial misconduct, usually with no specifically identifiable victim, and carrying minor penalties").

48. *See* Batey, *supra* note 45, at 2.

49. 529 S.E.2d 613 (Ga. 2000).

50. *Johnson*, 529 S.E.2d at 614.

51. *Id.* ("A person commits the offense of loitering or prowling when he is in a place at a time or in a manner not usual for law-abiding individuals under circumstances that warrant a justifiable and reasonable alarm or immediate concern for the safety of persons or property in the vicinity or under circumstances which cause a justifiable and reasonable alarm or immediate concern that such person is involved in unlawful drug activity." (quoting ATHENS-CLARKE COUNTY MUN. ORDINANCE § 3-5-23 (1993))).

52. *See* State v. Burch, 443 S.E.2d 483 (Ga. 1994); Bell v. State, 313 S.E.2d 678 (Ga. 1984).

53. *Johnson*, 529 S.E.2d at 615.

54. *Id.* at 616.

55. *Id.*

56. 313 S.E.2d 678 (Ga. 1984).

persons or property in the vicinity."[57] While the court in *Bell* had determined that a person of average intelligence could understand what conduct created a "reasonable alarm or immediate concern of the safety for persons or property in the vicinity," the court in *Johnson* concluded that a person of average intelligence could not necessarily understand what activity would "cause a justifiable and reasonable alarm or immediate concern that such person is involved in unlawful drug activity."[58]

The court examined the criteria that were used by the arresting officer in the present case to determine whether the defendant was in violation of the statute.[59] Here, the officer had arrested the defendant because the area that he was in was a known drug area and the defendant's conduct in returning to the same spot repeatedly was characteristic of drug related activities.[60] The court pointed out that the determination of whether or not the defendant was in violation of the statute was based on the officer's law enforcement experience in that area, not on general knowledge and common experience of a person of ordinary intelligence.[61] The court held that because the statute failed to provide fair warning to persons of ordinary intelligence as to what the language at issue that was contained in the ordinance actually prohibited, the statute was "void for vagueness."[62] Here, then, the court seemed to hang its hat on the concern over application of the statute to wholly innocent conduct. In addition, the statute was directed at the behavior of an individual, rather than a business, and was criminal, rather than civil, which made the nebulous language more problematic. Although not mentioned by the court, government proof of *scienter* was not required. Finally, loitering constitutes no significant threat to life, limb, or property.

Of course, the United States Supreme Court has had occasion to review a statute and conclude it failed to provide fair notice as to what was proscribed. An oft-cited case in this area is *Winters v. New York*,[63] where a defendant was convicted of a misdemeanor offense of possessing with intent to sell certain magazines "devoted . . . principally . . . [to] criminal news, police reports, and accounts of criminal deeds, and pictures and stories of deeds of bloodshed, lust and crime" contrary to the New York Penal Code.[64] On appeal, the New York Court of Appeals interpreted this statute to apply to only those "collections of criminal deeds of bloodshed or lust [which] 'can be so massed as to become vehicles for inciting violent and depraved crimes against the person'" and

57. *Johnson*, 529 S.E.2d at 616 (referring to GA. CODE ANN. § 16-11-36 (Michie 1999)).
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.* at 617.
63. 333 U.S. 507 (1948).
64. *Winters*, 333 U.S. at 508 (quoting N.Y. PENAL LAW, ch. 39 § 1141(2) (McKinney 1944)).

upheld the defendant's conviction.[65] However, the United States Supreme Court reversed.[66] The Court first noted basic First Amendment protections of free speech and press were implicated by this stricture.[67] "[E]ven considering the gloss" the New York Court of Appeals had put on this statute in order to narrow its scope to not include "detective tales and treatises on criminology," for example, it remained highly uncertain as to what type of materials might still "be interdicted because of the utter impossibility of the actor or the trier to know where this new standard of guilt would draw the line between the allowable and the forbidden publications."[68] Also, no criminal intent or purpose was required in order to convict an alleged offender.[69] Moreover, this measure reflected "no indecency or obscenity in any sense heretofore known to the law."[70] It carried "no technical or common law meaning."[71] In addition, the statute had the capacity to reach, for example, "[c]ollections of tales of war horrors" and criminalize other "innocent" activity.[72] The statute set neither guidelines for the distributor of questionable materials nor a useful measuring stick for courts or juries.[73] Because the "standards of certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanction for enforcement," this proscription that was devoid of "fair notice" was contrary to due process of law and thus void-for-vagueness.[74]

Winters, like the Georgia Supreme Court's decision in *Johnson*, reflects the type of measure that is most vulnerable to a vagueness attack.[75] Innocent, as well as constitutionally protected, behavior was implicated.[76] Proof of *scienter* was lacking.[77] The penalty was criminal, not civil.[78] The defendant was an individual, not a collective entity.[79] Finally, no demonstrable threat to person or property was involved.[80]

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65. *Id.* at 512-13 (quoting People v. Winters, 63 N.E.2d 98, 100 (N.Y. 1945)).
66. *Id.* at 520.
67. *Id.* at 518-19.
68. *Id.*
69. *Id.* at 519.
70. *Id.*
71. *Id.*
72. *Id.* at 520.
73. *Id.* at 519-20.
74. *Id.* at 509-10, 515.
75. *Id.* at 509-10; *Johnson*, 529 S.E.2d at 615.
76. *Johnson*, 529 S.E.2d at 616.
77. *Winters*, 333 U.S. at 509-10.
78. *Id.*
79. *Id.*
80. *Id.*

B. The "Ascertainable Standard of Guilt"[81] Requirement

Although an analysis of a vagueness claim focuses both on the adequacy of the notice to citizens and concern over arbitrary enforcement, the United States Supreme Court has recognized that the more important aspect of the vagueness doctrine "is not actual notice, but the other principal element of the doctrine – the requirement that a legislature establish minimal guidelines to govern law enforcement."[82] "The absence of a determinate standard" in a given legal proscription "gives police officers, prosecutors, and the triers of fact unfettered discretion to apply the law and, thus there is a danger of arbitrary and discriminatory enforcement" of such a law.[83] Consequently, the void-for-vagueness doctrine demands that these measures provide "officials with explicit guidelines in order to avoid [such] arbitrary and discriminatory enforcement."[84] They must reflect what the Court has described as an "ascertainable standard[] of guilt."[85] The Court has long recognized that "[i]t would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large."[86] To that end, laws are invalidated if they are "wholly lacking in 'terms susceptible of objective measurement.'"[87] It has been observed that "[l]aws that have failed to meet this [vagueness] standard are, almost without exception, those which turn on language calling for the exercise of subjective judgment [of the enforcer] unaided by objective norms."[88]

Beyond concerns relating to providing guidance to police, "[I]t is established that a law [also] fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves . . . *judges* and *jurors* free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case."[89] An act's criminality cannot depend upon, as a general rule, whether a jury may think one's

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81. *See Palmer*, 402 U.S. at 545.

82. *Kolender*, 461 U.S. at 358 (quoting *Goguen*, 415 U.S. at 574).

83. *Kramer*, 712 F.2d at 176 (holding that a Texas harassment statute outlawing communications which "annoy" or "alarm" another is vague).

84. Big Mama Rag, Inc. v. United States, 631 F.2d 1030, 1035 (D.C. Cir. 1980) (finding that the definition of "educational" contained in a federal treasury regulation governing tax exemptions for charitable and educational organization was vague).

85. *Palmer*, 402 U.S. at 545 (holding municipal "suspicious persons" ordinance vague); *Winters*, 333 U.S. at 515 (holding state Obscene and Prints Article Act vague); Cline v. Frink Dairy Co., 274 U.S. 445, 459-60 (1927) (holding Colorado Anti-Trust Act vague).

86. United States v. Reese, 92 U.S. 214, 221 (1875).

87. Keyishian v. Bd. of Regents, 385 U.S. 589, 604 (1967) (quoting Cramp v. Bd. of Pub. Instruction, 368 U.S. 278, 286 (1961)).

88. *NAACP*, 371 U.S. at 466 (Harlan, J., dissenting).

89. Giaccio v. Pennsylvania, 382 U.S. 399, 402-03 (1966) (emphasis added).

conduct is unreasonable, improper, or immoral.[90] Rather, there must be some definiteness and certainty written into the law.[91] The Court has made clear that "[t]he dividing line between what is lawful and unlawful cannot be left to conjecture."[92] "The citizen cannot be held to answer charges based upon penal statutes whose mandates are so uncertain that they will reasonably admit of different constructions" by the fact finder.[93] When a law fails to provide an ascertainable standard of guilt, "[i]t leaves open . . . the widest conceivable inquiry, the scope of which no one can . . . foreshadow or adequately guard against."[94]

One example of a statute being struck down for vagueness because of its potential for arbitrary enforcement appeared in *Papachristou v. City of Jacksonville*.[95] In this consolidated case, nine defendants were arrested for violating Jacksonville's vagrancy ordinance.[96] The first four defendants, Papachristou, Calloway, Melton, and Johnson[97] were riding in Calloway's car on a main thoroughfare in Jacksonville, Florida, on the way to a nightclub.[98] They were arrested because "the defendants had stopped near a used-car lot that had been broken into several times."[99] These four individuals were charged with "prowling by auto."[100]

Two other defendants, Smith and Henry, were waiting for a friend in downtown Jacksonville.[101] It was a cold day and Smith did not have a jacket.[102] The two entered a dry cleaning shop to continue their wait but

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90. Nash v. United States, 229 U.S. 373, 377 (1913) (citing Tozer v. United States, 52 F. 917, 919 (C.C.E.D. Mo. 1892)).

91. *Nash*, 229 U.S. at 377.

92. *Connally*, 269 U.S. at 393.

93. *Id.*

94. United States v. L. Cohen Grocery Co., 255 U.S. 81, 89 (1921).

95. 405 U.S. 156, 171 (1972).

96. *Papachristou*, 405 U.S. at 156. The Florida ordinance provided in part:

> Rogues and vagabonds, or dissolute persons who go about begging, common gamblers, person who use juggling or unlawful games or plays, common drunkards, common night walkers, thieves, pilferers or pickpockets, traders in stolen property, lewd, wanton and lascivious persons, keepers of gambling places, common railers and brawlers, person wandering or strolling around from place to place without any lawful purpose or object, habitual loafers, disorderly persons, persons neglecting all lawful business and habitually spending their time by frequenting houses of ill fame, gaming houses, or places were alcoholic beverages are sold or served, persons able to work but habitually living upon the earnings of their wives or minor children shall be deemed vagrants and, upon conviction in the Municipal Court shall be punished as provided for Class D offenses.

JACKSONVILLE, FLA., CODE § 26-57.

97. Papachristou and Calloway were white females; Melton and Johnson were black males. *Papachristou*, 405 U.S. at 158.

98. *Id.* at 158-59.

99. *Id.* at 159. The Court pointed out that there was no evidence of any breaking or entering into the used car lot during the night in question. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

were asked to leave.[103] After they left, they walked up and down a two block area two or three times, whereupon the observing storeowners contacted the police.[104] The police officers arrested Smith and Henry because they did not have any identification and because the police officers did not believe the defendants' story.[105]

The seventh defendant, Heath, was arrested after he and his companion drove down his girlfriend's driveway, where they noticed police officers arresting a third party, whereupon the two proceeded to back out.[106] At this point, police arrested Heath and his companions. Heath was charged with being a "common thief" because he had a reputation of being a thief.[107] Heath's companion was arrested for "loitering" in the driveway.[108]

The eighth defendant, Campbell was arrested when he arrived home in the very early morning hours.[109] Police officers stopped him for speeding, but no speeding charge was ever issued against him.[110]

The ninth defendant, Brown, was arrested when police officers called him over to their car.[111] The police officers began to search him and, when Brown started to resist, the officers discovered two packets of heroin in his pocket.[112] However, Brown was charged with "disorderly loitering on the street, and disorderly conduct – resisting arrest with violence."[113]

In reviewing the charges, the United States Supreme Court stated that the activities codified in the Jacksonville ordinance involved "normally innocent" behavior.[114] These activities included "night walking," "loafing," "wandering or strolling," and "habitually . . . frequenting . . . places where alcoholic beverages are sold or served."[115] The Court used the writings of Walt Whitman, Vachel Lindsay, and Henry David Thoreau to illustrate:

> The difficulty is that these activities are historically part of the amenities of life as we have known them. They are not mentioned in the Constitution or in the Bill of Rights. These unwritten amenities have

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103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.* at 160.
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.* at 160-61.
114. *Id.* at 163.
115. *Id.* at 163-64.

> been in part responsible for giving our people the feeling of independence and self-confidence, the feeling of creativity.
>
> . . . They are embedded in Walt Whitman's writings, especially in his 'Song of the Open Road.' They are reflected too, in the spirit of Vachel Lindsay's 'I Want to Go Wandering,' and by Henry D. Thoreau.[116]

The Court determined that the Jacksonville ordinance cast a net too large such that the crimes it defined were "so all-inclusive and generalized . . . [that] those convicted may be punished for no more than vindicating affronts to police authority."[117] Additionally, law enforcement had "unfettered discretion" in determining when an individual was violating the ordinance.[118] The Court concluded that the statutory "scheme permits and encourages an arbitrary and discriminatory enforcement of the law."[119] The Court, therefore, held that the Jacksonville ordinance was unconstitutionally vague.[120]

Another case that predicated a claim of vagueness on inordinate police discretion was *Kolender v. Lawson*,[121] wherein the United States Supreme Court considered the constitutionality of a California statute[122] that the California appellate court had interpreted as requiring persons who wander on the streets to provide "credible and reliable" identification and "to account for his presence" when requested by a peace officer under circumstances that would justify a valid stop.[123] While the California Court of Appeals had construed the statutory mandate that an individual provide "credible and reliable" identification when requested by a police officer as requiring a reasonable suspicion of criminal activity sufficient to justify a *Terry* stop,[124] "credible and reliable" identifications had been defined by the appellate court as identification "carrying reasonable assurance that the identification is authentic and providing

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116. *Id.* at 164.

117. *Id.* at 166-67.

118. *Id.* at 168.

119. *Id.* at 170.

120. *Id.* at 171.

121. *Kolender*, 461 U.S. at 353-54.

122. *Id.* at 354 n.1 ("Every person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor: . . . (e) Who loiters or wanders upon the streets or from place to place without apparent reason or business and who refuses to identify himself and to account for his presence when requested by any peace officer to do so, if the surrounding circumstances are such as to indicate to a reasonable man that the public safety demands such identification." (quoting CAL. PENAL CODE ANN. § 647(e) (West 1970))).

123. *Id.* at 355-56 (quoting People v. Solomon, 108 Cal. Rptr. 867, 872-73 (Cal. Ct. App. 1973), *cert. denied*, 415 U.S. 951 (1974)).

124. *See* Terry v. Ohio, 392 U.S. 1, 26 (1968) (providing that the police may conduct a brief investigatory detention of a suspect where the officer has a reasonable suspicion that an individual may have committed, or is about to commit, an offense).

means for later getting in touch with the person who has identified himself."[125]

The Court noted that the statute and case law interpreting it contained "no standard for determining what a suspect has to do in order to satisfy the requirement to provide a 'credible and reliable' identification."[126] Thus, a suspect would be held to have violated this statute unless "the officer [was] satisfied that the identification [was] reliable."[127] The statute was construed by the Court as vesting "virtually complete discretion in the hands of the police to determine whether the suspect has satisfied the statute and must be permitted to go on his way."[128] The Court saw the result of the statute as entrusting lawmaking "to the moment-to-moment judgment of the policeman on his beat."[129] In addition, the Court noted that this statute furnished "a convenient tool for 'harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure,'"[130] and conferred "on police a virtually unrestrained power to arrest and charge persons with a violation."[131] Here, the Court held that this statute was unconstitutionally vague because it allowed "arbitrary enforcement by failing to describe with sufficient particularity" what a citizen must do in order to comply with the statute.[132]

Similar to the decision in *Papachristou*, the United States Supreme Court struck down a Chicago gang loitering ordinance because it failed to set forth an ascertainable standard of guilt in *City of Chicago v. Morales*.[133] In *Morales*, the United States Supreme Court reviewed Chicago's Gang Congregation Ordinance, which prohibited "criminal street gang member[s]" from "loitering" with one another in any public place.[134] For three years, the Chicago police enforced this ordinance,

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125. *Kolender*, 461 U.S. at 356 (quoting *Solomon*, 108 Cal. Rptr. at 872-73).

126. *Id.* at 358.

127. *Id.* at 360.

128. *Id.* at 358.

129. *Id.* at 360 (quoting *Goguen*, 415 U.S. at 575 (quoting Gregory v. City of Chicago, 394 U.S. 111, 120 (1969))).

130. *Id.* (quoting *Papachristou*, 405 U.S. at 170 (quoting Thornhill v. Alabama, 310 U.S. 88, 97-98 (1940))).

131. *Id.* (quoting Lewis v. City of New Orleans, 415 U.S. 130, 135 (1974) (Powell, J., concurring)).

132. *Id.* at 361.

133. 527 U.S. 41, 64 (1999).

134. *Morales*, 527 U.S. at 47 n.2 (1999) (quoting CHICAGO, ILL., MUN. CODE § 8-4-015 (1992)).

> (a) Whenever a police officer observes a person whom he reasonably believes to be a criminal street gang member loitering in any public place with one or more other persons, he shall order all such persons to disperse and remove themselves from the area. Any person who does not promptly obey such an order is in violation of this section.

issuing over 89,000 dispersal orders and arresting approximately 42,000 people for violating the ordinance.[135] When the ordinance was challenged in the Illinois appellate court, it ruled the ordinance was vague and overbroad and, thus, struck the ordinance down.[136] After the Illinois Supreme Court affirmed,[137] the United States Supreme Court inquired into whether the statute was "invalid on its face."[138] The Court noted there were two separate doctrines under which an ordinance may be found unconstitutional.[139] "First, the overbreadth doctrine permits the facial invalidation of laws that inhibit the exercise of First Amendment rights if the impermissible applications of the law are substantial when 'judged in relation to the statute's plainly legitimate sweep.'"[140] Second, the Court pointed out that where a proscription "does not reach a substantial amount of constitutionally protected conduct, it may be impermissibly vague because it fails to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty interests."[141] The Court decided the First Amendment overbreadth claim advanced in this case did not provide a sufficient basis to invalidate the ordinance because no free speech or right of association was infringed by the anti-loitering ordinance.[142] Moving to the Due Process Clause, the Court stated *in dictum*:

(b) It shall be an affirmative defense to an alleged violation of this section that no person who was observed loitering was in fact a member of a criminal street gang.
(c) As used in this Section:
(1) 'Loiter' means to remain in any one place with no apparent purpose.
(2) 'Criminal street gang' means any ongoing organization, association in fact or group of three or more persons, whether formal or informal, having as one of its substantial activities the commission of one or more of the criminal acts enumerated in paragraph (3), and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity . . .
(5) 'Public place' means the public way and any other location open to the public, whether publicly or privately owned.

CHICAGO, ILL., MUN. CODE § 8-4-015 (1992).

135. *Morales*, 527 U.S. at 49.

136. *Id.* at 50 (citing City of Chicago v. Youkhana, 660 N.E.2d 34, 38, 41-42 (Ill. Ct. App. 1995)). The Illinois Appellate Court concluded that the "ordinance impaired the freedom of assembly of nongang members in violation of the First Amendment to the Federal Constitution and Article I of the Illinois Constitution, that it was unconstitutionally vague, that it improperly criminalized status rather than conduct, and that it jeopardized rights guaranteed under the Fourth Amendment." *Id.*

137. *Id.* The Illinois Supreme Court determined "that the gang loitering ordinance violate[d] due process of law in that it [was] impermissibly vague on its face and an arbitrary restriction on personal liberties." *Id.* (quoting City of Chicago v. Morales, 687 N.E.2d 53, 59 (Ill. 1997)).

138. *Id.* at 52.

139. *Id.*

140. *Id.* (quoting Broadrick v. Oklahoma, 413 U.S. 601, 612-15 (1973)).

141. *Id.* at 52 (citing *Kolender*, 461 U.S. at 358).

142. *Id.* at 52-53.

While we, like the Illinois courts, conclude that the ordinance is invalid on its face, we do not rely on the overbreadth doctrine. We agree with the city's submission

> [A]s the United States recognizes, the freedom to loiter for innocent purposes is part of the "liberty" protected by the Due Process Clause of the Fourteenth Amendment. We have expressly identified this "right to remove from one place to another according to inclination" as "an attribute of personal liberty" protected by the Constitution. Indeed, it is apparent that an individual's decision to remain in a public place of his choice is as much a part of his liberty as the freedom of movement inside frontiers that is "a part of our heritage," or the right to move "to whatsoever place one's own inclination may direct" identified in Blackstone's Commentaries.[143]

However, the Court stated it was unnecessary to decide "whether the impact of the Chicago ordinance on constitutionally protected liberty alone would suffice to support a facial challenge under the overbreadth doctrine" inasmuch as a facial vagueness challenge appropriately addressed the claim that the law was invalid.[144] The Court noted that the ordinance did not "simply regulate[] business behavior."[145] Rather, this ordinance was a *criminal* statute that contained *no mens rea*.[146] Also, it "infringe[d] on constitutionally protected rights" and, as such, was subject to a facial vagueness attack.[147]

Applying the vagueness standard to the ordinance, the Court reasoned that a criminal statute could be void for vagueness under two separate rationales.[148] "First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory conduct."[149] In this case, the Chicago ordinance prohibited individuals from "loitering," which the enactment itself defined in the following terms: "to remain in any one place with no apparent purpose."[150] Under this broad definition, the Court reasoned that "any citizen of the city of Chicago"

> that the law does not have a sufficiently substantial impact on conduct protected by the First Amendment to render it unconstitutional. The ordinance does not prohibit speech. Because the term "loiter" is defined as remaining in one place "with no apparent purpose," it is also clear that it does not prohibit any form of conduct that is apparently intended to convey a message. By its terms, the ordinance is inapplicable to assemblies that are designed to demonstrate a group's support of, or opposition to, a particular point of view. [citations omitted] Its impact on the social contact between gang members and others does not impair the First Amendment "right of association" that our cases have recognized.

Id. (citations omitted).

143. *Id.* at 53-54 (quoting Williams v. Fears, 179 U.S. 270, 274 (1900); Kent v. Dulles, 357 U.S. 116, 126 (1958); 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *130).

144. *Id.* at 55.

145. *Id.* (quoting *Vill. of Hoffman Estates*, 455 U.S. at 499).

146. *Id.*

147. *Id.*

148. *Id.* at 56.

149. *Id.*

150. *Id.*

would have extreme difficulty in ascertaining whether "he or she had an apparent purpose" while standing in a public place.[151] The Court suggested that individuals simply engaged in conversation with one another might wonder if they had no "apparent purpose."[152] Because citizens might not be aware that they were impermissibly loitering, they would not be receiving fair notice of what conduct the ordinance prohibited in order to conform their behavior prior to receiving notice from a police order to disperse.[153] The Court pointed out that if the loitering was "harmless and innocent," then the police dispersal order would constitute an "unjustified impairment of liberty."[154] Here, if the police were able to arbitrarily decide who was guilty of loitering and who was not, then the law was not providing "advance notice that [would] protect the putative loiterer from being ordered to disperse. Such an order cannot retroactively give adequate warning of the boundary between the permissible and the impermissible applications of the law."[155] Additionally, individuals subject to dispersal orders were not afforded clear instructions as to how comply with the police order.[156] The Court illustrated this problem with the following questions: "[H]ow long must the loiterers remain apart? How far must they move? If each loiterer walks around the block and they meet again at the same location, are they subject to arrest or merely to being ordered to disperse again?"[157] Because the answers to the Court's questions could not be ascertained from the ordinance, the Court concluded that "the entire ordinance fail[ed] to give the ordinary citizen adequate notice of what [was] forbidden and what [was] permitted."[158] The Court held that the ordinance was vague because "no standard of conduct is specified at all."[159]

II. AMBIGUITY AND VAGUENESS DICHOTOMY

The dividing line between statutory vagueness, which renders an enactment void, and statutory ambiguity, which means a law is fixable by judicial interpretation, is not entirely clear.[160] Nevertheless, it is important to not only attempt an explanation of vagueness, as in the previous section, but also one of ambiguity. Scholars have, of course, managed to see a difference by pointing out that while a vague statute does

151. *Id.* at 56-57.
152. *Id.*
153. *Id.* at 58-59 ("No one may be required at peril of life, liberty, or property to speculate as to the meaning of penal statutes." (quoting Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939))).
154. *Id.* at 58.
155. *Id.* at 59.
156. *See id.*
157. *Id.*
158. *Id.* at 60.
159. *Id.* (quoting Coates v. Cincinnati, 402 U.S. 611, 614 (1971)).
160. LAFAVE, *supra* note 34, § 2.2(d), at 86, § 2.3(b), at 100-01.

not satisfactorily define the proscribed conduct, one that does define prohibited conduct with some precision, but is subject to two or more different interpretations, is ambiguous.[161]

For instance, an expression is ambiguous when a criminal statute outlaws conduct "P" and "P" can alternatively be read to encompass either conduct "a" or conduct "b" and it is beyond dispute that the defendant engaged only in conduct "a."[162] To illustrate, using Chomsky's linguistic literature, "the sentence, 'flying planes can be dangerous' can mean either 'it can be dangerous to fly planes' or 'planes that are aloft can be dangerous.'[163] While a vague statute is void as unconstitutional, an ambiguous statute may be saved by using a variety of techniques to determine the legislature's intent.[164] To interpret an ambiguous statute, courts may employ three techniques: (1) utilizing rules for interpreting the statute's actual language; (2) using rules directing a court to look outside of the statutory language; and (3) in criminal cases only, relying on the rule of strict construction, which commands an ambiguity to be resolved in the defendant's favor.[165] This latter rule is the rule of lenity.[166]

To interpret the statute's actual language, the courts have recognized five basic principles: (1) a statute that uses different language in different sections is presumed to have a different meaning in each of the different sections; (2) catch-all phrases are limited by the rule of *ejusdem generis* (Latin for "of the same kind") which limits interpretation to a common theme or factor; (3) statutes that set forth a list of exceptions implicitly exclude other exceptions by utilizing the rule of *expressio unius est exclusion alterius* (Latin for "the expression of one thing is the exclusion of another"); (4) where two statutes conflict, the specific statute has priority over the general; and (5) where two statutes conflict, the later enacted statute has priority over the earlier.[167] If these rules do not help the court to resolve the ambiguity or conflict, the court may look beyond the actual statute at the legislative history or another authoritative interpretation.[168]

In addition, because criminal statutes are held to a higher standard of precision and clarity, courts apply the rule of lenity, which one noted

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161. ROBINSON, *supra* note 7, at 76; LAFAVE, *supra* note 34, § 2-3(b), at 100-01.

162. Lawrence M. Solan, *Law, Language, and Lenity*, 40 WM. & MARY L. REV. 57, 62 (1998).

163. *Id.* (quoting NOAM CHOMSKY, ASPECTS OF THE THEORY OF SYNTAX § 4, at 21 (1965)).

164. ROBINSON, *supra* note 7, § 2.2, at 76.

165. *Id.* § 2.3, at 90.

166. *See, e.g.*, Rewis v. United States, 401 U.S. 808, 812 (1971) (citing Bell v. United States, 349 U.S. 81, 83 (1995), and finding Travel Act vague and therefore no violation by out-of-state gamblers frequenting a gambling operation).

167. ROBINSON, *supra* note 7, § 2.3, at 90-91.

168. *Id.* § 2.3, at 92.

scholar aptly called the "junior version of the vagueness doctrine."[169] Although it is not constitutionally required,[170] this rule directs that an ambiguity in a statute be resolved in the defendant's favor.[171] It should be understood that "[t]he motivating purpose of the rule is to provide adequate notice to defendants (due process), and to reinforce the notion that only the legislature has the power to define what conduct is criminal and what conduct is not (separation of powers)."[172]

This rule has been endorsed by the United States Supreme Court in their interpretation of federal law.[173] Although the rule had an established history in English law, the first United States Supreme Court decision to apply it appeared in 1820.[174] In *United States v. Wiltberger*,[175] the Court was faced with the question of whether a federal statute that proscribed manslaughter "on the high seas" could apply to a homicide that occurred on an American merchant marine vessel on a river in the interior of a foreign country.[176] While one section of the Crimes Act of 1790 simply referred to commission of manslaughter "on the high seas," another section of the Act, which addressed murder and other felonies committed on water, specifically referred to commission of such acts "upon the high seas, or in any river, haven, basin or bay, out of the jurisdiction of any particular [American] State."[177] The government asserted if consideration was given to the "construction of the whole act," one could logically conclude the "obvious intent of the legislature" was to define manslaughter on the high seas as including such a homicide on a foreign river.[178]

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169. PACKER, *supra* note 6, at 95.

170. DRESSLER, *supra* note 14, § 5.04, at 47-48.

171. *Rewis*, 401 U.S. at 812 (citing *Bell*, 349 U.S. at 83).

172. Solan, *supra* note 162, at 58. This rationale appears in *United States v. Bass*, 404 U.S. 336, 347-48 (1971).

173. *See, e.g.*, McNally v. United States, 483 U.S. 350, 359-60 (1987) ("The Court has often stated that when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language."). Here, mail fraud does not encompass schemes to defraud people of their right to honest government; rather, it is interpreted as applying only to schemes to defraud one's property rights. *Id.*; *see also* Liparota v. United States, 471 U.S. 419, 425, 426, 428, 433-34 (1985) (holding rule of lenity commands offense of unlawful acquiring and possessing food stamps requires *mens rea* of knowledge); United States v. United States Gypsum Co., 438 U.S. 422, 435-36 (1978) (holding rule of lenity requires interpretation of federal Sherman Antitrust Act as requiring intent); *Bass*, 404 U.S. at 347-48 (holding rule of lenity requires that offense of receipt, possession or transportation of firearms by a felon in interstate commerce require proof that receipt and possession as well as transportation be in interstate commerce).

174. *See* United States v. Wiltberger, 18 U.S. 76 (1820); *see also* Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345, 357, 358 (1994).

175. 18 U.S. 76.

176. *Id.* at 93-96.

177. *Id.* at 92-96, 98-99.

178. *Id.* at 94-95.

However, the Court responded, "The rule that penal laws are to be construed strictly . . . is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department."[179] The Court added, "The intention of the legislature is to be collected from the words they employ [and] [w]here there is no ambiguity in the words, there is no room for construction."[180] Here, the plain language of the manslaughter statute outlawed a killing "on the high seas," nothing more.[181] This indictment, for the commission of manslaughter that occurred on a river, then, was not based on a "cognizable" offense of the laws of the United States.[182]

In *Jones v. United States*,[183] the Court relied, in part, on the rule of lenity in finding that the commission of "arson of an owner-occupied dwelling" fell outside the scope of federal criminal law.[184] In this case, the defendant was convicted of a federal offense for damage or destruction "by means of fire or an explosive, [of] any . . . property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce."[185] Upon examination of the defendant's claim that an owner-occupied residence not used for any commercial purpose did not qualify as property "used in" commerce or "affecting" commerce, the Court said the proper inquiry involved considering the *function* of the building itself and how, if at all, that function could be considered commerce-related.[186] The government had claimed the defendant's arson involved "use" of interstate commerce in three ways: (1) the homeowner "used" the dwelling as collateral to get a loan from an out-of-state lender; (2) the homeowner "used" the residence to obtain a casualty insurance policy from an insurer in another state; and (3) the homeowner "used" the dwelling to receive natural gas from another state.[187] However, the Court responded that "[i]t surely is not the common perception that a private, owner-occupied residence is 'used' in the 'activity' of receiving natural gas, a mortgage, or an insurance policy."[188] The Court felt that "active employment" in commerce was what needed to be established, while in this case the only "active employment" was the "everyday living" of the residents of the damaged premises.[189] Applying the rule of

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179. *Id.* at 95.
180. *Id.* at 95-96.
181. *Id.* at 104-05.
182. *Id.* at 105.
183. 529 U.S. 848 (2000).
184. *Jones*, 529 U.S. at 858.
185. *Id.* at 850 (quoting 18 U.S.C. § 844(i) (1994)).
186. *Id.* at 854 (citing United States v. Ryan, 9 F.3d 660, 675 (8th Cir. 1993) (Arnold, C.J., concurring in part and dissenting in part)).
187. *Id.* at 855.
188. *Id.* at 856.
189. *Id.*

lenity to the "choice . . . between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite."[190] This Congress had failed to do and, thus, the defendant was given the benefit of the ambiguity.[191]

The United States Supreme Court has stated that the federal rule of lenity only applies where a court determines that a "grievous ambiguity or uncertainty" exists.[192] The Court limits the use of lenity since "most statutes are ambiguous to some degree."[193] In addition, a statute does not suffer the infirmity of ambiguity unless, "'after seizing everything from which aid can be derived,' [the Court] can make 'no more than a guess as to what Congress intended.'"[194] Thus, if the Court understands what Congress intended in choosing a particular word or phrase in a criminal statute, there is neither ambiguity nor need to resort to the rule of lenity.[195]

Also, "the fact that a statute can be 'applied in situations not expressly anticipated by Congress does not'" establish ambiguity but rather breadth.[196] In other words, merely because a statute is all-encompassing does not establish ambiguity. When the rule does apply, the law in question should not be interpreted in a manner which defies common sense nor should the law be given a "forced, narrow or overstrict construction."[197]

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190. *Id.* at 858 (quoting United States v. Universal C.I.T. Credit Corp., 344 U.S. 218, 221-22 (1952)).

191. *Id.* at 859.

192. Staples v. United States, 511 U.S. 600, 619 n.17 (1994) (quoting Chapman v. United States, 500 U.S. 453, 463 (1991)). In *Staples*, for example, the Court found it unnecessary to employ the rule of lenity in concluding that a conviction for possessing an unregistered machine gun required proof of scienter. *Id.* The Court established that crimes without a *mens rea* have a most disfavored status in criminal law. *Id.* at 605-06. In addition, the Court had not previously held that "statutes silent with respect to *mens rea* are ambiguous." *Id.* at 619.

193. Muscarello v. United States, 524 U.S. 125, 138 (1998).

194. Reno v. Koray, 515 U.S. 50, 65 (1995) (quoting Smith v. United States, 508 U.S. 223, 239 (1993); Ladner v. United States, 358 U.S. 169, 178 (1958)). *Reno* held that a prisoner who spent time at a community treatment center while "released" on bail was not in "official detention" entitling him to sentence credit. *Id.*

195. *See, e.g.*, *Muscarello*, 524 U.S. at 138-39 (holding that where Congress clearly intended to use a broad definition of "carry" for purposes of outlawing the carrying of a firearm during a drug transaction, there existed no need to consider rule of lenity); United States v. Walton, 514 F.2d 201, 204 (D.C. Cir. 1975) (finding that where Congress clearly intended to outlaw all forms of marijuana, there was no ambiguity in a federal statute that only referenced one species of marijuana).

196. Pa. Dep't of Corrs. v. Yeskey, 524 U.S. 206, 212-13 (1998) (quoting Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 499 (1985)). *Yeskey* held that the American Disabilities Act "unambiguously extends to state prison inmates." *Id.*

197. LAFAVE, *supra* note 34, § 2.2(d), at 84.

While the federal courts and many state courts[198] rely on the rule of lenity, other states have abolished the rule.[199] At the core of this movement to eliminate the rule lies the notion that its implementation oftentimes runs contrary to legislative intent.[200] The Model Penal Code rejects the rule of lenity and states:

> The provisions of the Code shall be construed according to the fair import of their terms but when the language is susceptible of differing constructions it shall be interpreted to further the general purposes stated in this Section and the special purposes of the particular provision involved. The discretionary powers conferred by the Code shall be exercised in accordance with the criteria stated in the Code and, insofar as such criteria are not decisive, to further the general purposes stated in this Section.[201]

This *fair import* rule is considered less "strict" because it allows for interpretation in a way that does not frustrate the legislative purpose.[202] The rule seeks to ensure that some reasonable notice of the offense is possible.[203] This strikes a compromise between the principles of legality and countervailing interests.[204] However, it is not clear that the rule of lenity and the rule of fair import generate a significant difference in application.[205] Arguably, the fair import rule allows a court more leeway to follow legislative intent that conflicts with a literal reading, but this is mere speculation.[206] The difference may lie in the use of judicial discretion in the fair import rule.[207] This may be the reason some courts prefer the rule of strict construction since it permits discretion yet appears mechanical and thereby leaves a decision less open to criticism.[208]

III. OVERBREADTH AND VAGUENESS DICHOTOMY

The concepts of overbreadth and vagueness are, in some sense, distinct and yet, in other regards, inseparable. As mentioned previously, "[a]

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198. *See, e.g.*, People v. Davis, 766 N.E.2d 641, 644, 647 (Ill. 2002) (stating in dicta that rule of lenity would compel a finding that a pellet gun is not a "dangerous weapon" within meaning of Illinois armed violence statute).

199. DRESSLER, *supra* note 14, § 5.04. *Compare* Kahan, *supra* note 174, at 346 (criticizing the doctrine), *with* Solan, *supra* note 162, at 59-60 (defending the rule of lenity).

200. ROBINSON, supra note 7, § 2.3, at 93 ("The rule can frustrate a legislature's obvious intent on what can be an important issue and risks bringing the criminal justice system into disrepute, subjecting it to criticism that it is a game governed by technicalities having little reference to fairness or justice."); DRESSLER, *supra* note 14, § 5.04, at 47 ("A statute should be interpreted to further, not frustrate, the legislative policies behind the specific law in question.").

201. MODEL PENAL CODE § 1.02(3) (1962).

202. ROBINSON, *supra* note 7, at 94.

203. *Id.*

204. *Id.*

205. *Id.* at 96.

206. *Id.*

207. *Id.*

208. *Id.*

statute is void for vagueness if it fails to give adequate notice to people of ordinary intelligence concerning the conduct it proscribes or if it invites arbitrary and discriminatory enforcement."[209] If a party challenges an enactment based on the assertion that one cannot determine whether the regulation intrudes upon otherwise "innocent terrain," then the complaint is one of vagueness.[210] On the other hand, if a challenge is based on an objection that the regulation *does*, in fact, intrude into territory where it does not belong, then the claim is one of overbreadth.[211]

> While a statute may often be found both vague and overbroad at the same time, the two concepts are distinct. A statute is too vague when it fails to give fair notice of what it prohibits. It is overbroad when its language, given its normal meaning, is so broad that the sanctions may apply to conduct which the state is not entitled to regulate.[212]

Nevertheless, it has been recognized that the possible "vagueness of a law affects overbreadth analysis."[213] When a court looks at a claim of overbreadth and considers whether "a substantial amount of constitutionally protected conduct" is involved, it must examine both the uncertain and the clear reach of the proscription in order to decide whether the nebulous aspect of the proscription may be discouraging the citizenry from engaging in protected speech or behavior.[214]

In any event, some discussions of vagueness confuse the concepts of "vagueness" and "overbreadth." In some sense, this is a product of seemingly inconsistent statements and analyses which appear in the case law. This section will first discuss overbreadth, followed by discussions of "facial vagueness" and "vagueness as applied."

A. First Amendment (or Facial) Overbreadth

The overbreadth doctrine is atypical of ordinary constitutional adjudication because it does not insist on the traditional requirements of standing.[215] The United States Supreme Court "has altered its traditional

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209. Schwartzmiller v. Gardner, 752 F.2d 1341, 1345 (9th Cir. 1984).

210. Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 497 n.9 (1982) (stating that if the respondent's objection to the statute is based on the question of "whether the ordinance regulates items with some lawful uses, then it is complaining of vagueness").

211. *Vill. of Hoffman Estates*, 455 U.S. at 497 n.9; *see also Schwartzmiller*, 752 F.2d at 1346 ("A law is overbroad if it prohibits not only acts the legislature may forbid, but also constitutionally protected conduct.").

212. Ariz. *ex rel.* Purcell v. Superior Court, 535 P.2d 1299, 1301 (Ariz. 1975).

213. *Vill. of Hoffman Estates*, 455 U.S. at 494 n.6.

214. *Id.* at 494.

215. *See* Broadrick v. Oklahoma, 413 U.S. 601, 610-12 (1973) (reiterating that under the traditional rule of standing which governs constitutional adjudication, it is impermissible for a person to challenge a statute on the grounds that the statute infringes upon other persons' constitutional rights; but in regards to First Amendment overbreadth challenges, there exists no standing requirement); *see also* New York v. Ferber, 458 U.S. 747, 767-68 (1982) (declaring that the

rules of standing to permit -- in the First Amendment area -- 'attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.'"[216] Therefore, an individual may allege that a statute is unconstitutionally overbroad and deprives either himself or another person of his or her First Amendment rights.[217] The Court's reasoning for this deviation from the traditional standing requirement rests upon "a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression."[218]

The First Amendment overbreadth doctrine prevents *any* enforcement of a law that interferes with free speech "until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression."[219] Inasmuch as the effect of this doctrine is so dramatic, by allowing preenforcement challenges without any showing of traditional standing, this "strong medicine" has historically "been employed by the Court sparingly and only as a matter of last resort."[220] Furthermore, these claims, "if entertained at all, have been curtailed when invoked against ordinary criminal laws that are sought to be applied to protected conduct."[221] Thus, where a Jehovah's Witness was convicted of a common law breach of the peace for playing a phonograph record attacking the Catholic Church in the presence of two Catholics, the Court reversed the defendant's conviction but refused to void the offense "in toto because it was capable of some unconstitutional applications."[222]

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traditional rule of standing "reflects two cardinal principles of our constitutional order: the personal nature of constitutional rights and prudential limitations on constitutional adjudication" and that the First Amendment overbreadth doctrine is an exception to this principle).

216. *Broadrick*, 413 U.S. at 612 (quoting Dombrowski v. Pfister, 380 U.S. 479, 486 (1965)).

217. *Id.* at 611-12.

218. *Id.* at 612.

219. *Id.* at 613.

220. *Id.* However, the Court is not disinclined to use this doctrine. For example, after stating that the Communications Decency Act's "coverage is wholly unprecedented," the Court ruled it to be facially overbroad. Reno v. ACLU, 521 U.S. 844, 877-82 (1997) (striking down the Communications Decency Act which prohibited transmission of obscene or indecent communications by means of telecommunication to persons under 18, or sending patently offensive communications through use of interactive computer service to persons under 18, because the Act was contrary to the First Amendment); *see also* Ashcroft v. Free Speech Coalition, 535 U.S. 234, 258 (2002) (holding that the ban on "virtual child pornography" contained in Child Pornography Prevention Act of 1996 was overbroad and contrary to the First Amendment).

221. *Broadrick*, 413 U.S. at 614.

222. *Id.* at 613-14 (discussing Cantwell v. Connecticut, 310 U.S. 296, 308, 311 (1940)).

This concept of overbreadth, also referred to as "facial overbreadth,"[223] clearly arises where a criminal statute seeks to regulate "only spoken words" protected by the First Amendment.[224] In addition, these challenges have been allowed where a broadly worded statute might burden innocent associations,[225] "regulate the time, place, and manner of expressive or communicative conduct,"[226] or give "standardless discretionary power to local functionaries" to refuse such expressive conduct in advance, thereby creating "unreviewable prior restraints on First Amendment rights."[227] As stated, overbreadth challenges have "been limited with respect to conduct-related regulation."[228] When a defendant alleges that a statute is overbroad and vague, the reviewing court first focuses on whether the statute "reaches a substantial amount of constitutionally protected conduct."[229] The substantial overbreadth requirement applies to challenges to legislation that "arise in defense of a criminal prosecution as well as civil enforcement *or* actions seeking a declaratory judgment."[230] In making this evaluation, a court must measure the ambiguous as well as the unambiguous scope of the law in an effort to determine if it is deterring innocent citizens from engaging in licit speech or conduct.[231] When ruling on an overbreadth challenge, a court must initially attempt to interpret the enactment in a fashion that avoids a finding of unconstitutionality.[232] If the statute does not implicate a substantial amount of constitutionally protected conduct, then the statute is not overbroad.[233] Next, the court must examine the facial vagueness challenge (discussed more fully below). Assuming the stricture impedes no constitutionally protected conduct, the court should sustain a challenge only if the law "is impermissibly vague in all of its applications."[234] In

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223. *Id.* at 612; *see also* Byrum v. Texas, 762 S.W.2d 685, 687 (Tex. Ct. App. 1988) (stating that a claim of "facial overbreadth" may arise where a statute either intrudes on the First Amendment or impedes some other "fundamental interest" that restricts one's "conduct").

224. *Broadrick*, 413 U.S. at 612 (quoting Gooding v. Wilson, 405 U.S. 518, 520 (1972)).

225. *Id.* (citing cases such as *Keyishian v. Board of Regents*, 385 U.S. 589 (1967), where the Court granted injunctive relief while striking down a New York Statute which made treasonable or seditious acts grounds for removal from state employment).

226. *Id.* at 612-13 (citing cases such as *Thornhill v. Alabama*, 310 U.S. 88, 104 (1940), where a statute forbidding loitering and picketing was successfully challenged on overbreadth grounds because the law also restricted "nearly every practicable, effective means" of educating the public about a labor dispute).

227. *Id.* at 613 (citing cases such as *Cox v. Louisiana*, 379 U.S. 536 (1965), where the Court found as overbroad a general breach of the peace statute which punished people for expressing unpopular views that might agitate others).

228. *Ferber*, 458 U.S. at 766.

229. *Vill. of Hoffman Estates*, 455 U.S. at 494 (quoted in State v. Dixon, 998 P.2d 544, 547 (Mont. 2000)).

230. *Ferber*, 458 U.S. at 772-73 (emphasis added).

231. *Vill. of Hoffman Estates*, 455 U.S. at 494 n.6.

232. *Ferber*, 458 U.S. at 769 n.24.

233. *Vill. of Hoffman Estates*, 455 U.S. at 494 (quoted in *Dixon*, 998 P.2d at 547).

234. *Id.* at 494-95.

contrast to the First Amendment overbreadth challenge, a vagueness challenge, not involving First Amendment freedoms but mere *conduct*, does not allow an individual to challenge the possible inappropriate application of the law to others.[235]

In *Lewis v. City of New Orleans*,[236] the United States Supreme Court invoked the overbreadth doctrine to strike down a municipal ordinance restricting "opprobrious language." In that case, the defendant had been found guilty of an offense that made it unlawful and 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 any member of the city police while in the actual performance of his duty."[237] The charge arose out of a verbal confrontation between the defendant and a police officer that included utterances of profanity directed at the officer.[238] In its analysis, the Court ultimately concluded "opprobrious" language embraced words that did not inflict injury or "incite an immediate breach of the peace."[239] In addition, it observed that the First and Fourteenth Amendments protect speech, including that which might be deemed "vulgar or offensive."[240] Because the ordinance punished "only spoken words" and was "susceptible of application to protected speech," it was "constitutionally overbroad and therefore . . . facially invalid."[241]

Just as the Court has employed the overbreadth doctrine to void legislation where a defendant has raised it in defense of a criminal charge,[242] it has relied on it to undo an enactment in a pre-enforcement action.[243] For example, in *Dombrowski v. Pfister*,[244] the plaintiffs sought an injunction, under provisions contained in two federal civil rights statutes,[245] restraining various Louisiana officials from prosecution or other enforcement of the Louisiana Subversive Activities and Communist Control Law and the Communist Propaganda Control Law.[246] The plaintiffs

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235. *Id.* at 495.

236. 415 U.S. 130, 132 (1974).

237. *Lewis*, 415 U.S. at 132 (quoting NEW ORLEANS, LA., ORDINANCE 828 M.C.S. § 49-7).

238. *Id.* at 132 n.1.

239. *Id.* at 133 (quoting *Gooding*, 405 U.S. at 525).

240. *Id.* at 134.

241. *Id.*

242. *See, e.g.*, Plummer v. City of Columbus, 414 U.S. 2, 2 (1973) (per curiam) (holding municipal ordinance outlawing use of "menacing, insulting, slanderous, or profane language" was invalid on its face); *Gooding*, 405 U.S. at 519-21 (holding Georgia statute outlawing use of "opprobrious words or abusive language, tending to cause a breach of the peace" was on its face unconstitutionally vague and overbroad under the First and Fourteenth Amendments).

243. *See, e.g.*, *Ashcroft*, 535 U.S. at 241-43 (affirming pre-enforcement challenge of prohibition against "virtual child pornography" contained in federal Child Pornography Prevention Act of 1996 on First Amendment overbreadth grounds).

244. 380 U.S. 479 (1965).

245. *Dombrowski*, 380 U.S. at 484 n.2 (citing 28 U.S.C. § 2283 (1964); 42 U.S.C. § 1983 (1964)).

246. *Id.* at 481-82.

were several civil rights activists who were concerned about the State of Louisiana's possible use of this legislation to curtail the activities of those asserting or vindicating the rights of African-American citizens.[247] The Court began its consideration of the plaintiffs' claim by noting that concerns of federalism normally required postponement of consideration of federal issues that might arise in a state prosecution until state court processes had run their course.[248] However, the Court observed that allegations in the complaint in this case "depict a situation in which defense of the State's criminal prosecution will not assure adequate vindication of constitutional rights."[249] Specifically, it was suggested that "substantial loss or impairment of freedoms of expression" violative of appellants' First Amendment rights would occur in the interim between commencement of prosecution by the state and federal review of any adverse determination.[250] When faced with such a claim, due to "the sensitive nature of constitutionally protected expression," the Court stated "we have not required that all of those subject to overbroad regulations risk prosecution to test their rights."[251] To hold otherwise, "free expression – of transcendent value to all society, and not merely to those exercising their rights – might be the loser."[252] Indeed, the Court stated it had "consistently allowed attacks on overly broad statutes" without insisting that the complainant "demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity."[253] This exception to the usual rules of standing was developed, in the context of the First Amendment, to insure against "the existence of a penal statute susceptible of sweeping and improper application."[254] Such an exception avoids the spector of "case by case" review of the applicability of an enactment "tested only by those hardy enough to risk criminal prosecution" in order to challenge its integrity while free expression hangs in the balance awaiting "the outcome of protracted litigation."[255]

In the instant case, several of the plaintiffs had been arrested by Louisiana state and local police, had their offices raided and records seized—all of which was voided by subsequent court rulings.[256] Nevertheless, state officials continued to threaten prosecution, while repeatedly

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247. *Id.* at 482.
248. *Id.* at 483-85.
249. *Id.* at 485.
250. *Id.* at 486.
251. *Id.*
252. *Id.*
253. *Id.* (citing *Thornhill*, 310 U.S. at 97-98; NAACP v. Button, 371 U.S. 415, 432-33 (1963); Aptheker v. Sec'y of State, 378 U.S. 500, 515-17 (1964); United States v. Raines, 362 U.S. 17, 21-22 (1960)).
254. *Dombrowski*, 380 U.S. at 487 (quoting *NAACP*, 371 U.S. at 433).
255. *Id.*
256. *Id.* at 487-89.

announcing their belief that the plaintiffs' organization was a "subversive or Communist-front organization."[257] The consequence was the paralyzation of the plaintiffs' efforts to vindicate minority civil rights.[258] As a result, the Court concluded that the individual plaintiffs' refusals to comply with the Louisiana Subversive Activities and Communist Control Law by not registering as members of a Communist-front organization—which had given rise to the plaintiffs' criminal indictments—was protected by the plaintiffs' due process rights inasmuch as what constituted "a subversive organization" was "unduly vague, uncertain and broad."[259] Accordingly, plaintiffs' "failure to register as member[s] of a Communist-front organization" was not actionable by the State and thus ruled invalid.[260] These enactments challenged by the plaintiffs, said the Court, were "void on their face."[261]

Yet another case where the Court entertained an overbreadth challenge was *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*,[262] wherein the Court reviewed and upheld a drug paraphernalia ordinance. The municipal ordinance in question made it "unlawful for any person 'to sell any items, effect, paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drugs, as defined by Illinois Revised Statutes, without obtaining a license therefor.'"[263] Plaintiff Flipside, in "a pre-enforcement facial challenge," alleged that the statute was unconstitutionally overbroad as well as vague.[264] The Court began its analysis by stating that "[i]n a facial challenge to the overbreadth and vagueness of a law, a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct. If it does not, then the overbreadth challenge must fail."[265] The Court noted that in this context, a facial challenge of a statute "means a claim that the law is 'invalid *in toto* – and therefore incapable of any valid application.'"[266]

To determine whether the drug paraphernalia ordinance was overbroad, the Court examined whether the ordinance violated "Flipside's First Amendment rights or [was] overbroad because it [inhibited] the First Amendment rights of other parties."[267] The Court held that the ordinance was not overbroad because it did not infringe on the "noncommer-

257. *Id.* at 488.
258. *Id.* at 488-89.
259. *Id.* at 493-94.
260. *Id.* at 494-95.
261. *Id.* at 497.
262. 455 U.S. 489 (1982).
263. *Vill. of Hoffman Estates*, 455 U.S. at 492 (citing VILL. OF HOFFMAN ESTATES, ILL., MUN. CODE § 8-7-16 (1978)).
264. *Id.* at 491-93.
265. *Id.* at 494.
266. *Id.* at 495 n.5 (quoting Steffel v. Thompson, 415 U.S. 452, 474 (1974)).
267. *Id.* at 495.

cial speech of Flipside or other parties" inasmuch as it only regulated and licensed "the sale of items displayed 'with' or 'within proximity of' literature encouraging illegal use of cannabis or illegal drugs.'"[268] The Court ruled that, even assuming commercial speech was implicated by the ordinance, "it is irrelevant whether the ordinance has an overbroad scope encompassing protected commercial speech of other persons, because the overbreadth challenge does not apply to commercial speech."[269] Thereafter, the Court also rejected Flipside's claim that the ordinance was overbroad in that it outlawed "innocent" or "lawful" behavior[270] and that it was unconstitutionally vague.[271]

In *New York v. Ferber*,[272] the United States Supreme Court expounded at great length on what it described as the "First Amendment overbreadth doctrine" when it evaluated the troublesome subject of child pornography.[273] In *Ferber*, the Court reviewed a New York statute[274] that criminalized "promoting a sexual performance by a child."[275] In this case, the defendant was a proprietor of a bookstore located in Manhattan, New York.[276] The defendant's bookstore specialized in "sexually orientated products."[277] After the defendant sold to an undercover police officer two films "depicting young boys masturbating,"[278] the defendant was prosecuted and convicted of violating section 263.15 of the New York Penal Law, which read that "[a] person is guilty of promoting a sexual performance by a child when, knowing the character and content thereof, he produces, directs or promotes any performance which includes sexual conduct by a child less than sixteen years of age."[279] "Sexual performance" was defined as including any "sexual conduct by a child less than sixteen years of age."[280] Following the defendant's conviction in the trial court, the New York Court of Appeals reversed the conviction after deciding that section 263.15 was "overbroad because it prohibited the distribution of materials produced outside the State, as well as materials, such as medical books and educational sources, which 'deal with adoles-

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268. *Id.* at 496 (quoting VILL. OF HOFFMAN ESTATES, ILL., LICENSE GUIDELINES FOR ITEMS, EFFECT, PARAPHERNALIA, ACCESSORY OR THING WHICH IS DESIGNED OR MARKETED FOR USE WITH ILLEGAL CANNABIS OR DRUGS (1978)).

269. *Id.* at 496-97.

270. *Id.* at 497 n.9.

271. *Id.* at 505.

272. 458 U.S. 747 (1982).

273. *Ferber*, 458 U.S. at 768.

274. *Id.* at 750 (citing N.Y. PENAL LAW §§ 263.00 to .25 (McKinney 1981)).

275. *Id.* at 751 (quoting N.Y. PENAL LAW § 263.15 (McKinney 1981)).

276. *Id.* at 751-52.

277. *Id.* at 752.

278. *Id.*

279. *Id.* at 751 (quoting N.Y. PENAL LAW § 263.15 (McKinney 1981)).

280. *Id.* (quoting N.Y. PENAL LAW § 263.00(1) (McKinney 1981), and citing N.Y. PENAL LAW § 263.00(3) (McKinney 1981) (defining "sexual conduct")).

cent sex in a realistic but nonobscene manner.'"[281] However, the United States Supreme Court reversed the New York Court of Appeals decision, holding that section 263.15 was not overbroad.

After concluding this enactment did not restrict the production and distribution of material protected by the First Amendment,[282] the Court turned to a consideration of whether the statute was unconstitutionally overbroad because it curtailed "the distribution of material with serious literary, scientific, or educational value *or* material which [would] not threaten the harms" the state sought to combat.[283] While noting that "[t]he traditional rule is that a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court,"[284] it explicitly ruled that "[w]hat has come to be known as the First Amendment overbreadth doctrine is one of the few exceptions to this principle."[285] The Court observed that this "doctrine is predicated on the sensitive nature of protected expression: 'persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions by a statute susceptible of application to protected expression.'"[286] The Court then reiterated its prior pronouncements on the subject:

> The scope of the First Amendment overbreadth doctrine, like most exceptions to established principles, must be carefully tied to the circumstances in which facial invalidation of a statute is truly warranted. Because of the wide-reaching effects of striking down a statute on its face at the request of one whose own conduct may be punished despite the First Amendment, we have recognized that the overbreadth doctrine is "strong medicine" and have employed it with hesitation, and then "only as a last resort." [This Court has held] that the overbreadth involved be 'substantial' before the statute involved will be invalidated on its face.[287]

The Court next pointed out that it had previously explained the basis for this requirement:

> [T]he plain import of our cases is . . . that facial overbreadth adjudication is an exception to [the] traditional rules of practice and that its function, a limited one at the outset, attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from "pure speech" toward conduct and that conduct – even if expressive –

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281. *Id.* at 752-53 (quoting *Ferber*, 422 N.E.2d at 526).
282. *Id.* at 765-66.
283. *Id.* at 766 (emphasis added).
284. *Id.* at 767.
285. *Id.* at 768.
286. *Id.* (citing Vill. of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 634 (1980)).
287. *Id.* at 769 (citing *Broadrick*, 413 U.S. at 613, 615).

> falls within the scope of otherwise valid criminal laws that reflect legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct. Although such laws, if too broadly worded, may deter protected speech to some unknown extent, there comes a point where that effect – at best a prediction – cannot, with confidence, justify invalidating a statute on its face and so prohibiting a State from enforcing the statute against conduct that is admittedly within its power to proscribe.[288]

The Court then turned to an explanation as to the reason overbreadth "must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep" where conduct, and not mere speech, is at issue.[289]

> The requirement of substantial overbreadth is directly derived from the purpose and nature of the doctrine. While a sweeping statute, or one incapable of limitation, has the potential to repeatedly chill the exercise of expressive activity by many individuals, the extent of deterrence of protected speech can be expected to decrease with the declining reach of the regulation. This observation appears equally applicable to the publication of books and films as it is to activities, such as picketing or participation in election campaigns, which have previously been categories as involving conduct plus speech. . . .
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> Indeed, the Court's practice when confronted with ordinary criminal laws that are sought to be applied against protected conduct is not to invalidate the law *in toto*, but rather to reverse the particular conviction.
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> . . . .
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> . . . [T]he fact that a criminal prohibition is involved does not obviate the need for the inquiry or *a priori* warrant a finding of substantial overbreadth.[290]

In addition, the Court stated that the nature of the penalty to be imposed for violating a statute was "relevant in determining whether demonstrable overbreadth [was] substantial."[291]

Applying the above principle to the statute at issue, the Court held that section 263.15 was "not substantially overbroad" because the statute could only be impermissibly applied in a "tiny fraction of the materials within the statute's reach."[292] The Court concluded by stating that "whatever overbreadth may exist should be cured through case-by-case analy-

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288. *Id.* at 770 (quoting *Broadrick*, 413 U.S. at 615).
289. *Id.* (quoting *Broadrick*, 413 U.S. at 615).
290. *Id.* at 772-73.
291. *Id.* at 773.
292. *Id.*

sis of the fact situations to which its sanctions, assertedly, may not be applied."[293]

B. Facial Vagueness

Although a statute may be found not to be overbroad because it does not reach constitutionally protected conduct, it may nevertheless be held to be vague on its "face" or "as applied."[294] As earlier stated, a facial challenge is a challenge that the law is totally invalid and incapable of any constitutional application.[295] When considering whether a statute is facially invalid, a court must "consider any limiting construction that a state court or enforcement agency has proffered."[296]

In *Young v. American Mini-Theaters*,[297] the United States Supreme Court extended the "substantial" deterrent effect requirement, which it had developed in connection with facial overbreadth claims, to the analysis of whether a statute was facially vague.[298] The Court indicated that where a statute's arguable vagueness was "real and substantial," and not "readily subject to a narrowing construction," a defendant whose own speech might be unprotected could challenge the statute if "the very existence of [the] statute[] may cause persons not before the Court to refrain from engaging in constitutionally protected speech or expression" due to the "overriding importance of maintaining a free and open market for the interchange of ideas."[299]

Facial vagueness challenges have been approved in two circumstances. First, a statute may be challenged on its face when it has the capacity "to chill constitutionally protected conduct, especially conduct protected by the First Amendment."[300] Thus, the Tenth Circuit has concluded:

> [A court will] allow a person who is prosecuted for conduct which the state may constitutionally forbid to challenge the statute as vague on its face, rather than restricting him to challenging it as applied to his conduct, because those who will refrain from speech will never have a chance to make their claims in court. In this way the claims of those

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293. *Id.* at 773-74 (quoting *Broadrick*, 413 U.S. at 615-16).

294. *Dixon*, 998 P.2d at 547; *Vill. of Hoffman Estates*, 455 U.S. at 497.

295. *Vill. of Hoffman Estates*, 455 U.S. at 495 n.5; Steffel v. Thompson, 415 U.S. 452, 474 (1974).

296. *Vill. of Hoffman Estates*, 455 U.S. at 495 n.5 (citing Grayned v. City of Rockford, 408 U.S. 104, 110 (1972)).

297. 427 U.S. 50 (1976).

298. *Young*, 427 U.S. at 59-60 (citing *Broadrick*, 413 U.S. at 611-12, 615).

299. *Id.* at 60 (citing Erznozik v. City of Jacksonville, 422 U.S. 205, 216 (1975)).

300. United States v. Gaudreau, 860 F.2d 357, 360 (10th Cir. 1988) (citing Colautti v. Franklin, 439 U.S. 379, 390-91, 394, 396 (1979); Lauzetta v. New Jersey, 306 U.S. 451 (1939)).

> who would be silenced are heard. Vagueness and overbreadth challenges are similar in this respect.[301]

Second, pre-enforcement challenges are also appropriate where the challenger attacks the statute as "vague in all its applications," which necessarily means that the statute is void on its face.[302]

The 1971 case of *Coates v. City of Cincinnati*[303] offers an illustration of the Court's willingness to find a statute vague on its face, contrary to due process, and violative of the First Amendment. In *Coates*, several defendants had been convicted under a Cincinnati ordinance which made it illegal for "three or more persons to assemble, except at a public meeting of citizens, on any of the sidewalks, . . . and there conduct themselves in a manner annoying to persons passing by, or occupants of adjacent buildings."[304] In its consideration of the defendants' appeal, the Court concluded that the ordinance was vague, not in the sense that it required compliance with an "imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all."[305] An examination of this statute suggested its enforcement could entirely turn on "whether or not a policeman [was] annoyed" by a particular assembly.[306] Furthermore, the Court observed more than due process vagueness was involved in that the ordinance was at odds with First Amendment rights of free assembly and association.[307] The Court declared that the First and Fourteenth Amendments could not be dependent on whether a particular assembly was annoying to "some people."[308] This ordinance provided a recipe for discriminatory enforcement against assemblages of groups whose "ideas . . . lifestyle, or . . . physical appearance" engender resentment by "the majority of their fellow citizens."[309] In this case, where the Court ultimately reversed defendants' conviction on vagueness grounds, it was obvious to the Court that this ordinance had the capacity to limit the exercise of First Amendment freedoms, and at the same time, result in quasi-criminal sanctions.[310] Moreover, while not explicitly discussed in the opinion, an additional problem with this ordinance was that a conviction could be predicated on the *conduct* of the group *without* regard to any *mens rea*.

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301. *Id.*
302. *Id.* at 360-61.
303. 402 U.S. 611, 614-15 (1971).
304. *Coates*, 402 U.S. at 612 n.1 (quoting CINCINNATI, OH., CODE OF ORDINANCES § 901-L6 (1956)).
305. *Id.* at 614.
306. *Id.*
307. *Id.* at 615.
308. *Id.*
309. *Id.* at 616.
310. *Id.* at 614-16.

The case of *Colautti v. Franklin*[311] provides another example of a statute that was determined to be void on its face. In this case, the Court reviewed the Pennsylvania Abortion Control Act, which contained a section that required persons, including physicians, to exercise the same standard of care to preserve a fetus' life and health as would be required in the case of a fetus intended to be born alive if the fetus was "viable" or if there was "sufficient reason to believe that the fetus may be viable."[312] Inasmuch as the "may be viable" language set out either a subjective or mixed subjective and objective standard test for viability, the Court ruled in this pre-enforcement action brought by a group of physicians that a person of ordinary intelligence would not have fair notice of its scope.[313] In addition, the required "standard of care" provision was deemed equally vague.[314] The Court's concern regarding the language in question was aggravated by the fact that the measure included criminal penalties, contained no *scienter*, and carried the potential of inhibiting the exercise of constitutionally protected rights.[315]

Notwithstanding *Coates* and *Coluatti*, it should be recognized that claims of facial vagueness that prove successful are the exception rather than the rule. The difficulties inherent in advancing a facial challenge are illustrated in the following two cases. In *United States v. Gaudreau*,[316] the defendants were prosecuted under the Colorado commercial bribery statute, which was used as a component of a federal RICO indictment.[317] The state commercial bribery statute was challenged as vague on the ground that its prohibition of a "knowing violation of a duty of fidelity" to a corporation by an officer of the corporation was vague.[318] The federal district court agreed and dismissed the RICO counts of the indictment as both facially vague and vague as applied.[319] The United States Court of Appeals for the Tenth Circuit reversed.[320] Here, the Tenth Circuit, in rejecting the facial vagueness claim, stated that the Colorado statute did not threaten to chill constitutionally protected conduct and, inasmuch as it had been applied to the defendants, it would be necessary to conduct an examination of the statute *as applied* for vagueness, in light of the conduct for which the defendants had been charged.[321] After consulting various treatises, the Tenth Circuit concluded that the defendants had fair notice of the meaning of the language they had challenged

311. 439 U.S. 379 (1979).
312. *Coulautti*, 439 U.S. at 380-81 n.1 (quoting PA. STAT. ANN. tit. 35, § 6605(a) (West 1977)).
313. *Id.* at 388-97.
314. *Id.* at 397.
315. *Id.* at 391, 394-96.
316. 860 F.2d 357 (10th Cir. 1988).
317. *Gaudreau*, 860 F.2d at 359.
318. *Id.* at 358 (quoting COLO. REV. STAT. § 18-5-401(1)(a), (d) (1986)).
319. *Id.* at 358-59.
320. *Id.* at 358.
321. *Id.* at 361.

and that the statute did not lend itself to arbitrary enforcement standards.[322]

Another case where a facial vagueness claim failed was *Village of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*,[323] part of which was discussed in the previous section.[324] In that case, which reflects both an in-depth discussion of facial overbreadth and facial vagueness, the United States Supreme Court pointed out that in cases involving a facial challenge to the overbreadth and vagueness of a statute, the reviewing court must initially ascertain if the statute is overbroad by examining whether the statute touches "a substantial amount of constitutionally protected conduct."[325] If the statute fails to do so, the reviewing court should then proceed to the facial vagueness challenge and, if it finds the statute does not cover constitutionally protected conduct, it must "uphold the challenge only if the enactment is impermissibly vague in all of its applications."[326]

The Court explained that a complainant who commits some acts that are "clearly proscribed" in the enactment "cannot complain of the vagueness of the law as applied to the conduct of others."[327] In other words, a reviewing court should "examine the complainant's conduct before analyzing other hypothetical applications of the law."[328] Also, when evaluating any facial challenge, the Court in *Flipside* noted a reviewing court must consider any "limiting construction" that a lower court or enforcement agency has provided.[329] Moreover, when the reviewing court applies the tests of whether the statute under consideration (1) provides the citizenry with *fair warning* of what it prohibits and (2) contains *explicit standards* that avoid arbitrary and discriminatory application, the court should not insist that these "standards . . . be applied mechanically."[330] Rather, the "degree of vagueness that the Constitution tolerates – as well as the relative importance of fair notice and fair enforcement – depends in part on the nature of the enactment."[331] A greater tolerance has been expressed with "civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe."[332] If the stricture requires government proof of *scienter*, this mental state requirement

322. *Id.* at 362-64.
323. 455 U.S. 489 (1982).
324. *See supra* notes 262-71 and accompanying text.
325. *Vill. of Hoffman Estates*, 455 U.S. at 494.
326. *Id.* at 494-95.
327. *Id.* at 495.
328. *Id.*
329. *Id.* at 495 n.5.
330. *Id.* at 498.
331. *Id.*
332. *Id.* at 498-99.

"may mitigate a law's vagueness."[333] The most important factor, however, "affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights. If, for example, the law interferes with the right of free speech or of association, a more stringent vagueness test should apply."[334]

Following the Court's rejection of the complainant's pre-enforcement overbreadth challenge,[335] the Court subjected the drug paraphernalia ordinance to a vagueness analysis.[336] The Court determined that the ordinance simply regulated the complainant's "business behavior" and observed that it required proof of *scienter* with respect to the alternative "marketed for use" standard.[337] Also, this ordinance carried a nominal civil sanction.[338] Although the Village conceded that the ordinance was "'quasi-criminal,' and its prohibitory and stigmatizing effect [would consequently] warrant a relatively strict test,"[339] the Court concluded that this facial vagueness challenge could not succeed inasmuch as whatever analysis might be used to examine "either a quasi-criminal or a criminal law, the ordinance [was] sufficiently clear as applied to Flipside."[340]

First, Flipside's suggestion that the language outlawing distribution of paraphernalia "designed for use" or "marketed for use" with cannabis or drugs could not withstand a facial challenge, which implied that the statute was vague in all its applications, was contradicted by the facts that the language covered "at least some of the items that Flipside sold" and Flipside's co-operator admitted that the business sold items "principally used for illegal purposes."[341] And second, the *scienter* requirement belied the notion that one might be entangled innocently in the web of the enactment.[342] Thus, one could not seriously assert that this measure offered *this complainant* insufficient "fair warning" as to its reach.[343] Additionally, regarding the arbitrary and discriminatory application claim, the absence of such evidence at this juncture militated the conclusion that this concern be best addressed when any such problem actually arise.[344]

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333. *Id.* at 499.
334. *Id.*
335. *Id.* at 496-97; *see supra* notes 262-71 and accompanying text.
336. *Vill. of Hoffman Estates*, 455 U.S. at 497-501.
337. *Id.* at 499.
338. *Id.*
339. *Id.*
340. *Id.* at 500.
341. *See id.* at 500, 502.
342. *See id.* at 502.
343. *See id.* at 498, 502.
344. *Id.* at 503-04.

Gaudreau and *Flipside* together reflect the substantial barriers that sit in the path of a facial vagueness challenge. First, if the enactment does not somehow have the potential for intrusion into constitutionally protected terrain, as turned out to be the case with *Gaudreau*, then the claim comes to an abrupt halt.[345] Second, even when the defendant's assertion proceeds beyond the first obstacle just mentioned, if the complainant is unable to convince the reviewing court that the statute is vague "in all its applications," as occurred in *Flipside*, it fails.[346] As one court stated, "facial vagueness review is not common because ordinary concerns of judicial restraint do not permit a party whose particular conduct is adequately described by a criminal statute 'to attack [the statute] because the language would not give similar fair warning with respect to other conduct which might be within its broad and literal ambit.'"[347]

C. *Vagueness As Applied*

A defendant may bring an "as applied" vagueness challenge on the grounds that a statute failed to clearly define the criminally proscribed conduct with which he has been charged.[348] Unlike a facial challenge, which allows an attack on the entire enactment, an "as applied" challenge focuses only on whether the statute was inappropriately applied to the complainant's conduct."[349] In an "as applied" challenge, the court examines the statute in light of the facts of the case at bar.[350] In other words, an "as applied" vagueness challenge must be decided on its own facts.[351]

"In scrutinizing a statute for intolerable vagueness as applied to specific conduct," a reviewing court must interpret it consistently with any judicial construction preferred by the jurisdiction's highest court.[352] The question, therefore, is whether the challenged statute, as well as judicial

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345. *Gaudreau*, 860 F.2d at 360.

346. *Vill. of Hoffman Estates*, 455 U.S. at 497.

347. *Schwartzmiller*, 752 F.2d at 1346 (quoting Parker v. Levy, 417 U.S. 733, 756 (1974)).

348. *See id.* at 1348-49 (holding Idaho statute outlawing "lewd and lascivious" acts on a child was not unconstitutionally vague as applied to defendant where defendant's conduct involved anal intercourse with a child and masturbation with a child).

349. *See id.* at 1348 (holding Idaho statute prohibiting "lewd and lascivious" acts on a child did not impinge on or chill any constitutionally protected conduct, so that defendant convicted of this offense could not attack statute "on its face, but only as applied to his conduct"); *see also* Holland v. Tacoma, 954 P.2d 290, 293-96 (Wash. Ct. App. 1998) (holding complainant's action barring enforcement of ordinance, which limited volume of sound projected from car sound system, involved conduct not associated with First Amendment expression and, as such, ordinance was not vulnerable to a facial challenge; furthermore, ordinance had "clear guidelines," in that a person of ordinary intelligence would know what it means for sound to be "audible" at more than 50 feet away and, therefore, was not vague as applied).

350. Chapman v. United States, 500 U.S. 453, 467 (1991) (holding what constitutes a "mixture or substance" containing LSD as proscribed in federal narcotics offense was not vague).

351. Johnson v. Athens-Clarke County, 529 S.E.2d 613, 615-16 (Ga. 2000) (holding municipal "loitering or prowling" ordinance vague as applied).

352. *Schwartzmiller*, 752 F.2d at 1348.

interpretations thereof, "provided sufficient notice, under the circumstances of [the particular] case, [such] that a person in [the defendant's] situation would know whether his conduct was criminal."[353] Thus, even if the statute could be considered vague "as applied" to some activity, if the defendant's conduct in the case at bar was clearly within the limits of the statute, that defendant cannot sustain an "as applied" vagueness challenge.[354]

For example, in the case of *Davis v. State*,[355] the Indiana Court of Appeals considered an "as applied" challenge to a statute that prohibited neglect of a dependent.[356] The defendants were convicted of violating this child neglect statute by abandoning their child, who was only a few hours old, by the side of a gravel road in rural Indiana.[357] The defendants challenged the "places the dependent in a situation that *may endanger* his life or limb" language, stating that the statute failed to explicitly inform the public and law enforcement officers of the specific conduct that was prohibited.[358] They argued that the statute was so broad that it could be said parents who allow their child to "engage in interscholastic and contact sports 'may endanger' the child's life or health."[359]

In reviewing the statute, the appellate court stated that it was "well established that vagueness challenges to statutes which do not involve First Amendment freedoms must be examined in light of the facts of the case at hand."[360] The court noted that in a vagueness "as applied" challenge, defendants are not permitted to devise a hypothetical situation which would demonstrate vagueness.[361] Rather, the court emphasized that the question to be analyzed in a vagueness challenge is "whether an individual of ordinary intelligence would reasonably understand that *his contemplated conduct* is proscribed."[362] Here, the court held that "[n]o reasonable person of ordinary intelligence" would have difficulty determining that abandoning a child that is only a few hours old along the side of a gravel road constituted a violation of a statute that prohibited the "neglect" of a dependent.[363]

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353. *Johnson*, 529 S.E.2d at 615.

354. *See* Davis v. State, 476 N.E.2d 127, 130-31 (Ind. Ct. App. 1985).

355. 476 N.E.2d 127.

356. *Id.* at 130 n.1 ("A person having the care, custody, or control of a dependent who knowingly or intentionally: (1) places the dependent in a situation that may endanger his life or health; (2) abandons or cruelly confines the dependent; (3) deprives the dependent of necessary support; or (4) deprives the dependent of education as required by law; commits neglect of a dependent." (quoting IND. CODE ANN. § 35-46-1-4 (Michie 1979))).

357. *Id.*

358. *Id.*

359. *Id.*

360. *Id.* (quoting United States v. Mazurie, 419 U.S. 544, 550 (1975)).

361. *Id.* at 130-31.

362. *Id.* at 131 (emphasis added) (citing *Mazurie*, 419 U.S. at 553).

363. *Id.* at 130-31.

Where an individual engages in conduct without any reasonable realization that it falls within the reach of a legal prohibition, that person may succeed with an *as applied* challenge.[364] In *Shuttlesworth v. City of Birmingham*,[365] the United States Supreme Court reviewed the conviction of a defendant who had been found guilty of violating (1) a municipal ordinance which made it an offense for any person who (a) was blocking free passage on a sidewalk, or (b) was standing or loitering on a sidewalk, to fail to heed a police request to move on;[366] and (2) another ordinance that made it an offense for any person to refuse or fail to comply with a police order.[367] According to the prosecution, the defendant was observed by a police officer on a sidewalk with ten or twelve companions outside a department store, whereupon the officer approached the group and told them to clear the sidewalk.[368] "After some, but not all, of the group" dispersed, the defendant asked the officer, "You mean to say we can't stand here on the sidewalk?"[369] After repeating the request, during which time everyone but the defendant began walking off, the officer arrested defendant.[370]

In its review, the Court noted that the first ordinance the defendant had allegedly violated actually contained two strictures: one prohibiting *obstructing free passage* on a sidewalk and another prohibiting *standing or loitering* on a sidewalk.[371] The Court found that the Alabama Court of Appeals had given this ordinance a limiting construction in a separate unrelated case, to-wit, that the second stricture only restricted standing or loitering that obstructed free passage, but that such construction had been provided only *after* the defendant had been charged and convicted under the ordinance.[372] Given the Alabama appellate court construction, while also considering the fact that the Alabama trial judge did not have the benefit of this judicial narrowing of the statute while deciding the defendant's fate, the Court ruled, "As so construed, we cannot say that the

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364. *See, e.g.*, Palmer v. City of Euclid, 402 U.S. 544, 544-46 (1971) (explaining municipal "suspicious person" ordinance vague as applied).

365. 382 U.S. 87 (1965).

366. *Shuttlesworth*, 382 U.S. at 88 ("It shall be unlawful for any person or any number of persons to so stand, loiter or walk upon any street or sidewalk in the city as to obstruct free passage over, on or along said street or sidewalk. It shall also be unlawful for any person to stand or loiter upon any street or sidewalk of the city after having been requested by any police officer to move on." (quoting BIRMINGHAM, ALA., GENERAL CITY CODE § 1142 (1944))).

367. *Id.* ("It shall be unlawful for any person to refuse or fail to comply with any lawful order, signal or direction of a police officer." (quoting BIRMINGHAM, ALA., GENERAL CITY CODE § 1231 (1944))).

368. *Id.* at 89.

369. *Id.*

370. *Id.*

371. *Id.* at 90 (citing BIRMINGHAM, ALA., GENERAL CITY CODE § 1142 (1944)).

372. *Id.* at 91-92 (citing Middlebrooks v. City of Birmingham, 170 So. 2d 424, 426 (Ala. App. Ct. 1964)).

ordinance is unconstitutional, though it requires no great feat of imagination to envisage situations in which such an ordinance might be unconstitutionally applied."[373] Further, because the Court was "unable to say that the Alabama courts in this case did not judge the petitioner by an unconstitutional construction," the Court decided it had no choice but to reverse defendant's conviction on the first ordinance charge.[374]

As to the second count of the complaint, the Court noted that the underlying ordinance on its face simply made it illegal "to refuse or fail to comply with any lawful order, signal or direction of a police officer."[375] Standing alone, said the Court, "the literal terms of this ordinance are so broad as to evoke constitutional doubts of the utmost gravity."[376] Nevertheless, like the first ordinance, it too had been given a limiting instruction, namely, the refusal had to be in conjunction with a police order *directing vehicular traffic*.[377] As such, it became clear that the ordinance could *not* be applied to the defendant.[378] The arresting officer was not directing traffic when he asked the defendant to move on, and the defendant was a pedestrian, "not in, on, or around any vehicle at the time he was directed to move on or at the time he was arrested."[379]

In *Watts v. United States*,[380] the Court ruled that although a federal statute that made "criminal a form of pure speech" was constitutional on its face, it was not applicable to a defendant who had been convicted for a violation of the statute.[381] In this case, the defendant had been charged with the felony offense of "knowingly and willfully . . . [making] any threat to take the life of or to inflict bodily harm upon the President of the United States."[382] At a public rally on the grounds of the Washington Monument, the defendant mentioned to several individuals present that he was eligible to be drafted into the military and that he had received his notice to report for his physical examination the following Monday morning.[383] The defendant then added, "I am not going. If they ever make me carry a rifle the first man I want to get in my sights is L.B.J.," referring to then President Lyndon Johnson.[384] At trial, the defendant's counsel moved for judgment of acquittal, while insisting the defendant's

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373. *Id.* at 91.
374. *Id.* at 92.
375. *Id.* at 93 (quoting BIRMINGHAM, ALA., GENERAL CITY CODE § 1231 (1944)).
376. *Id.*
377. *Id.* (citing Phifer v. City of Birmingham, 160 So. 2d 898, 901 (Ala. Ct. App. 1963)).
378. *Id.* at 93-94.
379. *Id.* at 95.
380. 394 U.S. 705 (1969) (per curiam).
381. *Watts*, 394 U.S. at 707, 708. It is not clear if the Court was examining the statute against a vagueness claim. *See id.* at 712 (Fortas, J., dissenting) ("The Court holds . . . that this statute is constitutional and that it is here wrongly applied.").
382. *Id.* at 706 (alteration in original) (citing 18 U.S.C. § 871(a) (1948)).
383. *Id.* at 705-06.
384. *Id.* at 706.

comments did not amount to a threat to the life of the President.[385] In its review of the defendant's conviction, the Court first examined the statute itself. The Court stated that this statute was "[c]ertainly" constitutional, given the nation's "overwhelming interest in protecting the safety of its Chief Executive and in allowing him to perform his duties without interference from threats of physical violence," but nevertheless it had to "be interpreted with the commands of the First Amendment clearly in mind."[386] In the opinion of the Court, this statute could only apply to speech if the government proved the existence of a "true 'threat.'"[387] The Court did "not believe that the kind of political hyperbole indulged in by petitioner fit within that statutory term."[388] Given the "expressly conditional nature of the statement," this law could not reasonably be deemed applicable to the defendant's utterance.[389]

IV. APPROACHES DESIGNED TO PROVIDE NOTICE AND ENFORCEMENT STANDARDS

There exist mechanisms that *may* assure the citizenry has adequate notice of what a criminal prohibition outlaws. These will be explored at this juncture.

A. Listing Prohibited Items and Conduct

One way to ensure that citizens are provided adequate notice of what is proscribed by a particular statute is to provide a *list* of what items or activities are prohibited.[390] This approach is typically followed in instances where a statute proscribes items that may have the potential for both legitimate and illegitimate uses. One example of the use of the listing approach is the Illinois Drug Paraphernalia Control Act.[391] The Act defines "drug paraphernalia" as follows:

> "Drug paraphernalia" means all equipment, products and materials of any kind which are peculiar to and marketed for use in planting,

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385. *Id.* at 706-07.

386. *Id.* at 707.

387. *Id.* at 708.

388. *Id.*

389. *Id.*

390. *See, e.g.*, United States v. Kairouz, 751 F.2d 467, 468 (1st Cir. 1985) (where defendant claimed he did not realize he possessed heroin because he thought it was cocaine, court responded "both cocaine and heroin are controlled substances within the meaning of schedules I and II of the Comprehensive Drug Abuse Prevention and Control Act of 1970. *See* 21 U.S.C. § 812(c) sched. I (b)(10) (*listing* heroin as a controlled substance)." (emphasis added)). This is not suggesting the failure to list proscribed items or conduct invariably leads to a finding of vagueness. *See, e.g.*, Ward v. Illinois, 431 U.S. 767, 781 (1977) (rejecting claim that Illinois obscenity statute is necessarily vague because it failed to include "exhaustive list" of type of sexual acts that are outlawed by the act).

391. 720 ILL. COMP. STAT. 600/1-/7 (2002).

> propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling or otherwise introducing into the human body cannabis or a controlled substance in violation of the "Cannabis Control Act" or the "Illinois Controlled Substances Act" . . . . It includes, but is not limited to:
>
> (1) Kits peculiar to and marketed for use in manufacturing, compounding, converting, producing, processing or preparing cannabis or a controlled substance;
>
> (2) Isomerization devices peculiar to and marketed for use in increasing the potency of any species of plant which is cannabis or a controlled substance;
>
> (3) Testing equipment peculiar to and marketed for private home use in identifying or in analyzing the strength, effectiveness or purity of cannabis or controlled substances;
>
> (4) Diluents and adulterants peculiar to and marketed for cutting cannabis or a controlled substance by private persons;
>
> (5) Objects peculiar to and marketed for use in ingesting, inhaling, or otherwise introducing cannabis, cocaine, hashish, or hashish oil into the human body including, where applicable, the following items:
>
> (A) water pipes;
>
> (B) carburetion tubes and devices;
>
> (C) smoking and carburetion masks;
>
> (D) miniature cocaine spoons and cocaine vials;
>
> (E) carburetor pipes;
>
> (F) electric pipes;
>
> (G) air-driven pipes;
>
> (H) chillums;
>
> (I) bongs;
>
> (J) ice pipes or chillers;
>
> (6) Any item whose purpose, as announced or described by the seller, is for use in violation of this Act.[392]

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392. *Id.* at 600/2(d).

Following the enactment of the Illinois Drug Paraphernalia statute, it was challenged as unconstitutionally vague in the case of *Adams Apple Distributing Co. v. Zagel*.[393] In *Adams Apple*, the Illinois Appellate Court found that the enactment, which fully defined what constituted *drug paraphernalia* "in six ways and *specifically list[ed]* 10 items that [had] been determined to constitute drug paraphernalia," provided adequate notice to those subject to the law and, as such, was not unconstitutionally vague.[394]

An example of legislation that has relied on the "listing" of *activity* to avoid a vagueness attack is child pornography. *New York v. Ferber*,[395] discussed at length above,[396] relied in part on this approach in upholding New York's child pornography prohibition.[397] Inasmuch as any legislation outlawing distribution of visual materials, including portrayals of children engaged in sexual activity, would have to withstand a First Amendment challenge, it was necessary that such legislation be written in a manner that clearly delineated that activity which was proscribed. Realizing that a depiction, for example, of a baby in his or her birthday suit could never be sanctioned, the New York legislature described in precise, if not graphic, detail what was contemplated: a "sexual performance" involving a child below the age of 16 engaged in "sexual conduct," with the latter being defined as "actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals."[398] In analyzing the legislation, the Court commented that "[t]he forbidden acts to be depicted are *listed* with sufficient precision" that one could not seriously assert lack of notice of what activity involving children was included.[399]

B. Inclusion of Mens Rea

Sometimes a statute, which may otherwise be void-for-vagueness, may survive a vagueness challenge because of the statute's inclusion of a *mens rea* element.[400] For example, in the earlier mentioned case of

393. 501 N.E.2d 302, 304 (Ill. App. Ct. 1986).

394. *Adams Apple*, 501 N.E.2d at 305 (emphasis added) (referring to ILL. REV. STAT. ch. 56 1/2, para. 2102 (1985), subsequently codified at 720 ILL. COMP. STAT. 600/2 (2002)). It should be noted that in *People v. Monroe* the Illinois Supreme Court ruled that while the definition section of the statute which specified what constituted "drug paraphernalia" was satisfactory, the "penalty" section that permitted a conviction where a person had no actual knowledge that that which he was selling was drug paraphernalia was unconstitutional in that it lacked a necessary scienter. People v. Monroe, 515 N.E.2d 42, 43-45 (Ill. 1987).

395. 458 U.S. 747 (1982).

396. *See supra* notes 272-93 and accompanying text.

397. *Ferber*, 458 U.S. at 765.

398. *Id.* at 750 (quoting N.Y. PENAL LAW §§ 263.00(1), 263.00(3) (McKinney 1980)).

399. *Id.* at 765 (emphasis added).

400. *See, e.g.*, Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 502 (1982) (upholding municipal drug paraphernalia ordinance); United States v. Nat'l Dairy Prods.

United States v. Gaudreau,[401] the United States Court of Appeals for the Tenth Circuit considered the validity of a Colorado commercial bribery statute when used as a component of a federal prosecution under the Racketeer Influenced Corrupt Organizations Act (RICO).[402] The Colo-

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Corp., 372 U.S. 29, 34-35 (1963) (holding federal Robinson-Patman Act making it a crime to sell goods at "unreasonably low prices *for the purpose of destroying or eliminating competition*" was not vague; element of "predatory intent" required by Act "provides further definition of the prohibited conduct"); Boyce Motor Lines, Inc. v. United States, 342 U.S. 337, 342 (1952) (holding federal regulation requiring truckers to avoid "congested thoroughfares" and the like when transporting explosive substances was not vague, because "statute punishes only those who knowingly violate the Regulation"); Screws v. United States, 325 U.S. 91, 103-04 (1945) (plurality opinion) (holding federal law which prohibits, under color of law, the "willful" deprivation of a citizen's federal constitutional or other legal rights was not vague given construction that the word "willful" means government must establish accused had the specific intent to deprive a person of a federal right); Hygrade Provision Co., Inc. v. Sherman, 266 U.S. 497, 502 (1925) (holding that a "specific intent to defraud," saved an otherwise vague statute which outlawed sale of meat falsely represented to be "kosher"); United States v. Collins, 272 F.3d 984, 989 (7th Cir. 2001) (holding, because of scienter requirement in federal controlled substances legislation, the defendant "bears an especially heavy burden in raising his vagueness challenge" (quoting United States v. Cherry, 938 F.2d 748, 754 (7th Cir. 1991))); United States v. Biro, 143 F.3d 1421, 1428 (11th Cir. 1998) (holding "[w]e are persuaded that an ordinary person would understand" a federal statute prohibiting a person from "selling a device to a customer designed by the manufacturer primarily for the purpose of the surreptitious interception of communications," where the statute explicitly requires proof that accused sent or sold such a device "*knowing or having reason to know that the design* of such device renders it primarily useful for the purpose of the surreptitious interception of wire, oral, or electronic communication"); Poole v. Wood, 45 F.3d 246, 249 (8th Cir. 1995) (holding Minnesota statutes proscribing sexual contact or sexual penetration accomplished by means of a false representation was not vague, because statutes required element of false representation and sexual contact is defined as being "committed with sexual or aggressive intent"), *cert. denied*, 515 U.S. 1134 (1995); Comm. in Solidarity with the People of El Salvador v. FBI, 770 F.2d 468, 476 (5th Cir. 1985) (holding statute which made it a crime to coerce, threaten, intimidate, harass, or obstruct certain foreign officials or their guests was not vague because all proscribed acts had to be carried out "willfully"); Murphy v. Matheson, 742 F.2d 564, 573-74 (10th Cir. 1984) (holding Utah drug paraphernalia law that required proof of vendors' *intent* to market an item they *know* to be drug paraphernalia not vague); M.S. News Co. v. Casado, 721 F.2d 1281, 1290 (10th Cir. 1983) (holding Wichita ordinance outlawing promotion of sexually orientated materials to minors was not vague where distributor must *know* the content of the material and its nature and character); United States v. Salazar, 720 F.2d 1482, 1485-86 (10th Cir. 1983) (holding federal offense of acquisition and unlawful possession of food stamps was not vague where statute requires proof of scienter), *cert. denied*, 469 U.S. 1110 (1983); Levas & Levas v. Antioch, 684 F.2d 446, 452-54 (7th Cir. 1982) (holding municipal drug paraphernalia ordinance was not vague in view of "intent requirement"); City of Chicago v. Powell, 735 N.E.2d 119, 130 (Ill. App. Ct. 2000) (holding municipal ordinance outlawing "soliciting unlawful business" was not vague where ordinance required proof of *purposeful* solicitation); Byrum v. Texas, 762 S.W.2d 685, 688 (Tex. Ct. App. 1988) (holding Texas crime of public lewdness by sexual contact was not vague because law requires "a specific culpable mental state, a factor which tends to defeat a vagueness challenge"); *cf.* Colautti v. Franklin, 439 U.S. 379, 390 (1979) (holding Pennsylvania Abortion Control Act which required physician's preservation of life of fetus where fetus "may be viable" was vague because it subjected physician to criminal liability without regard to fault; the ambiguous viability-determination requirement "is aggravated by the absence of a scienter requirement").

401. 860 F.2d 357 (10th Cir. 1988); *see supra* notes 317-322 and accompanying text.

402. *Gaudreau*, 860 F.2d at 358 ("A person commits a class 6 felony if he solicits, accepts, or agrees to accept any benefit as consideration for knowingly violating or agreeing to violate a duty of fidelity to which he is subject as: (a) Agent or employee; or . . . (d) Officer . . . of an incorporated association." (quoting COLO. REV. STAT § 18-5-401(1)(a), (d) (1986))).

rado statute at issue prohibited soliciting or accepting money "as consideration for knowingly violating or agreeing to violate a duty of fidelity."[403] In this case, the defendants were indicted for violation of RICO, which was based in part on violation of the Colorado statute for agreeing to accept money in exchange for awarding Public Service Company of Colorado contracts to certain suppliers.[404] The defendants were charged with conspiracy to violate the statute by enticing a public service executive named Oscar Lee to violate his duty of fidelity to the public service corporation.[405] The defendants moved to dismiss the indictment on the grounds that the Colorado statute was unconstitutionally vague in regards to what constituted a breach of a "duty of fidelity."[406] The defendants argued that "the statute did not give them fair notice that their conduct was prohibited because they could have discovered that Mr. Lee's duty of loyalty forbade him from taking bribes only by consulting cases, other statutes and treatises."[407] The defendants also argued that "while the statute may give notice to an ordinary lawyer, it does not give notice to an ordinary layman."[408] The federal district court had held that the challenged sections of the Colorado commercial bribery statute were void for vagueness, both facially and as applied in this case and, therefore, dismissed the indictments under this statute.[409] The government then appealed to the Tenth Circuit, which addressed the issues of whether the statute was both facially vague and vague as applied in this case.[410] The Tenth Circuit quickly dismissed the facial vagueness challenge as inappropriate.[411] The court noted that there are only two instances when a facial vagueness challenge is permissible.[412] The first occurs where an enactment "threatens to chill constitutionally protected conduct," and the second arises when the statute is being challenged in a declaratory judgment action requesting pre-enforcement review.[413] Neither of these situations were applicable in this instance.[414] The court then turned to the vagueness as applied challenge to the statute.[415] The court determined that the statute provided adequate notice to those who were subject to the statute because the statute had a "*scienter* requirement."[416] The court

403. *Id.* (citing COLO. REV. STAT. § 18-5-401(1) (1986)).
404. *Id.*
405. *Id.*
406. *Id.*
407. *Id.* at 362.
408. *Id.*
409. *Id.* at 359.
410. *Id.*
411. *Id.* at 361.
412. *Id.* at 360.
413. *Id.* at 360-61.
414. *Id.* at 361.
415. *Id.*
416. *Id.* at 363.

noted that the statute prohibited "*knowingly* violating or agreeing to violate a duty of fidelity."[417] The court held that the "type of *scienter* which the prosecution must prove [was] precisely the type that overcomes the objection that the Colorado statute may punish without fair warning to the accused."[418] The court interpreted the statute to require that "the prosecution . . . prove beyond a reasonable doubt that [the defendant] knew his duty of fidelity and knew he was violating it."[419] Because the defendant must have actually known of the duty of fidelity that he was inducing another to violate, the court held that the statute provided adequate notice of what was proscribed and, therefore, the statute was not void for vagueness.[420]

In *People v. Monroe*,[421] the *absence* of a satisfactory *mens rea* element spelled doom for a state drug paraphernalia prohibition.[422] In this case, the Illinois Supreme Court noted that the Illinois drug paraphernalia law contained two distinct sections: a "definition" provision and a "penalty" provision.[423] The definitional language, which appears in the previous section of this paper,[424] specified that "drug paraphernalia" meant any devices or materials which are "peculiar to and marketed for use" in connection with illicit drug activity.[425] Meanwhile, the penalty language prohibited commercial sale of such items where a vendor "knows, *or under all of the circumstances reasonably should have known*" he was marketing drug paraphernalia.[426] The court observed that the language in the definitional section was very similar to that contained in the municipal drug paraphernalia ordinance that was approved by the United States Supreme Court in *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*,[427] discussed earlier.[428] In *Flipside*, the Court had ruled the "designed or marketed for use with illegal cannabis or drugs" language in the Hoffman Estates ordinance encompassed a *scienter* requirement inasmuch as "a retailer could scarcely 'market' items 'for' a particular use without intending that use."[429] The Illinois Supreme Court pointed out that the *Flipside* decision relied heavily on the principle that *scienter*

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417. *Id.* (emphasis added) (citing COLO. REV. STAT. § 18-5-401(1) (1986)).
418. *Id.* at 363.
419. *Id.*
420. *Id.*
421. 515 N.E.2d 42 (Ill. 1987).
422. *See Monroe*, 515 N.E.2d at 42.
423. *Id.* at 43.
424. *See supra* note 394 and accompanying text.
425. *Monroe*, 515 N.E.2d at 43 (quoting ILL. REV. STAT. ch. 56 1/2, para. 2102 (1985), subsequently codified as 720 ILL. COMP. STAT. 600/2 (2002)).
426. *Id.* (quoting ILL. REV. STAT. ch. 56 1/2, para. 2103, subsequently codified as 720 ILL. COMP. STAT. 600/3 (2002)).
427. 455 U.S. 489 (1982).
428. *See supra* notes 262-71, 323-44 and accompanying text.
429. *Monroe*, 515 N.E.2d at 43-44 (quoting *Vill. of Hoffman Estates*, 455 U.S. at 502).

may "mitigate a law's vagueness."[430] Although the definitional section of the Illinois statute posed no problem in the mind of the Illinois Court, it was troubled by the language in the penalty section that would base a conviction on the fact that a vendor "reasonably should have known" he was dealing in drug paraphernalia.[431] This meant a conviction would rest on "constructive knowledge" rather than actual knowledge, a proposition, the court concluded, which forced it to rule the penalty section unconstitutionally vague for failing to confer "fair notice."[432] *Monroe*, then, illustrates how lack of *scienter* may trigger a finding of vagueness.

New York v. Ferber,[433] discussed earlier,[434] is an illustration of the United States Supreme Court's apparent insistence that a law that carries the potential of somehow limiting First Amendment protections *must* contain a criminal *mens rea*.[435] In that case, the Court commented in its review of the state child pornography stricture, "[a]s with obscenity laws, criminal responsibility [for child pornography] may not be imposed without some element of *scienter* on the part of the defendant."[436] After noting that the statute at issue "expressly includes a *scienter* requirement," the Court ruled that the proscription passed constitutional muster.[437]

It must be understood that a penal enactment that *does* include a *mens rea* element will not necessarily survive a vagueness challenge. In *Kramer v. Price*,[438] the United States Court of Appeals for the Fifth Circuit entertained a vagueness challenge to a Texas harassment statute.[439] This legal dispute arose out of the defendant's mailing of a postcard to a man with whom she previously lived, who had later married another woman and subsequently become the father of the latter woman's child.[440] The post card read, "Baby Problem Solved," followed by an advertisement regarding a child burial vault.[441] Following the defendant's prosecution and conviction for violation of the state harassment law, the Fifth Circuit in a *habeas corpus* challenge considered the Texas statute,

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430. *Id.* at 44 (quoting *Vill. of Hoffman Estates*, 455 U.S. at 499).

431. *Id.* at 44-45.

432. *Id.* at 45.

433. 458 U.S. 747 (1982).

434. *See supra* notes 272-93, 395-99 and accompanying text.

435. *See Ferber*, 458 U.S. at 764-65.

436. *Id.* at 765.

437. *Id.*

438. 712 F. 2d 174 (5th Cir. 1983), *aff'd on other grounds on reh'g*, 723 F.2d 1164 (5th Cir. 1984) (en banc).

439. *Kramer*, 712 F.2d at 176 ("A person commits an offense if he intentionally . . . communicates by telephone or in writing in vulgar, profane, obscene, or indecent language or in a coarse and offensive manner and by this action intentionally, knowingly, or recklessly annoys or alarms the recipient." (quoting TEX. PENAL CODE ANN. § 42.07 (Vernon 1983))).

440. *Id.* at 175.

441. *Id.*

which made it illegal to "annoy" or "alarm" another by some written or telephone communication, terms which the defendant claimed were vague.[442] The State of Texas argued that the statute's requirement of intent defused the vagueness assertion.[443] The Fifth Circuit first noted that the Texas courts had never made an "attempt to construe the terms 'annoy' and 'alarm' in a manner which lessens their inherent vagueness."[444] Further, the Texas courts had "refused to construe the statute to indicate whose sensibilities must be offended."[445] Thus, even though the statute mandated proof of *intentional* annoyance or alarm, it was not clear what "underlying conduct" was proscribed by these two words and, as such, the statute was deemed vague.[446]

V. SOURCES OF NOTICE AND ENFORCEMENT STANDARDS

As discussed above, vagueness can arise in two situations: (1) uncertainty as to whom a statute applies and (2) uncertainty as to what conduct the statute proscribes, that is, whether the statute provides an ascertainable standard of guilt. A reviewing court will ordinarily resort to every reasonable construction in order to declare the statute constitutional and defeat the vagueness challenge.[447] As the United States Supreme Court stated in *Winters v. New York*:[448]

> This Court goes far to uphold state statutes [and federal statutes] that deal with offenses, difficult to define, when they are not entwined with limitations on free expression. . . . Only a definite conviction by a majority of this Court that the conviction violates the Fourteenth Amendment justifies reversal of the court primarily charged with responsibility to protect persons from conviction under a vague state statute.[449]

In contrast, if a statute is ambiguous, the court will normally apply the rule of strict construction, giving the defendant the benefit of the doubt, to ascertain the meaning of questionable statutory language.[450] However,

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442. *Id.* at 176.

443. *Id.*

444. *Id.* at 178.

445. *Id.*

446. *Id.* at 177-78 (emphasis added).

447. Winters v. New York, 333 U.S. 507, 517-18 (1948).

448. 333 U.S. 507 (1948); *see supra* notes 63-74 and accompanying text for the earlier discussion of this case.

449. *Winters*, 333 U.S. at 517.

450. *See, e.g.*, Rewis v. United States, 401 U.S. 808, 812 (1971) (resolving in the defendants' favor statutory ambiguity as to whether federal Travel Act applied to defendants who ran a lottery frequented by out-of-state visitors but where there was no showing that defendants themselves crossed state line to commit an offense); United States v. Bass, 404 U.S. 336, 347-48 (1971) (holding, where ambiguity existed raising questions as to whether prohibition against a felon's receipt, possession or transportation of a firearm in interstate commerce is to be interpreted in a manner whereby government must establish *receiving* and *possessing* as well as *transporting* be in interstate commerce, rule of lenity so required such proof).

as stated earlier, many jurisdictions reject this doctrine of strict construction, with courts often avoiding it by simply finding that the statutory uncertainty does not involve an ambiguity.[451] Thus, the courts tend to give considerable deference to the legislature in an effort to uphold the laws the people have created. In order to accomplish this goal, courts resort to various measures to declare that a statute provided notice to the citizenry regarding what a law prohibits. In effect, the courts look to various sources for guidance as to the meaning of various words, phrases, and other language contained in the statutes being challenged. These interpretive aids vary widely from referencing common law, plain language, dictionaries, and even the Bible. The courts routinely implement various techniques to find that the citizenry enjoyed a workable definition of what was outlawed by the stricture. In many cases, a court will look to numerous sources to demonstrate that the defendant had adequate notice. For example, in *Muscarello v. United States*,[452] the United States Supreme Court was faced with the question of whether having a firearm in the glove box or the trunk of a car during the commission of a drug offense constituted "carrying a firearm."[453] The Court looked to the plain language of the statute,[454] five different dictionaries,[455] the Bible,[456] several works of literature,[457] previous decisions by the Court using the word "carry,"[458] newspapers,[459] and legislative history[460] in order to finally determine that having a gun in one's glove

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451. *See supra* notes 198-208 and accompanying text.

452. 524 U.S. 125 (1998). This decision does not explicitly address a vagueness claim. However, the analysis the Court used was similar to that it would have utilized had it encountered such a challenge.

453. *Muscarello*, 524 U.S. at 126 (referring to 18 U.S.C. § 924(c)(1) (1997), which imposes a five-year mandatory prison term upon anyone who "uses or carries a firearm" during an illegal drug transaction). Since the accused was *not* actively *using* the weapon at the time, the issue was whether he was "carrying" a weapon during the commission of the offense. *Id.* at 127-28.

454. *Id.*

455. *Id.* at 128 (citing 2 OXFORD ENGLISH DICTIONARY 919 (2d ed. 1989); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 343 (1986); RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 319 (2d ed. 1987); BARNHART DICTIONARY OF ETYMOLOGY 146 (1988); OXFORD DICTIONARY OF ENGLISH ETYMOLOGY 148 (C. Onions ed., 1966)).

456. *Id.* at 129 (citing 2 *Kings* 9:28; *Isaiah* 30:6).

457. *Id.* (citing DANIEL DEFOE, ROBINSON CRUSOE 174 (J. Crowley ed., 1972); HERMAN MELVILLE, MOBY DICK 43 (U. Chi. Press 1952)).

458. *Id.* (citing California v. Acevedo, 500 U.S. 565, 572-73 (1991); Florida v. Jimeno, 500 U.S. 248, 249 (1991)).

459. *Id.* The Court conducted a search of the *New York Times* database in Lexis/Nexis and the "US News" database in Westlaw looking for articles in which the words "carry," "vehicle," and "weapon" all appeared. *Id.* The Court concluded that nearly one third of the articles found used the word "carry" to mean "the carrying of guns in a car." *Id.*

460. *Id.* at 132.

compartment or trunk did constitute "carrying" a firearm within the meaning of the statute.[461]

It is also important to note that the particular source or concern that the reviewing court places the most emphasis on, quite often, will determine the outcome of the ruling.[462] For example, in *Keeler v. Superior Court*,[463] the California Supreme Court faced the question of whether the death of a fetus constitutes a murder.[464] The majority opinion focused most of its attention on the *common law* definition of murder and of a "human being" in order to determine that a fetus was not a "human being" within the meaning of the statute.[465] The dissent, on the other hand, focused mainly on the *purpose* of the law, that is, to prevent killing.[466] The dissent concluded that the purpose or "fair import" of the statute was best fulfilled by applying the statute to all deaths, including the death of a viable fetus.[467] This smorgasbord approach to vagueness analysis contributes to what some see as the reality that "courts' construction of criminal statutes is typically ad hoc, sacrificing broader legal principles for the sake of a desired result in a particular case."[468] In any event, the remainder of this section will discuss the variety of those sources and guidelines to which courts routinely look to address a void-for-vagueness challenge, ambiguity, or other indefinite legislation. It should be noted that in some instances, a case will be examined which did not explicitly involve a vagueness challenge or ambiguity, but which reflects a court's struggle as it decides the meaning of somewhat nebulous language in a criminal law. These latter cases involving statutory uncertainty are nevertheless useful in understanding the resolution of vagueness and ambiguity arguments in that the court's analysis often closely resembles the analysis it would utilize if it was addressing such an issue.

A. Common Usage of Terms

Often, courts simply look to the common usage of terms or language to decipher the meaning of a criminal statute.[469] Judicial opinions

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461. It should be noted the majority refused to apply the rule of lenity because it saw no "grievous ambiguity." *Id.* at 138-39. *But see id.* at 148 (Ginsberg, J., dissenting) (arguing statute was sufficiently ambiguous to apply rule of lenity).

462. *See, e.g.*, Keeler v. Superior Court of Amador County, 470 P.2d 617, 618 (Cal. 1970).

463. Keeler, 470 P.2d at 618.

464. *Id.* at 618.

465. *Id.* at 619-30.

466. *Id.* at 630 (Burke, J., dissenting).

467. *Id.* at 634 (Burke, J., dissenting).

468. Robert Batey, *Vagueness and the Construction of Criminal Statutes—Balancing Acts*, 5 VA. J. SOC. POL'Y & L. 1, 39 (1997).

469. *See, e.g*, Chapman v. United States, 500 US 453, 462 (1991) (holding that the words "mixture" and "substance" as used in federal statute outlawing distribution of a "mixture or substance" containing LSD was not vague given "ordinary meaning" of the words); Rose v. Locke, 423 U.S. 48, 50 (1975) (holding the phrase "crimes against nature," as outlawed by Tennessee

routinely state that "when a statute contains language with an ordinary and popularly understood meaning, courts will assume that this is the meaning intended by the legislature."[470] For example, in *Bailey v. United States*,[471] the United States Supreme Court considered the word "use" in connection with a drug trafficking charge.[472] Specifically, two different defendants had been convicted of a federal drug offense that carried enhanced penalties where the perpetrator "during and in relation to any . . . drug trafficking crime . . . use[s] or carries a firearm."[473] The first defendant, upon his arrest following a traffic stop, was found to have a substantial amount of cocaine, as well as a loaded 9-mm. pistol in the trunk of his car.[474] The second defendant, after selling drugs in her apartment to an undercover officer, was found to have additional drugs and a .22-caliber pistol in a locked trunk in her bedroom.[475] Both offenders were convicted of the more serious trafficking charges on the theory that they had "used" their firearms "in relation" to their illicit drug activity.[476]

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statute, was not vague in that "[t]he phrase has been in use among English-speaking people for many centuries"); Grayned v. City of Rockford, 408 U.S. 104, 112 (1972) (holding municipal anti-noise ordinance barring noise which "disturbs" adjacent school was not vague because the ordinance "clearly 'delineates its reach in words of common understanding'" (quoting Cameron v. Johnson, 390 U.S. 611, 616 (1968))); United States v. Harriss, 347 U.S. 612, 620, 624 (1954) (holding the term "lobbying' as used in Federal Regulation of Lobbying Act "should be construed to refer only to 'lobbying in its commonly accepted sense'" and that statute satisfied constitutional requirement of "definiteness"))); United States v Gaudreau, 860 F.2d 357, 363 (10th Cir. 1988) ("The statute prohibits bribery, a concept well-understood by the ordinary person."); Comm. in Solidarity with People of El Salvador v. FBI, 770 F.2d 468, 477 (5th Cir. 1985) (holding federal statute prohibiting intentional threatening, harassing or intimidating foreign officials or their guests was not vague, because "[i]t is not necessary for the lawmaker . . . to define words in common usage if the statute use them according to their everyday meaning" (quoting Kramer v. Price, 712 F.2d 174, 179 (5th Cir. 1983))); People v. Bailey, 657 N.E.2d 953, 962 (Ill. 1995) (holding state anti-stalking statute, which prevents "following" victim plus directing threats to the victim, was not vague and "[i]n absence of a statutory definition, courts will assume that statutory words have their ordinary and popularly understood meanings"); People v. Reynolds, 689 N.E.2d 335, 342 (Ill. App. Ct. 1997) (holding aggravated criminal sexual assault stricture that outlawed a person from taking advantage of his "position of trust, authority, or supervision" by having sexual contact with a minor was not vague; statute reliant on "plain language"); State v. Fisher, 631 P.2d 239, 246 (Kan. 1981) (holding statute outlawing "endangering a child" was not vague considering "commonsense reading of the statute"); Commonwealth v. Cass, 467 N.E.2d 1324, 1325 (Mass. 1994) (holding, after determining the "ordinary meaning" of the word "person" is synonymous with "human being," vehicular homicide statute was not vague because it lent itself to conclusion that a fetus was a "person" within the vehicular homicide prohibition); City of Mankato v. Fetchenhier, 363 N.W. 2d 76, 79 (Minn. Ct. App. 1985) (holding statute outlawing "lewd" and "indecent" conduct was not vague because "[t]hese terms . . . have a reliable and sufficiently definite meaning to the ordinary citizen").

470. People v. Haywood, 515 N.E.2d 45, 51 (1987) (holding phrase "bodily harm," used in offense of aggravated criminal sexual assault, was not vague).

471. 516 U.S. 137 (1995).

472. *Bailey*, 516 U.S. at 138-39.

473. *Id.* (quoting 18 U.S.C. § 924(c)(1) (1997)).

474. *Id.*

475. *Id.* at 140.

476. *Id.* at 139-41.

In its review of these cases, the Court stated, "We start, as we must, with the language of the statute."[477] Here, "[t]he word 'use' . . . must be given its 'ordinary or natural meaning.'"[478] Noting that this word carried definitions in earlier judicial opinions as well as ordinary dictionaries which "imply action and implementation"[479] and "connote activity beyond simple possession,"[480] the Court observed that neither of the defendants had *actively* used their firearms in relation to their drug trafficking and, as such, their convictions could not stand.[481]

Another decision from the Court centered on the definition of the commonly used word "carry." In *Muscarello v. United States*,[482] which was mentioned earlier,[483] the issue before the United States Supreme Court was whether the phrase "'carries a firearm' is limited to the carrying of firearms on the person."[484] This issue arose from two independent cases, consolidated together for analysis. In the first case, defendant Muscarello unlawfully sold marijuana from his truck.[485] Upon arrest, law enforcement officers searched the defendant's truck and found a handgun locked in the glove compartment.[486] This defendant argued that the federal statute with which he was charged, which carried an enhanced penalty if the drug trafficker was carrying a firearm, did not apply to his having the gun in the glove compartment of his vehicle.[487] In the second case, two other defendants "placed several guns in a bag, put the bag in the trunk of their car, and then . . . [drove] to a proposed drug-sale point, where they intended to steal drugs from their sellers."[488] Federal agents at the scene where the drug transaction was to occur stopped the two defendants, searched the car, and found the guns and drugs.[489] All three defendants appealed their respective convictions, arguing that they had not "carried" guns within the meaning of the statute.

The United States Supreme Court began its examination of the phrase "carries a firearm" by considering the statutory language itself.[490]

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477. *Id.* at 144.

478. *Id.* at 145 (quoting Smith v. United States, 508 U.S. 223, 228 (1993)).

479. *Id.*

480. *Id.* (quoting United States v. McFadden, 13 F.3d 463, 467 (1st Cir. 1994) (Breyer, C.J., dissenting)).

481. *Id.* at 148-51.

482. 524 U.S. 125 (1998).

483. *See supra* notes 452-61 and accompanying text.

484. *Muscarello*, 524 U.S. at 126.

485. *Id.* at 127.

486. *Id.*

487. *Id.* at 125-27; *see also* 18 U.S.C. § 924(c)(1) (1997) (mandating a five-year prison term for any person who "uses or carries" a firearm during and in relation to a drug trafficking crime).

488. *Muscarello*, 524 U.S. at 127.

489. *Id.*

490. *Id.* at 126-28.

The Court noted that the word "carry" had two meanings relevant to the issue at hand.[491]

> When one uses the word in the first, or primary, meaning, one can, as a matter of ordinary English, "carry firearms" in a wagon, car, truck, or other vehicle that one accompanies. When one uses the word in a different, rather special, way, to mean, for example, "bearing," or (in slang) "packing" (as in "packing a gun"), the matter is less clear. . . . [W]e believe Congress intended to use the word in its primary sense and not in this latter, special way.[492]

The Court deferred to the ordinary English language usage of the word "carries," while operating on the premise that Congress intended the word "to convey its ordinary, and not some special legal, meaning."[493] In answering the "purely legal question of whether Congress intended to use the word 'carry' in its ordinary sense, or whether it intended to limit the scope of the phrase to instances in which a gun [was] carried 'on the person,'"[494] the Court looked to the statute's "basic purpose," which they surmised was to "combat the 'dangerous combination' of 'drugs and guns.'"[495] The Court stated that it would not make sense for the statute:

> to penalize one who walks with a gun in a bag to the site of a drug sale, but to ignore a similar individual who . . . travels to a similar site with a similar gun in a similar bag, but instead of walking, drives there with the gun in his car.[496]

Thus, the Court concluded that the "'generally accepted contemporary meaning' of the word 'carry' include[d] the carrying of a firearm in a vehicle."[497] The Court then affirmed the lower courts' decisions that each of the defendants' conduct fell within the scope of the enactment.[498]

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491. *Id.* at 128.

492. *Id.*

493. *Id.* at 128-29 (The Court referred to various dictionaries to define the word "carry." The Court noted that the *OXFORD ENGLISH DICTIONARY* defines carry as "convey, originally by cart or wagon, hence in any vehicle, by ship or horseback, etc." (quoting OXFORD ENGLISH DICTIONARY 919 (2d ed. 1989)). The *King James Bible* uses the word "carry," finding passages such as, "[H]is Servants carried him in a chariot to Jerusalem." (quoting 2 *Kings* 9:28 (King James)). The Court also noted the use of the word in literature including its use in *ROBINSON CRUSOE*: "[w]ith my boat, I carry'd away every Thing." (quoting DANIEL DEFOE, ROBINSON CRUSOE 174 (J. Crowley ed. 1972)). The Court also looked to its previous decisions, acknowledging that "[t]his Court, too, has spoken of the 'carrying' of drugs in a car or in its 'trunk.'" (citing California v. Acevedo, 500 U.S. 565, 572-73 (1993); Florida v. Jimeno, 500 U.S. 248, 249 (1991))).

494. *Id.* at 132.

495. *Id.* (quoting *Smith*, 508 U.S. at 240).

496. *Id.* at 133.

497. *Id.* at 139.

498. *Id.*

Another example of reliance on the common usage of terms appeared in *United States v. Powell*,[499] in which the defendant challenged a statute that made it a crime to knowingly mail "firearms capable of being concealed on the person."[500] Following her conviction for violation of this offense arising out of the mailing of a sawed-off shotgun, the defendant argued that the "firearms capable of being concealed on the person" terminology was vague and therefore unconstitutional.[501] The [United States] Court of Appeals for the Ninth Circuit questioned whether the "person" referred to in the statute was to be "the person mailing the firearm, the person receiving the firearm, or perhaps, an average person, male or female, wearing whatever garb might be reasonably appropriate whatever the season."[502] Unclear about the statute's meaning, the Ninth Circuit found it vague.[503] However, the United States Supreme Court disagreed with the Ninth Circuit's ruling and instead attributed to Congress the "commonsense meaning that such a person would be an average person garbed in a manner to aid, rather than hinder, concealment of the weapons."[504] The Court stated that "[s]uch straining to inject doubt as to the meaning of the words where no doubt would be felt by the normal reader is not required by the 'void for vagueness' doctrine, and we will not indulge in it."[505] The Court, therefore, reversed the appellate decision by the simple process of examining the common meaning of the statutory language at issue.[506]

Coates v. City of Cincinnati,[507] another United States Supreme Court decision, is an example where a *lack* of a common meaning that might be ascribed to a specific term undermined a particular criminal statute. In *Coates*, the defendants were convicted of violating a Cincinnati ordinance which made it a crime "for three or more persons to assemble . . . on any of the sidewalks. . . and there conduct themselves in a manner annoying to persons passing by."[508] The issue before the Court was whether the statute was unconstitutional because it was unclear as to what constituted "annoying" conduct.[509] Prior to the Court's review, the Ohio Supreme Court had stated that "[t]he word 'annoying' is a widely used and well understood word; it is not necessary to guess its mean-

499. 423 U.S. 87 (1975).
500. *Powell*, 423 U.S. at 89 (quoting 18 U.S.C. § 1715 (1970)).
501. *Id.* at 89-90.
502. *Id.* at 93 (quoting United States v. Powell, 501 F.2d 1136, 1137 (9th Cir. 1974)).
503. *Id.* at 88.
504. *Id.* at 93.
505. *Id.*
506. *Id.* at 94.
507. 402 U.S. 611 (1971).
508. *Coates*, 402 U.S. at 611 (quoting CINCINNATI, OH., CODE OF ORDINANCES § 901-L6 (1956)).
509. *Id.* at 613.

ing."[510] Therefore, the Ohio Supreme Court concluded that the ordinance "clearly and precisely delineates its reach in words of common understanding."[511] However, the United States Supreme Court determined that although "annoying" was a commonly used word, the statute was unconstitutionally vague because it did not indicate upon "whose sensitivity a violation does depend – the sensitivity of the judge or jury, the sensitivity of the arresting officer, or the sensitivity of a hypothetical reasonable man."[512] The Court noted, for example, that a reading of the statute might lead to the conclusion that where individuals might "meet together on a sidewalk or street corner, they must conduct themselves so as not to annoy any police officer or other person who happens to pass by."[513] Considering this and other possible inappropriate applications, the Court found the statute to be "unconstitutionally vague because it subjecte[d] . . . [individuals' right to freedom] of assembly to an unascertainable standard."[514] The Court further stated that the ordinance was vague not because "it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all."[515]

Bailey, *Muscarello*, *Powell*, and *Coates* are illustrative of the processes courts employ in reviewing statutes that have been challenged as being vague or uncertain. Clearly, a court presumes the validity of a state or federal criminal statute.[516] Thus, in an effort to uphold a statute, the court will apply common understanding or commonsense usage of terms and assume a person of common intelligence could understand the meaning of the statute and the conduct it prohibits. As one court said, "It cannot be presumed that the [legislature], in legislating, intended obscurity, or 'to override common sense.'"[517]

B. Common Understanding Within a Discrete Group

Sometimes, a court in attempting to determine the precise meaning of a statute will look to the way that a term or phrase is commonly understood in a discrete group, trade, profession, or geographical area.[518]

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510. *Id.* at 612 (quoting City of Cincinnati v. Coates, 255 N.E.2d 247, 249 (Ohio 1970)).

511. *Id.* at 613 (quoting *Coates*, 255 N.E.2d at 249).

512. *Id.*

513. *Id.* at 614.

514. *Id.*

515. *Id.*

516. *See* Screws v. United States, 325 U.S. 91, 98 (1945) (plurality opinion) (presuming validity of federal statute); *see also* People v. Haywood, 515 N.E.2d 45, 49 (Ill. 1987) (presuming validity of state statute).

517. *Haywood*, 515 N.E.2d at 48 (quoting United States v. Brown, 333 U.S. 18, 25 (1948)).

518. *See, e.g.*, Connelly v. General Const. Co., 269 U.S. 385, 391 (1926) (discussing decisions of the court that have upheld statutes as not vague which include those "rested upon the conclusion that the employed word or phrases have a technical or other special meaning, well enough known to

Obviously, many criminal statutes are directed at certain conduct in which only a fraction of the general population engages and, as such, these statutes are in reality targeted at specific groups of people. Thus, the question becomes whether affected persons within such a group understood the meaning of certain statutory language. For example, in *Omaechevarria v. Idaho*,[519] the United States Supreme Court examined such a law. Here, the territorial legislature had passed in 1875 the Two Mile Limit Law to "avert clashes between sheep herdsmen and cattle farmers" because the "cattle [would] not graze . . . [or] thrive on ranges where sheep were allowed to graze extensively."[520] Specifically, the Two Mile Limit Law prohibited "any person having charge of sheep from allowing the sheep to graze on a range previously occupied by cattle."[521] Thus, the Two Mile Limit law was enacted by the legislature to protect the cattle farmers and their industry from the sheep herdsmen's behavior of permitting their sheep to destroy those pastures that would otherwise be suitable for cattle grazing.

In *Omaechevarria*, the criminal statute was challenged on Fourteenth Amendment indefiniteness grounds in that it failed to identify the particular boundaries or ranges that were off limits to the sheep herdsmen and also failed to identify a time frame for which the lands were off limits.[522] The United States Supreme Court relied on what could be described as the "common understanding within a discrete group" approach in upholding the Two Mile Limit Law. The Court held that the statute was not vague or indefinite because "men familiar with range conditions and desirous of observing the law [would] have little difficulty in determining what is prohibited by [the statute]."[523] Here, the law pertained to two groups of individuals, sheep herdsmen and cattle farmers. Thus, individuals involved in sheep herding or cattle farming would understand the type of conduct prohibited by the law. The fact that

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enable whose within their reach to correctly apply them"); *see also* Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 502 (1982) (holding that the business co-operator's admission that he sold "roach clips," commonly associated with cannabis consumption, belied his argument that he had no notice of what constituted "drug paraphernalia" outlawed by municipal ordinance); Hygrade Provision Co. v. Sherman, 266 U.S. 497, 502 (1925) (holding that New York law prohibiting sale of meat falsely represented to be "kosher" was not vague because "the term 'kosher' has a meaning well enough defined to enable one engaged in the trade to correctly apply it"); United States v. Easter, 981 F.2d 1549, 1558 (10th Cir. 1992) (stating that "[w]hen Congress has used technical or terms of art, the term must be given its technical or scientific meaning," and here, what constitutes cocaine "base" is not vague). *But see Winters*, 333 U.S. at 519 (holding that state "obscene prints and articles" law punishing dissemination of certain materials carried no "technical . . . meaning" that might have put vendors on notice as to what law prohibited).

519. 246 U.S. 343 (1918).

520. *Omaechevarria*, 246 U.S. at 344-45.

521. *Id.* at 345.

522. *Id.* at 348.

523. *Id.*

a person outside the sheep herding or cattle farming industry would not understand the law or how it applies has no bearing as to whether the law is constitutional because the law targets conduct of particular individuals for a particular purpose within a particular situation. Anyone in the particular industry would commonly understand the meaning of the Two Mile Limit Law. Furthermore, "[s]imilar expressions [that pertain to a particular group or groups] are common in criminal statutes of other states."[524] Therefore, the Court upheld the Two Mile Limit Law.[525]

Meanwhile, in *Connally v. General Construction Co.*,[526] the United States Supreme Court examined a criminal statute in Oklahoma that prohibited a government employer from paying his or her employees "less than the current rate of per diem wages in the locality."[527] In this case, certain state and county officials brought an action to prevent enforcement of this act on the theory that the standard specified in the statute was vague. When the matter reached the Court, it ruled that while statutes employing language having "technical or other special meaning" would be upheld if "those within their reach" would have understood the language at issue,[528] this legislation did not meet that standard.[529] First, "current rate of wages" lacked an ascertainable meaning in that it was unclear as to whether this language meant the minimum, the maximum, or some other intermediate amount, such as the average.[530] Second, it was unclear as to what was meant by "locality."[531] Here, the Court likened the term of that of a "neighborhood," which carries different meanings to different people.[532] Thus, the *absence* of any special understanding of the statute's terminology by those directly affected by the law resulted in the Court finding the statute void for uncertainty.

C. Dictionary Definitions

Frequently, a court examining statutory vagueness, ambiguity, or uncertainty will look to a common dictionary to determine the meaning of words in a statute.[533] In *Chapman v. United States*,[534] a United States

524. *Id.*
525. *Id.*
526. 269 U.S. 385 (1926).
527. *Connally*, 269 U.S. at 388 (quoting OKLA. COMP. STAT. § 7255 (1921)).
528. *Id.* at 391.
529. *Id.* at 393-95.
530. *Id.* at 394.
531. *Id.* at 394-95.
532. *Id.* at 395.
533. *See, e.g.*, *Muscarello*, 524 U.S. at 128 (referring to several dictionaries to determine the meaning of the word "carry"); *Village of Hoffman Estates*, 455 U.S. at 501 (looking to dictionary to decipher the meaning of the word "design," as used in municipal drug paraphernalia ordinance which outlawed devices "designed" for use in connection with consumption of illicit drugs); Gooding v. Wilson, 405 U.S. 518, 525 (1972) (referring to the dictionary to determine what constitutes "fighting words" while finding Georgia breach of the peace statute vague and overbroad);

Supreme Court opinion, the defendants had been convicted in federal court for distribution of LSD. The statute under which they were convicted carried enhanced penalties if the offense involved more than one gram of a "mixture or substance containing [a] detectable amount" of LSD.[535] The defendants challenged the "mixture or substance" language as ambiguous.[536] They contended the "blotter paper" that was impregnated with the LSD could not be included in calculating the weight of the illicit drug.[537] However, after consideration of the dictionary definition of "mixture,"[538] the Court concluded that the statutory language reached the situation at issue in this case; namely, the blending of the chemical LSD into the blotter or carrier paper entitled the paper to be included in the calculated weight.[539] Thus, the dictionary proved to be a useful source in establishing that the statutory language was neither ambiguous nor vague.[540]

Meanwhile, in some cases, referencing a dictionary may offer a definition that belies the government's claim that a statute clearly applies to certain conduct. For instance, in the case of *State v. Blowers*,[541] decided by the Utah Supreme Court, the defendant was charged with driving under the influence of alcohol in violation of Utah law.[542] This statute

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Kramer v. Price, 712 F.2d 174, 177 (5th Cir. 1983) (considering that the dictionary definition of the word "annoy" leads to the conclusion that the meaning of this word which appears in Texas harassment law was so broad that it did *not* delineate what type of conduct was proscribed), *aff'd on other grounds on reh'g*, 723 F.2d 1164 (5th Cir. 1984) (en banc); People v. Bailey, 657 N.E.2d 953, 962-63 (Ill. 1995) (referring to dictionary to determine the meaning to "follow" and "to further" within the Illinois stalking law which was determined not to be vague); People v. Nitz, 747 N.E.2d 38, 47 (Ill. App. Ct. 2001) (citing People v. La Pointe, 431 N.E.2d 344, 353 (Ill. 1981) (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1050 (1971), in effort to determine meaning of "heinous" and "brutal" conduct as used in Illinois natural life imprisonment sentencing law)); People v. Selby, 698 N.E.2d 1102, 1108 (Ill. App. Ct. 1998) (examining dictionary definition of word "socializing" where defendants, Illinois Department of Correction employees, claimed "official misconduct" charges were invalid because charges were based on allegations they had engaged in sexual intercourse with inmates contrary to prison regulation barring employee socializing with inmates); People v. Reynolds, 689 N.E.2d 335, 340-42 (Ill. App. Ct. 1997) (referring to dictionary to determine the proper meaning of "trust," "authority," and "supervision," where aggravated criminal assault conviction was predicated on defendant's taking advantage of his superior position with minor); People v. Higginbotham, 686 N.E.2d 720, 722 (Ill. App. Ct. 1997) (looking to the dictionary in order to determine whether the defendant's conduct amounting to illegally "touching" as outlawed in aggravated criminal sexual abuse statute); Davis v. State, 476 N.E.2d 127, 130 n.3 (Ind. Ct. App. 1985) (referring to the dictionary in order to determine meaning of "endanger" contained in child neglect statute).

534. 500 U.S. 453 (1991).

535. *Chapman*, 500 U.S. at 456-57 (quoting 21 U. S. C. § 841 (b)(1) (1988)).

536. *Id.* at 458.

537. *Id.* at 456.

538. *Id.* at 462 (referring to WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 921 (2d. ed. 1989)).

539. *Id.* at 462-63.

540. *Id.* at 461-68.

541. 717 P.2d 1321 (Utah 1986).

542. *Blowers*, 717 P.2d at 1322 (citing UTAH CODE ANN. § 41-6-44(1) (1953)).

provided that "it is unlawful . . . for any person with a blood alcohol content of .08% or greater . . . to drive or be in actual physical control of a vehicle within the state."[543] In this particular case, when the defendant was arrested, he was not driving a motor vehicle, instead, he was riding a horse.[544] Therefore, the issue in this case was whether a horse could be considered a "vehicle" as defined in another Utah statute. "Vehicle" was defined in another Utah statute as "every device in, upon, or by which any person or property is or may be transported or drawn upon a highway."[545] After examining that definition, the question the court asked was whether a horse could be considered a "device" as it was meant in the statute.[546] The court noted that "[n]o dictionary we have examined defines 'device' to encompass an animal."[547] As such, the court concluded that the due process requirement of fair notice precluded the court from torturing the definition of a "vehicle" to include a horse.[548]

In some instances, the courts may resort to numerous dictionaries in an attempt to ascertain a consensus of meanings.[549] This was the case in *Lanzetta v. New Jersey*,[550] where the United States Supreme Court considered the constitutionality of a statute making it illegal to be a "gangster."[551] A New Jersey statute stated as follows:

> Any person not engaged in any lawful occupation, known to be a member of any gang consisting of two or more persons, who has been convicted at least three times of being a disorderly person, or who has been convicted of any crime in this or in any other State, is declared to be a gangster.[552]

The defendant had been charged with violating this statute and, upon conviction, he challenged the conviction by arguing that the statute violated his right to due process because it was vague and uncertain.[553] Specifically, the defendant challenged the usage of the word "gang" in the statute.[554] In attempting to determine the meaning of the word gang, the Court looked to several dictionaries.[555] Indeed, the Court studied the definitions of the word "gang" from no less than five different dictionar-

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543. *Id.* (quoting UTAH CODE ANN. § 41-6-44 (1) (1953)).
544. *Id.*
545. *Id.* at 1323 (citing UTAH CODE ANN. § 41-6-1(58) (1953)).
546. *Id.*
547. *Id.*
548. *Id.*
549. *See, e.g., Muscarello*, 524 U.S. at 128 (examining five dictionaries in an effort to define "carrying a firearm").
550. 306 U.S. 451 (1939).
551. *Lanzetta*, 306 U.S. at 452.
552. *Id.* (quoting N. J. REV. STAT. 1937, 2:136-4, ch.155, Law (1934)).
553. *Id.*
554. *Id.* at 453-54.
555. *Id.* at 454.

ies.[556] The Court concluded that no clear meaning of the word "gang" could be ascertained from a review of the various dictionaries that were consulted because their definitions varied so widely.[557] In addition, the Court looked to other potential sources, such as common law and various historical and sociological writings; however, these were also not helpful as to the meaning of the term.[558] The Court concluded that the term "gang," as used in the New Jersey statute, was vague and, therefore, the defendant's conviction was deemed a violation of due process.[559]

D. Common Law

Another source that the courts will look to in order to determine the meaning of a particular statute is the common law.[560] For instance, in *People v. Haywood*,[561] the Illinois Supreme Court examined a vagueness claim arising out of a newly enacted "criminal sexual assault" prohibition that had replaced the jurisdiction's "rape" and "deviate sexual assault" legislation. Specifically, this new offense specified that any sexual penetration accomplished by "force" or the threat of "force" was criminal.[562] The defendants asserted that the word "force," as it appeared in this enactment, could "be construed in its broadest sense possible and include every notion of force imaginable."[563] As such, they argued that the stat-

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556. *Id.* at n.3 (citing WEBSTER'S NEW INTERNATIONAL DICTIONARY (2d. ed.); FUNK & WAGNALLS NEW STANDARD DICTIONARY (1915); CENTURY DICTIONARY AND CYCLOPEDIA (1903); OXFORD ENGLISH DICTIONARY (1933); WYLD'S UNIVERSAL DICTIONARY OF THE ENGLISH LANGUAGE (1932)).

557. *Id.* at 454.

558. *Id.* at 454-55.

559. *Id.* at 458.

560. *See, e.g.*, Rose v. Locke, 423 U.S. 48, 50 (1975) (looking to the common law and specifically to 4 WILLIAM BLACKSTONE, COMMENTARIES *216, for an understanding of what constitutes a "crime against nature"); *Lanzetta*, 306 U.S. 451 (discussing how common law reflected no definition of what constitutes a "gang," which contributed to defendant's successful vagueness claim); Nash v. United States, 229 U.S. 373, 377 (1913) (looking to the common law to determine what constituted a "conspiracy and combination in restraint of trade" contrary to federal Sherman Act); *Gaudreau*, 860 F.2d at 362 (referring to the common law to determine the meaning of the phrase "duty of fidelity" within the Colorado commercial bribery statute); People v. Haywood, 515 N.E.2d 45, 48 (Ill. 1987) (looking to the common law offense of rape to determine the meaning of the word "force" within the aggravated criminal sexual assault statute); People v. Greer, 402 N.E.2d 203, 207 (Ill. 1980) (looking to the common law to determine whether an eight and one-half-month old fetus constituted an "individual" within the state murder prohibition (citing 3 EDWARD COKE, INSTITUTES *50; 1 WILLIAM BLACKSTONE, COMMENTARIES *129-30; 1 HALE, PLEAS OF THE CROWN 433 (London, T. Payne 1800))); State v. Soto, 378 N.W.2d 625, 628 (Minn. 1985) (utilizing common law rules of construction to determine whether an unborn fetus constituted a "human being" under the Minnesota vehicular homicide statute); Commonwealth v. Cass, 467 N.E.2d 1324, 1326 (Mass. 1984) (looking to the common law to determine whether a fetus can be considered a victim of homicide and concluding that it could; therefore, viable fetus was considered a "person" for purposes of vehicular homicide statute).

561. 515 N.E.2d 45 (Ill. 1987).

562. *Haywood*, 515 N.E.2d at 47 (citing ILL. REV. STAT. ch. 38, para. 12-12(d), 12-13(a)(1) (1985)).

563. *Id.* at 48.

ute contained no standard whatsoever in deciphering what constitutes "force" and, consequently, that the legislation had to be ruled vague.[564] However, the Illinois Supreme Court noted the criminal sexual assault measure was designed to replace the offenses of "rape" and "deviant sexual assault," both of which outlawed *forcible* sexual acts.[565] Moreover, the common law of Illinois had developed a clear understanding of what constituted "force" for purposes of these earlier offenses and, in the case at hand, it was quite reasonable to assume the legislature in enacting the new law intended to adopt the earlier meaning of the term unless the legislation indicated otherwise.[566] The court stated, "It is an axiom of statutory construction that a statute alleged to be in derogation of the common law should not be construed as changing the common law beyond what is expressed by the words in the statute or is necessarily implied from it."[567] Here, there was nothing in the language of the act which indicated a new definition of "force" was intended and, thus, the "common law definition of force found in both of the repealed offenses" governed the definition in the new law.[568] Thus, the defendants' claim of vagueness failed.[569]

Meanwhile, the common law may act as a barometer for courts, providing a reading that translates into a conclusion that a criminal charge, given existing legislation, is unwarranted. For example, in *Keeler v. Superior Court of Amador County*,[570] the California Supreme Court considered whether an eight and a-half month fetus constituted a "human being" within the meaning of the California statute defining murder.[571] In this case, the defendant attacked and physically assaulted his wife while a final divorce decree was pending. Realizing she was visibly pregnant by another man, he kneed her in the stomach, while saying, "I'm going to stomp it out of you."[572] Her fetus was later delivered stillborn.[573] Thereafter, the defendant was charged with the murder of the fetus.[574] Prior to trial, the defendant sought a writ of prohibition seeking to have the charge of murder dismissed on the theory that the death of a fetus did not constitute the death of a "human being" and, as such, could not give rise to murder.[575] A pathologist testified at a preliminary examination that the

564. *Id.*
565. *Id.* at 49 (citing ILL. REV. STAT. ch. 38, para. 11-1, 11-3 (1983) (repealed)).
566. *Id.* at 48-49.
567. *Id.* at 49.
568. *Id.* at 50.
569. *Id.*
570. 470 P.2d 617 (Cal. 1970).
571. *Keeler*, 470 P.2d at 618 (citing CAL. PENAL CODE § 187 (West 1970)).
572. *Id.*
573. *Id.*
574. *Id.* at 619.
575. *Id.*

cause of death of the fetus was a skull fracture and cerebral hemorrhaging resulting from "force applied to the mother's abdomen."[576] In reviewing the defendant's petition for a writ of prohibition, the California Supreme Court looked to the history of California's murder statute and determined that it contained the same language as did the original California statute defining murder in 1850, when California first became a state.[577] The court noted that the legislature in 1850 enacted its murder statute containing the same language as was typical of common law murder prohibitions.[578] After concluding that the 1850 murder statute should be interpreted consistently with the state of the common law at that time, it found that the common law understanding of murder was that an infant could not be the subject of homicide unless it had been born alive.[579] Also, the court pointed out that various other states had made it an offense to kill a fetus; however, these offenses were classified as either "feticide," "abortion," or "manslaughter," but not "murder."[580] The court then concluded that murder in California was to be defined the same way as it was at common law.[581] As such, the court held that the defendant had been provided no notice that the killing of a fetus, which was not born alive, was contrary to the California statute defining murder and, furthermore, that a judicial enlargement interpreting the statute broadly would be violative of due process.[582]

In contrast, in *Winters v. New York*,[583] a United States Supreme Court decision that was discussed in an earlier section,[584] the *lack* of common law interpretation or definition of certain language in a criminal enactment contributed to the Court's determination that the act was vague. In that case, a New York statute barred dissemination of "obscene prints and articles," which included materials "principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime."[585] The New York Court of Appeals had given this enactment a narrowing construction, namely, that the act only restricted such materials that were "so massed as to become vehicles for inciting violent and depraved crimes against the per-

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576. *Id.* at 618.

577. *Id.* at 619.

578. *Id.*

579. *Id.* at 620. The court looked to Lord Coke's Third Institutes, which asserted that abortion was "murder only if the [fetus] is (1) quickened, (2) born alive, (3) lives for a brief interval, and (4) then dies." *Id.* (quoting 3 EDWARD COKE, INSTITUTES *58 (1648)). The court also cited Blackstone and Hale to reiterate Coke's position. *Id.* at n.6 (citing 1 WILLIAM BLACKSTONE, COMMENTARIES *129-30; 1 HALE, PLEAS OF THE CROWN 433 (London, T. Payne 1778)).

580. *Keeler*, 470 P.2d at 621.

581. *Id.* at 622-24.

582. *Id.* at 630.

583. 333 U. S. 507 (1948).

584. *See supra* notes 63-74, 448-49 and accompanying text.

585. *Winters*, 333 U. S. at 508 (quoting N.Y. PENAL LAW, CONSOL. LAWS, ch. 40, § 1141(2) (McKinney 1945)).

son."[586] Notwithstanding this judicial gloss designed to save the statute from a claim of vagueness, the United States Supreme Court ruled the reach of the statute was "too uncertain and indefinite to justify the conviction of this petitioner."[587] Among other concerns articulated by the Court, this criminal ban carried no "common law meaning" or history from which it might be possible to glean a more precise understanding of (1) what was forbidden and (2) if it avoided unconstitutional restrictions on First Amendment rights.[588] Here, the Court was limited to examining the language of the statute itself and the single New York judicial construction of it, which standing alone was insufficient to survive the petitioner's challenge.

E. Obvious Policy Considerations

Often, a reviewing court will consider the *obvious policy* behind a statute in order to determine the meaning of a particular portion of a statute.[589] As one court observed, a "court should consider not only the language of the statute but also the reason and necessity for the law, the evils to be remedied and the objects and purposes to be obtained."[590] For example, in the case of *McLaughlin v. United States*,[591] the United States

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586. *Id.* at 518-519 (quoting People v. Winters, 63 N.E.2d 98, 100 (N.Y. 1945)).

587. *Id.* at 519.

588. *Id.*

589. *See, e.g.*, United States v. Powell, 423 U.S. 87, 91 (1975) (holding statute proscribing the mailing of pistols, revolvers and "other firearms capable of being concealed on the person" was not vague as applied to a 22-inch sawed-off shotgun; "[t]o narrow the meaning of the language Congress used so as to limit it only to those weapons which could be concealed as readily as pistols or revolvers would not comport with [the] . . . purpose" of making "it more difficult for criminals to obtain concealable weapons"); Grayned v. City of Rockford, 408 U.S. 104 (1972) (deciding that municipal anti-noise ordinance that restricts noise which has the capacity to "disturb" adjacent school not vague because "it is apparent from the statute's announced purpose that the [scope of] the measure is [limited to] whether normal school activity has been or is about to be disrupted"); People v. Bailey, 657 N.E.2d 953, 960-61 (Ill. 1995) (holding that anti-stalking laws not vague for failure to include language that perpetrator "without lawful authority" (1) followed or placed victim under surveillance and (2) made threats against victim; here, proscription could not be said to encompass innocent conduct inasmuch as purpose of the statutory scheme was limited to "goal of protecting possible victims of stalking and aggravated stalking"); *Haywood*, 515 N.E.2d at 49 (explaining that inasmuch as "the central purpose of the [newly enacted Criminal Sexual Assault Act] was to recodify the sexual offenses into a comprehensive statute with uniform statutory elements that would criminalize all sexual assaults without distinguishing between the sex of the offender or the victim and the type of sexual act proscribed," it was obvious the meaning of the word "force" in the Act should be interpreted in the same manner as it was in the now repealed "rape" and "deviant sexual assault" measures and, as such, the meaning of "force" is not vague); State v. Fisher, 631 P.2d 239, 245-46 (Kan. 1981) (holding that child endangerment statute not vague in scope where "purpose" of Act is to "protect children, and to prevent their being placed where it is reasonably certain injury will result").

590. *Haywood*, 515 N.E.2d at 49 (citing People v. Steppan, 473 N.E.2d 1300, 1303 (1985)); *see also* Bailey v. United States, 516 U.S. 137, 145 (1995) ("We consider not only the bare meaning of the word [in a statute] but also its placement and purpose in the statutory scheme.").

591. 476 U.S. 16 (1986).

Supreme Court considered whether an unloaded gun was a "dangerous weapon" within the meaning of the federal bank robbery statute.[592] The defendant and his companion entered a bank in Baltimore wearing gloves and stocking masks.[593] While displaying a handgun, defendant ordered everyone at the bank to put their hands up and not to move.[594] Meanwhile, the defendant's companion "vaulted the counter and placed about $3,400 in a brown paper bag."[595] As the two left the bank they were apprehended by police, who determined that the defendant's gun was not loaded.[596] Following his prosecution and conviction, the defendant appealed, arguing that an unloaded gun could not be considered "a dangerous weapon."[597] However, the United States Supreme Court cited three reasons why an unloaded gun could be considered a dangerous weapon:

> First, a gun is an article that is typically and characteristically dangerous; the use for which it is manufactured and sold is a dangerous one, and the law reasonably may presume that such an article is always dangerous even though it may not be armed at a particular time or place. In addition, the display of a gun instills fear in the average citizen; as a consequence, it creates an immediate danger that a violent response will ensue. Finally, a gun can cause harm when used as a bludgeon.[598]

Based on these considerations, the Court ruled that an unloaded gun is a "dangerous weapon" for purpose of this statute.[599]

McLaughlin represents an excellent example of a strong policy consideration that resolves the meaning of somewhat nebulous statutory language. Central to law enforcement concerns is the aspect of deterrence. In connection with a robbery, it is certainly appropriate to penalize the unlawful taking of property of another through threat of force—the robbery—and to punish to an even greater extent a robbery with a dangerous weapon. Obviously, *McLaughlin* recognized that the introduction of what *appears* to be a dangerous weapon will make the robbery victim more compliant with the robber's demands and invite a greater level of possible danger to innocent persons, such as where a bank security guard feels clearly justified in using deadly force against the gun-wielding assailant, with the unhappy result that an innocent bank patron is shot instead. Then, of course, there is the possibility of a robbery victim being "pistol whipped." Obviously the robbery brings its own danger—the apparent weapon even more. Finally, to rule otherwise would place the

592. *McLaughlin*, 476 U.S. at 16 (quoting 18 U.S.C. § 2113(d) (1982)).
593. *Id.*
594. *Id.*
595. *Id.*
596. *Id.*
597. *Id.* at 17.
598. *Id.* at 17-18.
599. *Id.* at 18.

law in the strange position of having allowed the robber to instill real fear in his victim, thereby creating for himself a greater prospect of success in his criminal enterprise, while simultaneously immunizing him from liability for the greater offense.

Another example of a court considering the obvious policy rationale behind a statute in order to determine the meaning of a particular portion of a statute is *Commonwealth v. Sexton*,[600] where the Supreme Judicial Court of Massachusetts considered whether concrete pavement could constitute a "dangerous weapon" to support a charge of "assault and battery with a dangerous weapon."[601] In this case, the defendant was charged with "assault and battery with a dangerous weapon" on a joint venture theory after he and his brother attacked a man after leaving a bar.[602] During the attack, the defendant's brother slammed the victim's head against the pavement several times.[603] After being convicted of "assault and battery by means of a dangerous weapon," the defendant appealed his conviction.[604] The appeals court reversed the defendant's conviction holding that a dangerous weapon could only include an object a person could "wield" or "arm" himself with and, as such, "concrete pavement," being a stationary *object*, could not be a "dangerous weapon."[605] The government, thereafter, appealed the reversal to the Supreme Judicial Court of Massachusetts.[606] The court noted that the legislative policy behind the statute was an intent to "invoke greater penalties for assaults which threaten serious injury because an actor chose to employ a dangerous weapon."[607] While some weapons may be *per se* dangerous—devices that are designed and constructed to kill or create great bodily harm—other "innocuous items" may be dangerous based on how they are *used* in a particular case.[608] The court asserted that if an object, including a stationary one, can be used in a way to inflict serious bodily injury, then the object could qualify as a dangerous weapon.[609] The court further reasoned that had the defendant used a broken slab of concrete to bludgeon his victim, that would have been, without question, defined as a dangerous weapon.[610] The court observed that the fact that the concrete was not a broken slab but rather a "fixed thing" did not affect the dan-

600. 680 N.E.2d 23 (Mass. 1997).
601. *Sexton*, 680 N.E.2d at 24.
602. *Id.*
603. *Id.*
604. *Id.*
605. *Id.* at 24-25 (citing Commonwealth v. Sexton, 672 N.E.2d 991 (Mass. App. Ct. 1996)).
606. *Id.* at 24.
607. *Id.* at 25.
608. *Id.*
609. *Id.* at 27.
610. *Id.* at 26.

gerousness of the instrumentality.[611] The court concluded that "an item's dangerous propensities 'often depend[] entirely on its use,' and not its mobility, for '[w]hether the pitcher hits the stone or the stone hits the pitcher, it will be bad for the pitcher.'"[612] Thus, the Supreme Judicial Court of Massachusetts held that a person who uses concrete pavement to intentionally inflict injury on another could be found guilty of assault and battery by means of a "dangerous weapon."[613]

As with *McLaughlin*, the *Sexton* decision correctly focused on the general purpose behind the Massachusetts proscription against assault and battery with a dangerous weapon in concluding the perpetrator had fair notice. Here, the clear policy behind assault and battery strictures is dissuading individuals from injuring or attempting to inflict injury upon another. Introduction of an object that has the capacity to cause even greater injury to an assault victim's life or limb is clearly an element of aggravation. Whether that object was stationary or not is beside the point. Here, the obvious purpose behind the Massachusetts law at issue was discouraging assailants from using an object to create more carnage than would have been the case without it.

Similarly, in *People v. Johnson*,[614] the Court of Appeals of the First District of California had to determine whether transmitting herpes during a rape constituted the infliction of "great bodily injury" upon the victim.[615] In this case, the defendant entered the car the victim was driving "and forced her at knife point to drive" to a deserted street.[616] There, the defendant forced the victim to "kiss him and orally copulate him."[617] The defendant then forcibly removed the victim's pants and raped her.[618] Five days later, the victim was diagnosed with herpes simplex II.[619] At the defendant's trial on charges of kidnapping, rape, oral copulation by force, robbery, and false imprisonment,[620] the jury found the defendant guilty of inflicting "great bodily injury" upon the victim because he had transmitted the herpes virus to the victim.[621] The effect of such a finding resulted in the enhancement of the defendant's sentence.[622] In its review, the California Court of Appeals noted that "great bodily injury" had been defined as a "serious impairment of physical condition" or a "protracted

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611. *Id.*

612. *Id.* at 27 (citing State v. Reed, 790 P.2d 551, 552 (Or. Ct. App. 1990) (quoting MIGUEL DE CERVANTES, DON QUIXOTE, Part II, ch. 43 (John Ormsby trans., William Benton 1952))).

613. *Id.*

614. 225 Cal. Rptr. 251 (Cal. App. 1986).

615. *Johnson*, 225 Cal. Rptr. at 253.

616. *Id.* at 252.

617. *Id.*

618. *Id.*

619. *Id.*

620. *Id.*

621. *Id.* at 253.

622. *Id.* at 252.

impairment of function of any portion of [the] body."[623] The court pointed out that an expert had testified at the defendant's trial that herpes is a venereal disease that cannot be cured by known means.[624] When active, herpes,

> [m]anifests itself in the form of vesicles or tiny blisters in the vaginal area. The principal symptom is intense itching and/or pain, but various complications may arise. These include possible blindness if the virus is accidentally transmitted to the eye and if it gets into the bloodstream, a potential for serious infection involving meningitis, which could result in death.[625]

The expert further testified that the victim was likely to carry the herpes virus for the rest of her life.[626] The court held, therefore, that the transmission of herpes during the rape inflicted "great bodily injury" upon the victim and upheld the jury's decision in that regard.[627] Here, then, this court was considering the obvious policy behind the law, namely, if a perpetrator *hurts his victim in any significant manner*, he ought not be able to avoid liability based on a claim that the nature or type of substantial physical harm he inflicted was not tantamount to great bodily injury.

F. Legislative Intent

Frequently, courts interpret a statute by looking to the legislative intent in enacting the particular statute.[628] The court may ascertain this

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623. *Id.* at 253 (quoting People v. Caudillo, 580 P.2d 274, 290 (Cal. 1978), *overruled on other grounds by* People v. Martinez, 973 P.2d 512 (Cal. 1999)).

624. *Id.*

625. *Id.*

626. *Id.*

627. *Id.*

628. *See, e.g.*, *Muscarello*, 524 U.S. at 132-34 (holding that legislative intent makes clear that language "carries a firearm" is not limited to carrying a firearm on one's person); United States v. Powell, 423 U.S. 87, 91 (1975) (looking to the legislative intent to determine whether a statute which prohibits mailing "firearms capable of being concealed on the person" prohibited mailing sawed off shotguns); United States v. Harriss, 347 U.S. 612, 620-21 (1954) (looking to the legislative history behind the Federal Lobbying Act to determine precisely to whom the statute applies); Screws v. United States, 325 U.S. 91, 98-100 (1945) (plurality opinion) (looking to legislative intent behind federal statute penalizing willful deprivation, under color of law, of an individual's federal right was intended to provide affected citizens broad protection); Robinson v. United States, 324 U.S. 282, 283-84 (1945) (looking to the "scant legislative history" behind a portion of the kidnapping statute that stated that the death sentence shall not be imposed on a person convicted of this offense, which provided that the "kidnapped person has been liberated unharmed," to determine if this proviso applied to the kidnapper who was convicted in the instant case); United States v. Wiltberger, 18 U.S. 76, 95 (1820) (examining the legislative history behind federal law to determine if a homicide that occurred on a river about a half mile wide in the interior of a country constituted "manslaughter at high sea"); Comm. in Solidarity with People of El Salvador v. FBI, 770 F.2d 468, 473 (5th Cir. 1985) ("[T]he legislative history of the statute" which makes it a federal offense to coerce, threaten, intimidate, harass or obstruct certain foreign officials and their guests "makes clear Congress' concern for, and desire to protect rights guaranteed by the First Amendment."); People v. Bailey, 657 N.E.2d 953, 960 (Ill. 1995) (holding claim that state anti-stalking statutes reached innocent

intent by looking to the legislature's exact word selection, in particular the words the legislature chose to use in preference to alternative possibilities,[629] or by looking to the legislative record and the debates that took place when the statute was being considered.[630]

First, a court may simply look at a legislative body's word selection to ascertain congressional intent. For example, in *Bailey v. United States*,[631] which was discussed earlier,[632] the United States Supreme Court considered a federal statute that imposed a five-year minimum term of imprisonment upon a person who "during and in relation to any crime of violence or drug trafficking crime . . . uses or caries a firearm."[633] The question posed to the Court was "whether evidence of the proximity and accessibility of a firearm to drugs or drug proceeds is alone sufficient to support a conviction for 'use' of a firearm during and in relation to a drug trafficking offense" under the statute.[634]

In this case, the defendant was stopped for a traffic violation and when he was asked to step out of the car, the police observed him stuff something between the seat and the front console.[635] A search of the passenger compartment of the car revealed one round of ammunition and 27 plastic bags containing a total of 30 grams of cocaine.[636] After the defendant's arrest, a search of the trunk of the car revealed a gun and a large amount of cash.[637] The defendant was charged with several counts, one of which was drug trafficking while using and carrying a firearm in violation of federal law.[638] At the defendant's trial, an expert testified that drug dealers frequently carry a firearm to protect their drugs and money.[639] Following the defendant's conviction, and on appeal to the United States Supreme Court, the defendant argued that "use" in the statute signified active employment of a firearm.[640] The government insisted

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conduct because statutes did not contain language that proscribed conduct must be "without lawful authority" which does not accord "with the legislature's intent in enacting the statutes to prevent violent attacks by allowing the police to act before the victim was actually injured and to prevent the terror produced by harassing actions"); People v. Greer, 402 N.E.2d 203, 209 (Ill. 1980) (looking to the legislative history of the murder statute to determine whether an eight and one-half-month old fetus constitutes an "individual" within the meaning of the statute); *Sexton*, 680 N.E.2d at 25 (interpreting "dangerous weapons" to include stationary objects, such as concrete pavement, does not contravene intent of legislature).

629. *See, e.g.*, Bailey v. United States, 516 U.S. 137, 146 (1995).
630. *See, e.g.*, United States v. Hernandez-Salazar, 813 F.2d 1126, 1133 (11th Cir. 1987).
631. 516 U.S. 137 (1995).
632. *See supra* notes 471-81 and accompanying text.
633. *Bailey*, 516 U.S. at 138 (citing 18 U.S.C. § 924(c)(1) (1997)).
634. *Id.* at 138-39.
635. *Id.* at 139.
636. *Id.*
637. *Id.*
638. *Id.* (citing 18 U.S.C. § 924(c)(1) (1997)).
639. *Id.*
640. *Id.* at 143.

that "use" in the statute should be interpreted to mean *availing* oneself of a gun.[641] The government argued that an individual violates the statute by putting or keeping the gun in a particular place from which it can be accessed if and when needed to facilitate a drug crime.[642] The Court looked to the word choice used by Congress when it enacted this law to decipher the intent of Congress, concluding that "use" was meant to connote something more than simple possession of a gun.[643] The Court stated that if Congress had "intended possession alone to trigger liability under [the statute], it easily could have so provided."[644] The Court noted that in many other gun-related statutes, Congress had used the term "possess," therefore, the fact that Congress chose to employ the word "use" rather than "possess" in this instance was significant.[645] The Court concluded that a broad definition of the word "use," which could be "satisfied in almost every case by evidence of mere possession[,] does not adhere to the obvious congressional intent to require more than possession to trigger the statute's application."[646]

Second, beyond simply focusing on the legislature's word choice, which itself may reflect the legislature's intent, a court may be required to dig deeper and look to the legislative history *behind* the statute to determine its meaning. For example, in *United States v. Hernandez-Salazar*,[647] the United States Court of Appeals for the Eleventh Circuit considered an amendment to a federal statute that dealt with currency reporting violations.[648] Specifically, this amendment expanded the authority of U.S. Customs officers to search persons and property entering and departing the United States for currency reporting violations where an officer had "reasonable cause to believe" a currency violation had occurred.[649] In this case, the defendant was apprehended in the Miami International Airport while attempting to smuggle large amounts of money to Columbia.[650] The defendant challenged the search of his bag-

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641. *Id.* at 141.
642. *Id.* (referring to United States v. Bailey, 36 F.3d 106, 115 (D.C. Cir. 1994) (en banc)).
643. *Id.* at 143.
644. *Id.*
645. *Id.*
646. *Id.* at 144.
647. 813 F.2d 1126 (11th Cir. 1987), *superceded by* 31 U.S.C. § 5317(b) (amended 1986).
648. *Hernandez-Salazar*, 813 F.2d at 1128, 1132 n.23. As amended in 1984, 31 U.S.C. § 5317(b) provided:

> A customs officer may stop and search, without a search warrant, a vehicle, vessel, aircraft, or other conveyance, envelope or other container, or person entering or departing from the United States with respect to which or whom the officer has reasonable cause to believe there is a monetary instrument being transported in violation of [federal currency reporting requirements] of this title.

31 U.S.C. § 5317(b) (1984).
649. *Hernandez-Salazar*, 813 F.2d at 1132 n.23.
650. *Id.* at 1131.

gage as an illegal search contrary to the Fourth Amendment and also challenged the "reasonable cause to believe" language as void-for-vagueness.[651]

In order to rule on the issue regarding the legitimacy of the search, the Eleventh Circuit had to first determine the meaning of "reasonable cause."[652] The defendant claimed that the statute was unconstitutional under the void-for-vagueness doctrine because the statute amounted to an unrestricted delegation of power to Customs officers.[653] In addition, the defendant argued that the phrase "reasonable cause" did not provide a reasonable person with notice of the precise standard of suspicion that authorities needed to conduct the search.[654] Upon review, the court looked to the "legislative history" behind the amendment to determine the meaning of this phrase.[655] The court stated that the legislative history indicated that the section clearly intended to authorize searches on the basis of less than probable cause.[656] Likewise, the court believed that Congress wanted to give Customs officers the ability to perform these warrantless searches in a manner consistent with United States Supreme Court precedent that suggested that "new" Fourth Amendment standards other than "probable cause" and "reasonable suspicion" were disfavored.[657] In doing so, the court deduced that Congress must have intended that the "reasonable cause to believe" standard only required "reasonable suspicion" for such a search because Congress had explicitly stated the standard was to be *less* than "probable cause."[658] Thus, the "reasonable cause" language was not vague.[659] Furthermore, the statute did authorize a search based on reasonable suspicion, rather than probable cause, and because the officers *had* reasonable suspicion to search the defendant in this instance, the defendant's additional challenge that the search was violative of the Fourth Amendment was denied.[660]

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651. *Id.* at 1132.
652. *Id.* at 1133.
653. *Id.* at 1132.
654. *Id.*
655. *Id.* at 1133.
656. *Id.* at 1133 n.28. The court discussed S. REP. NO. 98-225, at 303 (1983), which declared:

> [section 5317(b)'s] on the spot authority of the Customs Service would significantly enhance the effectiveness in monitoring and apprehending persons reasonably believed to be violating the currency reporting provisions of the law. The Committee is fully convinced that such authority is not only needed, but constitutional, under the line of cases holding that warrantless "border searches" are reasonable even without probable cause under the Fourth Amendment.

S. REP. NO. 98-225, at 303 (1983) (alteration in original) (citations omitted).
657. *Hernandez-Salazar*, 813 F.2d at 1133 n.29 (citing United States v. Montoya de Hernandez, 473 U.S. 531, 541 (1985)).
658. *Id.* at 1133 n.30 (citing *Montoya de Hernandez*, 473 U.S. at 541).
659. *Id.* at 1133.
660. *Id.* at 1136-39.

G. Prior Judicial Decisions

To determine the meaning of terms in a statute, reviewing courts routinely look to the way the terms have been interpreted in earlier judicial decisions.[661] For example, in *CISPES v. FBI*,[662] the United States Court of Appeals for the Fifth Circuit considered the validity of a statute, designed to protect foreign dignitaries and officials, which held criminally liable anyone who "intimidates, coerces, threatens, or harasses a foreign official or an official guest or obstructs a foreign official in the performance of his duties."[663] The Committee in Solidarity with the People of El Salvador ("CISPES") challenged this statute as both vague and overbroad, arguing that the terms "intimidate," "harass," "coerce," "threaten," and "obstruct" did not sufficiently identify what conduct was prohibited and that it permitted undue discretion on the part of enforcing authorities.[664]

In order to determine the proper meaning of the challenged terms and to decide whether the terms were unconstitutionally vague, the court considered other cases that had upheld those terms against vagueness challenges. First, the court looked to *International Society for Krishna Consciousness v. Eaves*,[665] an earlier decision from the circuit, wherein it had ruled that the terms "coerce" and "obstruct" were not unconstitutionally vague.[666] Next, the court examined *Cameron v. Johnson*,[667] an earlier opinion from the United States Supreme Court, which reflected the proposition that the term "obstruct" as used in a statute prohibiting "picketing . . . in such a manner as to obstruct or unreasonably interfere with free ingress or egress to or from any . . . courthouse" was not un-

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661. *See, e.g.*, United States v. Sturgis, 48 F.3d 784, 787-88 (4th Cir. 1995) (looking to prior judicial decisions to determine whether an HIV positive inmate's teeth used to bite correctional officers constitute a "deadly weapon"), *cert. denied*, 516 U.S. 833 (1995); Schwartzmiller v. Gardner, 752 F.2d 1341, 1348-49 (9th Cir. 1984) (looking to prior judicial decisions to determine whether the defendant's conduct constituted a "lewd" and "lascivious" sexual acts on a child); People v. Haywood, 515 N.E.2d 45, 49, 51 (Ill. 1987) (looking to prior judicial decisions to determine the meaning of "force" and "bodily harm" for purposes of state criminal sexual assault prohibitions); Commonwealth v. Cass, 467 N.E.2d 1324, 1325-26 (Mass. 1994) (looking to prior judicial decisions to determine whether a fetus constitutes a "person" within the vehicular homicide statute); State v. Soto, 378 N.W.2d 625, 628-29 (Minn. 1985) (looking to prior judicial decisions to determine whether an eight and one-half-month old fetus was a "human being" within the vehicular homicide statute); People v. McCullum, 706 N.Y.S. 2d 616, 617-19 (N.Y. Crim. Ct. 2000) (looking to prior judicial decisions involving inoperable guns to determine whether a can of mace not proved operable could constitute a "dangerous weapon").

662. 770 F.2d 468 (5th Cir. 1985).

663. *Comm. in Solidarity with People of El Salvador*, 770 F.2d at 470-71 n.2 (quoting 18 U.S.C. § 112(b)(1) (1982)). 18 U.S.C. § 112(b)(2) contained similar language which was challenged.

664. *Comm. in Solidarity with People of El Salvador*, 770 F.2d at 475.

665. *Id.* at 476 (citing International Society for Krishna Consciousness v. Eaves, 601 F.2d 809 (5th Cir. 1979)).

666. *Id.* (quoting *Eaves*, 601 F.2d at 831).

667. *Id.* (citing Cameron v. Johnson, 390 U.S. 611 (1968)).

constitutionally vague.[668] Next, the court looked to *Watts v. United States*,[669] another decision from the United States Supreme Court, in which the Court ruled that the term "threaten," as used in a statute outlawing threatening the United States President, was not void for vagueness.[670] Finally, the court considered *Youngdahl v. Rainfair*,[671] wherein the United States Supreme Court had upheld a law prohibiting "intimidating" and "threatening" activities by striking employees.[672] Based on this line of cases, the court determined that the statute as applied to CISPES was not void for vagueness.[673]

In *Greshman v. Peterson*,[674] the United States Court of Appeals for the Seventh Circuit reviewed an Indianapolis city ordinance that barred "aggressive panhandling,"[675] which was defined as including any solicitation of money or other gratuity "in an aggressive manner," including where the panhandling involves (1) "touching" the solicited person, (2) approaching a person waiting in line to be admitted into a commercial establishment, (3) blocking a person's path, (4) following a person, (5) using profane language or a gesture which would cause a reasonable person fear, or (6) a group of two or more panhandlers.[676] The plaintiff, a homeless person, brought an action claiming the ordinance was violative of his First Amendment rights and unconstitutionally vague in violation of the Fourteenth Amendment.[677] After rejecting the First Amendment argument,[678] the Seventh Circuit analyzed the vagueness claim.[679] The court noted that Indiana case law had upheld the state anti-stalking law that bars repeated "harassment" that causes another person to feel threatened.[680] It pointed out its own prior decisions had upheld proscriptions against "threats, extortion, blackmail and the like, 'despite the fact that they criminalize utterances because of their expressive content.'"[681] The Seventh Circuit cited as additional authority a United States Supreme Court decision upholding the constitutionality of a law against "threats" directed at the United States President,[682] followed by another case where

668. *Id.* (quoting *Cameron*, 390 U.S. at 616).
669. *Id.* (citing Watts v. United States, 394 U.S. 705 (1966)).
670. *Id.* (quoting *Watts*, 394 U.S. at 707).
671. *Id.* (citing Youngdahl v. Rainfair, 335 U.S. 131 (1957)).
672. *Id.* (quoting *Youngdahl*, 335 U.S. at 139).
673. *Id.* at 477.
674. 225 F.3d 899 (7th Cir. 2000).
675. *Gresham*, 225 F.3d at 901.
676. *Id.* at 901-02 (quoting INDIANAPOLIS CITY-COUNTY, IND., ORDINANCE NO. 78 (1999); REV. CODE OF INDIANAPOLIS AND MARION COUNTY § 407-102 (1999)).
677. *Id.* at 901.
678. *Id.* at 903-07.
679. *Id.* at 907-09.
680. *Id.* at 908-09 (citing Johnson v. State, 648 N.E.2d 666, 670 (Ind. Ct. App. 1995)).
681. *Id.* at 909 (quoting United States v. Hayward, 6 F.3d 1241, 1259 (7th Cir. 1993) (Flaum, J., concurring), *cert. denied*, 511 U.S. 1004 (1994)).
682. *Id.* (citing *Watts*, 394 U.S. at 707).

the Seventh Circuit itself held that "threats of physical violence" are not protected by the First Amendment.[683] Finally, the court noted another case, decided by the United States Supreme Court, wherein a concurring opinion quoted a law review article stating, "Although the First Amendment broadly protects 'speech,' it does not protect the right to 'fix prices, breach contracts, make false warranties, place bets with bookies, threaten [or] extort.'"[684] Here, the Indianapolis measure could be construed to prohibit any word or gesture that "makes a reasonable person feel they face danger if they refuse to donate" and, as such, could not be enjoined from enforcement.[685]

H. Definitions in Other Statutes Within the Jurisdiction

Sometimes the meaning of a statute can be interpreted by reference or comparison to another statute.[686] First, a court may look to criminal offenses that have previously appeared in the jurisdiction's penal code for instruction as to the meaning of language that is retained in later enactments.[687] Next, a reviewing court may look to other sections of its current criminal code to determine the proper meaning of a term as it is used throughout the code.[688] At other times, a court may look to a statute within the same jurisdiction but outside the penal code to interpret a criminal statute.[689]

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683. *Id.* (citing United States v. Velasquez, 772 F.2d 1348, 1357 (7th Cir. 1985), *cert. denied*, 475 U.S. 1021 (1986))).

684. *Id.* (citing R.A.V. v. St. Paul, 505 U.S. 377, 420 (1992) (Stevens, J., concurring) (quoting Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 270 (1981))).

685. *Id.*

686. *See, e.g.*, *Muscarello*, 524 U.S. at 134-39 (examining other federal statutes dealing with guns, including those that refer to "use" of firearm and others that refer to "transporting" a firearm, suggesting Congress intended that language "carries" a firearm in particular federal statute mean not merely carrying on one's person but also in one's automobile); *Bailey*, 516 U.S. at 143 (superceded by statute) (drawing on federal offenses that express themselves in terms of "possesses" guns to conclude that "use" of a gun in federal law connotes active employment and not mere possession); *Comm. in Solidarity with the People of El Salvador*, 770 F.2d at 476-77 (ruling a federal statute outlawing threatening, harassing and intimidating foreign officials not vague; "similar terms have been used and applied in numerous United States statutes"); People v. Greer, 402 N.E.2d 203, 209 (Ill. 1980) (superceded by statute) (discussing a statement in Illinois Abortion law, "killing of a fetus aborted alive may be punished as murder," suggests that killing unborn fetus is not murder).

687. *See, e.g.*, Keeler v. Superior Ct. of Amador County, 470 P.2d 617, 622-24 (Cal. 1970) (superceded by statute) (finding definition of "human being" in current California statute enacted in 1872 was same as prior murder statute enacted in 1850).

688. *See, e.g.*, People v. Davis, 766 N.E.2d 641, 645 (Ill. 2002) (referring to Illinois Air Rifle Act within Criminal Offenses Chapter for definition of "Air Rifle" so as to determine if a pellet gun, which is considered an air rifle under Act, is also a "dangerous weapon" within meaning of Illinois armed violence prohibition).

689. *See, e.g.*, People v. Spencer, 731 N.E.2d 1250, 1251 (Ill. App. Ct. 2000) (referring to Family Law Code definition of "harassment," used for purpose of determining if individual violated an "order of protection," in determining if defendant committed offense of telephone harassment).

In *People v. Haywood*,[690] discussed earlier,[691] the Illinois Supreme Court entertained a vagueness claim directed at certain language contained in prohibitions outlawing criminal sexual assault and aggravated criminal sexual assault, offenses that had replaced Illinois' earlier rape and deviate sexual assault legislation.[692] Specifically, the defendants, in this consolidated appeal, had challenged the word "force" as used in the criminal sexual assault statute and the phrase "bodily harm" as employed in the aggravated criminal sexual assault statute.[693] Regarding the word "force," the court assumed the legislature intended to define the term in essentially the same manner that it had in connection with the recently repealed rape/deviate sexual assault prohibitions that were supplanted by the new, more sophisticated Criminal Sexual Act legislation.[694] Thus, for one to claim lack of notice regarding the meaning of the word "force" was contrary to the "common sense" conclusion that a legislative body, in enacting a new law that relies on existing legal nomenclature, would *not* be intent on the "creation of a new definition" or "obscurity" of existing language.[695]

Meanwhile, regarding the defendants' claim in *Haywood* that the language "bodily harm," as used in the aggravated criminal sexual assault legislation, was vague, the court responded that the phrase "has a well-known legal meaning, and when a statute contains language with an ordinary and popularly understood meaning, courts will assume that that is the meaning intended by the legislature."[696] Here the words "bodily harm" had been earlier defined by the Illinois Supreme Court in the context of the Illinois crime of battery as "some sort of physical pain or damage to the body, like lacerations, bruises or abrasions, whether temporary or permanent."[697] Thus, because this language carried a clear meaning elsewhere in the existing Illinois Criminal Code, the defendants could not assert lack of fair notice.[698]

As occurred in *Haywood*, reviewing courts routinely look to other sections of the same statutory scheme to determine the meaning of a particular statute.[699] For example, in *People v. Aguilar*,[700] the Illinois Appel-

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690. 515 N.E.2d 45 (Ill. 1987).

691. *See supra* notes 561-69 and accompanying text.

692. *Haywood*, 515 N.E.2d at 46.

693. *Id.* at 47-48, 51 (referring to language in ILL. REV. STAT. ch. 38, para. 12-13, 12-14 (1985)).

694. *Id.* at 49.

695. *Id.* at 48.

696. *Id.* at 51.

697. *Id.* (quoting People v. Mays, 437 N.E.2d 633, 635-36 (Ill. 1982)).

698. *Id.* at 51-52.

699. *See, e.g.*, *Bailey*, 516 U.S. at 146-47 (superceded by statute) (looking to other parts of the statute leads to the conclusion that "carrying" a firearm does not constitute "use" of a firearm); United States v. Wiltberger, 18 U.S. 76, 94-105 (1820) (looking to the construction of the "whole act" criminalizing felonies on the "high seas" leads to conclusion that homicide on a foreign

late Court looked to the Illinois robbery statute for guidance as it determined the reach of the more recently enacted Illinois "vehicular hijacking" prohibition.[701] In this case, the driver of an automobile stepped out of his van after the defendant hit the driver's van with his foot.[702] After the driver exited his van, the defendant punched the driver in his jaw while defendant's companions threw bottles at him.[703] At this point, the driver fled the scene.[704] When the driver abandoned his van, the defendant and his companions entered the driver's van and drove it away.[705] Following the defendant's apprehension, he was prosecuted and convicted of "vehicular hijacking," which was defined as any taking of a motor vehicle "from the person or the immediate presence of another *by the use of force or by threatening the imminent use of force*."[706] On appeal, defendant argued the vehicle was not taken by force inasmuch as the driver had exited his automobile of his own accord.[707] Also, he claimed the beating of the driver and the bottle-throwing, which precipitated the flight of the driver, were unrelated to any intent to take the vehicle.[708] However, the appellate court noted the vehicular hijacking statute contained language identical in most respects to "robbery," which is defined in Illinois as the taking of property "from the person or presence of another *by the use of force or by threatening the imminent use of force*."[709] Moreover, the robbery statute had been previously interpreted as only requiring "some concurrence between the defendant's threat of force and the taking of the victim's property."[710] In other words, the force or threat of force for purposes of robbery need not immediately precede the taking.[711] To convict one of robbery, it is not necessary to show the force was exerted for the purpose of taking another's property or that the perpetrator formed the intention to take another's property before the force or threat of force occurred.[712] Extrapolating from the robbery stric-

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country's river does not amount to "manslaughter on the high seas"); Columbia Natural Resources v. Tatum, 58 F.3d 1101, 1106-09 (6th Cir. 1995) (consulting the entire federal RICO statute leads to conclusion that the meaning of a "pattern of racketeering activity" is not vague), *cert. denied*, 516 U.S. 1158 (1996); People v. Monroe, 515 N.E.2d 42, 43-46 (Ill. 1987) (holding that *mens rea* provision which appeared in penalty section that conflicts with *mens rea* provision in definitional section of Illinois drug paraphernalia statute renders it vague).

700. 676 N.E.2d 324 (Ill. App. Ct. 1997).
701. *Aguilar*, 676 N.E.2d at 327.
702. *Id.* at 325-26.
703. *Id.* at 326.
704. *Id.*
705. *Id.*
706. *Id.* (quoting 720 ILL. COMP. STAT. 5/18-3(a) (1994)).
707. *Id.*
708. *Id.*
709. *Id.* (quoting 720 ILL. COMP. STAT. 5/18-1(a) (1994)).
710. *Id.*
711. *Id.*
712. *Id.*

ture, the court concluded there existed a concurrence between the defendant's taking of the driver's vehicle and the use of force against him and, as such, the defendant was properly convicted of vehicular hijacking.[713]

As stated, sometimes courts will search *outside* the jurisdiction's *penal code* and find a statutory definition of a word or phrase elsewhere in the jurisdiction's laws in order to demonstrate that the citizenry were sufficiently apprised of the meaning of certain language appearing within the penal code.[714] This occurred in *People v. Calvert*,[715] an Illinois Appellate Court opinion involving a defendant who had been convicted of the offense of "harassment of a witness."[716] The defendant was charged with this Illinois offense after verbally berating a witness in an earlier trial with "language . . . rife with profanity and invective," which caused the witness to cry continuously and to be intimidated and physically shaken.[717] A violation of this offense occurs where a person, "with intent to harass or annoy" another person who had been a witness, defined as a person who had testified in a legal proceeding, "communicates" with such other person "in such manner as to produce mental anguish or emotional distress" or conveys a threat of injury or damage to the individual's person or property.[718] The defendant claimed the evidence was insufficient to establish that he had the requisite intent to harass or annoy and that the statute was overbroad and vague.[719] In its review, the Illinois Appellate Court conceded that the term "harassment" was not defined in the Illinois penal code.[720] However, the court noted that there existed a definition of "harassment" in the Illinois Domestic Violence Act of 1986,[721] which is part of the Family Law chapter of the Illinois code, that was "instructive."[722] Specifically, this definition stated that harassment is: "Knowing conduct which is not necessary to accomplish a purpose that is reasonable under the circumstances; would cause a reasonable person emotional distress; and does cause emotional distress . . . ."[723] Accordingly, the court concluded that harassment could arise as "the

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713. *Id.*

714. *See, e.g.*, State v. Dixon, 998 P.2d 544, 549 (Mont. 2000) (referring to MONT. ADMIN. R. 23-7-301 (2002) (Uniform Fire Code) in order to decipher what constitutes possession of "explosive").

715. 629 N.E.2d 1154 (Ill. App. Ct. 1994).

716. *Calvert*, 629 N.E. at 1155 (citing ILL. REV. STAT. ch. 38, para. 32-4a (1991), subsequently codified as 720 ILL. COMP. STAT. 5/32-4a (1993)).

717. *Id.* at 1156.

718. *Id.* (quoting ILL. REV. STAT. ch. 38, para. 32-4a (1991), subsequently codified as 720 ILL. COMP. STAT. 5/32-4a (1993)).

719. *Id.* at 1159.

720. *Id.* at 1157.

721. ILL. REV. STAT. ch. 40, para. 2311-3(6) (1991), subsequently codified as 750 ILL. COMP. STAT. 60/101 (2002)).

722. *Id.*

723. *Id.* (quoting ILL. REV. STAT. ch. 40, para. 2311-3(6) (1991), subsequently codified as 750 ILL. COMP. STAT. 60/103 (1999)).

result of intentional acts which cause another person to be worried, anxious, or uncomfortable and therefore can occur even if there is no overt act of violence."[724] Here, defendant's verbal diatribe, which caused an intense emotional reaction in the victim, and caused her to fear that some type of repercussions might be forthcoming in the future, precluded the defendant's assertion that he had not "harassed" the witness.[725] Thus, the defendant's claims, including his assertion that the entire criminal statute was vague, were rejected and his conviction was affirmed.[726]

I. Definitions From Other Jurisdictions

Yet another source courts facing vagueness claims may look to for guidance are definitions of terms in the law of other jurisdictions.[727] In *Rose v. Locke*,[728] a United States Supreme Court opinion, a defendant had been convicted under a Tennessee statute for committing a "crime against nature."[729] In this case, the defendant entered his female neighbor's apartment on the pretext of using her telephone.[730] Once inside, the defendant produced a knife, forced her to partially undress, "and compelled her to submit to his twice performing cunnilingus upon her."[731] Following the State's successful prosecution of the defendant, the Tennessee trial court sentenced the defendant to five to seven years'

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724. *Id.*

725. *Id.* at 1157-59.

726. *Id.* at 1159-60.

727. *See, e.g.*, People v. Greer, 402 N.E.2d 203, 209 (Ill. 1980) ("After considering the status of the unborn in the common law, *the uniform decisions of the court of last resort in our sister States*, and the attitude toward the unborn reflected in our abortion statute, we conclude that taking the life of a fetus is not murder under our current statute unless the fetus is born alive and subsequently expires as a result of the injuries inflicted." (emphasis added)); State v. Fisher, 631 P.2d 239, 242-45 (Kan. 1981) (deciphering that state statute which outlawed "endangering" a child was not vague by examining similar child endangerment laws and their interpretation in Colorado, California, New Mexico, and Pennsylvania); State v. Soto, 378 N.W.2d 625, 628-29 (Minn. 1985) (holding vehicular homicide statute interpreted as not applicable to killing a fetus. "We have been informed . . . that of 25 jurisdictions in the United States which have considered the issue . . . 23 have adopted the 'born alive' rule. From the foregoing it is clear that the common law 'born alive' rule is now well-established in the great majority of jurisdictions."); *cf.* Rogers v. Tennessee, 121 S. Ct. 1693, 1701 (2001) (explaining that where defendant contended that he had no "fair warning" of the judicial abolition of Tennessee's common law "year and a day rule," which precluded a prosecution for murder where an assault victim died more than a year after he suffered the infliction of wounds caused by a perpetrator, because "the year and a day rule has been legislatively or judicially abolished in the vast majority of jurisdictions recently to have addressed the issue," the rule had clearly outlived its usefulness and no longer existed so that where defendant's victim had died one and a half years after his attack, the Tennessee Supreme Courts' retroactive abolition was not unexpected or indefensible).

728. 423 U.S. 48 (1975) (per curiam).

729. *Rose*, 423 U.S. at 48 ("Crimes against nature, either with mankind or any beast, are punishable by imprisonment in the penitentiary not less than five (5) years nor more than fifteen (15) years." (quoting TENN. CODE ANN. § 39-707 (1955))).

730. *Id.* at 48.

731. *Id.*

imprisonment.[732] "The Tennessee Court of Criminal Appeals affirmed the conviction, rejecting [the defendant's] claim that the Tennessee statute's proscription of 'crimes against nature' did not encompass cunnilingus, as well as his contention that the statute was unconstitutionally vague."[733] However, the United States Court of Appeals for the Sixth Circuit accepted the defendant's constitutional challenge, determining that the term "'crimes against nature' could not 'in and of itself withstand a charge of unconstitutional vagueness.'"[734] The Sixth Circuit reasoned that cunnilingus was not encompassed in the Tennessee statute because it could not find any previous Tennessee opinion stating that the statute applied to such sexual activity.[735] Therefore, this court held that the statute failed to give the defendant "fair warning" and, on those grounds, sustained the defendant's constitutional challenge.[736]

In its review, the United States Supreme Court addressed the issue whether under the Tennessee statute "crime[s] against nature" was to be "narrowly applied to only those acts constituting the common-law offense of sodomy, or [was it] to be broadly interpreted to encompass additional forms of sexual aberration."[737] In addressing this issue, the Court first pointed out that a "substantial number of jurisdictions" maintain the common law proscription of "crimes against nature."[738] The Court first referenced *State v. Crawford*,[739] wherein the Missouri Supreme Court rejected a claim that "its crime-against-nature statute was so devoid of definition as to be unconstitutional, pointing out that its provision was derived from early English law and broadly embraced sodomy, bestiality, buggery, fellatio, and cunnilingus within its terms."[740] The Court next looked to *Wainwright v. Stone*,[741] in which the Court previously held that a Florida statute "proscribing 'the abominable and detestable crime against nature' was not unconstitutionally vague, despite the fact that the [Florida] State Supreme Court had recently changed its mind about the statute's permissible scope."[742] Additionally, the Court pointed out that in *Fisher v. State*,[743] the Tennessee Supreme Court had previously rejected a claim that "'crime against nature' did not cover fellatio, repudiating those jurisdictions which had taken a 'narrow restrictive definition

732. *Id.*
733. *Id.* at 48-49.
734. *Id.* (quoting Locke v. Rose, 514 F.2d 570, 571 (6th Cir. 1975)).
735. *Id.*
736. *Id.*
737. *Id.* at 50-51.
738. *Id.* at 50.
739. 478 S.W.2d 314 (Mo. 1972).
740. *Rose*, 423 U.S. at 51 (citing *Crawford*, 478 S.W.2d 314).
741. 414 U.S. 21 (1973).
742. *Rose*, 423 U.S. at 51 (citing *Wainwright*, 414 U.S. at 22).
743. 277 S.W.2d 340 (Tenn. 1955).

of the offense.'"[744] After *Fisher*, the Tennessee Supreme Court, in *Sherrill v. State*,[745] reiterated the fact that the Tennessee "crimes against nature" statute encompassed the broader meaning and declared that "the prohibition brings all unnatural copulation with mankind or a beast, including sodomy, within its scope."[746] The United States Supreme Court then noted that a similar Maine statute, which the Tennessee court in *Sherrill* had cited with approval, "had been applied to cunnilingus before either Tennessee decision."[747] Finally, the Court stated that "[o]ther jurisdictions had already reasonably construed identical statutory language to apply to such acts. And given the Tennessee court's clear pronouncements that its statute was intended to effect broad coverage, there was nothing to indicate, clearly or otherwise, that respondent's acts were outside the scope of [the Tennessee enactment]."[748] Thus, the Court reversed the Sixth Circuit's finding of vagueness.

Another example of a judicial opinion that studied decisions from other jurisdictions in order to determine the meaning of a statute is *Commonwealth v. Sexton*.[749] In *Sexton*, discussed in an earlier section,[750] the Supreme Judicial Court of Massachusetts considered whether concrete pavement could constitute a "dangerous weapon" to support a charge of assault and battery with a dangerous weapon.[751] In this case, the defendant was charged with assault and battery with a dangerous weapon on a joint venture theory after he and his brother attacked a man after leaving a bar. During the attack, the defendant's brother slammed the victim's head against the pavement several times. After being convicted of assault and battery by means of a dangerous weapon, the Massachusetts appellate court reversed the defendant's conviction, holding that a dangerous weapon could only include an object a person could "wield" or "arm" himself with and, as such, "concrete pavement," being a stationary object, could not be a "dangerous weapon."[752]

In deciding this issue of first impression, the Supreme Judicial Court of Massachusetts first looked to its former decisions,[753] as well as to decisions of other jurisdictions, which had found "otherwise innocent items to fit this classification when used in a way which endangers another's

744. *Rose*, 423 U.S. at 52 (citing *Fisher*, 277 S.W.2d 340).
745. 321 S.W.2d 811 (Tenn. 1959).
746. *Rose*, 423 U.S. at 52 (citing *Sherrill*, 321 S.W.2d at 812 (quoting from State v. Cyr, 198 A. 743 (Me. 1938))).
747. *Id.*
748. *Id.* at 53.
749. 680 N.E.2d 23 (Mass. 1997).
750. *See supra* notes 600-13 and accompanying text.
751. *Sexton*, 680 N.E.2d at 24 (citing MASS. GEN. LAWS ANN. ch. 265, § 15A (West 2000)).
752. *Id.* (citing Commonwealth v. Sexton, 672 N.E.2d 991, 993 (Mass. App. Ct. 1996)).
753. *Id.* at 25.

safety."[754] The court observed that the United States Court of Appeals for the Seventh Circuit had ruled that a walking stick used to strike someone was a "dangerous weapon."[755] Meanwhile, the United States Court of Appeals for the Fourth Circuit had held that a chair "brought down upon a victim's head" was a "dangerous weapon."[756] The California Court of Appeals had determined that a rock was a "dangerous weapon."[757] The Maryland Supreme Court had held that a "microphone cord wrapped around a victim's neck" was a "dangerous weapon."[758] Additionally, the Michigan Court of Appeals had stated in dictum that an "automobile, broomstick, flashlight, and lighter fluid" could all constitute "dangerous weapons."[759]

The court next considered the fact that "a number of other jurisdictions" had held that the "stationary character" of an object did not prevent it from being used as a "dangerous weapon."[760] For instance, the court pointed out that the United States Court of Appeals for the Fourth Circuit had determined that steel cell bars were a "dangerous weapon."[761] Similarly, the North Carolina Supreme Court had determined that cell bars and floors were "dangerous weapons."[762] Moreover, the New York Supreme Court, Appellate Division, had held that cell bars[763] and, in another case, a plate glass window constituted "dangerous weapons."[764] Finally, the New York Court of Appeals and the Oregon Court of Appeals had both held that a sidewalk was a "dangerous weapon."[765] While the Massachusetts court recognized that some other jurisdictions had taken a contrary position, it held that a person who deliberately uses concrete pavement as a means of inflicting serious injury could be found guilty of assault and battery by means of a "dangerous weapon."[766]

Beyond the above approaches to discerning notice, it is conceivable that a particular political subdivision may gain interpretative guidance from another governmental unit within the same jurisdiction. In *City of Chicago v. Powell*,[767] an Illinois Appellate Court decision, definitional

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754. *Id.*

755. *Id.* at 25-26 (citing United States v. Loman, 551 F.2d 164, 169 (7th Cir.), *cert. denied*, 433 U.S. 912 (1977)).

756. *Id.* at 26 (citing United States v. Johnson, 324 F.2d 264, 266 (4th. Cir. 1963)).

757. *Id.* (citing People v. White, 212 Cal. App. 2d 464, 465 (Cal. Ct. App. 1963)).

758. *Id.* (citing Bennett v. State, 205 A.2d 393, 395 (Md. 1964)).

759. *Id.* (citing People v. Buford, 244 N.W.2d 351, 353 (Mich. Ct. App. 1976) (dictum)).

760. *Id.*

761. *Id.* (citing United States v. Murphy, 35 F.3d 143, 147 (4th Cir. 1994), *cert. denied*, 513 U.S. 1135 (1995)).

762. *Id.* (citing State v. Brinson, 448 S.E.2d 822 (N.C. 1994)).

763. *Id.* (citing People v. O'Hagan, 574 N.Y.S.2d 198 (N.Y. App. Div. 1991)).

764. *Id.* (citing People v. Coe, 564 N.Y.S.2d 255, 256 (N.Y. App. Div. 1991)).

765. *Id.* (citing People v. Galvin, 481 N.E.2d 565, 566 (N.Y. 1985); State v. Reed, 790 P.2d 551, 551 (Or. Ct. App. 1990)).

766. *Id.* at 27.

767. 735 N.E.2d 119 (Ill. App. Ct. 2000).

guidance regarding the scope of a municipal ordinance was extracted from state legislation. In that case, a Chicago municipal ordinance prohibiting "soliciting unlawful business" was used to prosecute a defendant who was soliciting prospective purchasers of heroin in public.[768] Other defendants were prosecuted for soliciting for purposes of prostitution, and yet another for soliciting the sale of false identification cards.[769] These defendants claimed the municipal law in question was vague in regards to what constituted "solicitation" and "unlawful business."[770] After a trial court granted one of the defendant's motion to dismiss, the City appealed.[771] The appellate court reversed the trial court's vagueness findings after concluding the words "solicitation" and "unlawful business" carried a clear meaning.[772] As to "solicitation," the appellate court pointed out that this term was defined in the Illinois Criminal Code as "to command, authorize, urge, incite, request, or advise another to commit an offense."[773] In addition, the Illinois penal law contained a specific prohibition outlawing criminal "solicitation" which occurs when one is "commanding, encouraging, or requesting another to commit a particular offense with the intent that the offense be committed."[774] Moreover, Black's Law Dictionary contained a definition,[775] as did caselaw that had upheld charges of illicit "solicitation of professional patronage,"[776] while other caselaw had upheld a statute prohibiting "solicitation of the sale of residential real estate once a property owner gave an agent notice that he did not intend to sell the property."[777] Regarding the meaning of "unlawful business," the appellate court noted that the Illinois Supreme Court had previously upheld very similar language.[778]

As observed previous sections, the fact that certain language in a specific criminal law has *not* been provided some definitional clarification may contribute to a court's finding of vagueness. In *Winters v. New York*,[779] discussed in several previous sections,[780] which involved examination of a prohibition criminalizing dissemination of "[o]bscene prints and articles," the United States Supreme Court found the measure vague

768. *Powell*, 735 N.E.2d at 122-23 (quoting CHICAGO, IL., MUN. CODE § 10-8-515(a) (1998)).
769. *Id.* at 125.
770. *Id.* at 122-25.
771. *Id.* at 123.
772. *Id.* at 128-30.
773. *Id.* at 128 (quoting 720 ILL. COMP. STAT. 5/2-20 (1998)).
774. *Id.* (quoting 720 ILL. COMP. STAT. 5/8-1 (1998)).
775. *Id.* (citing BLACK'S LAW DICTIONARY 1392 (6th ed. 1990)).
776. *Id.* (citing Desnick v. Dep't of Prof'l Regulation, 665 N.E.2d 1346, 1361 (Ill. 1996), *cert. denied*, 519 U.S. 965 (1996)).
777. *Id.* at 129 (citing Curtis v. Thompson, 840 F.2d 1291, 1305 (7th Cir. 1988)).
778. *Id.* at 130 (citing People v. Williams, 551 N.E.2d 631, 633 (Ill. 1990)).
779. 333 U.S. 507 (1948).
780. *See supra* notes 63-74, 448-49, 583-88 and accompanying text.

in part due to the *absence* of interpretative aids in other jurisdictions.[781] The Court pointed out that "[o]nly two other state courts, whose reports are printed appear to have construed language in their laws [dealing with depictions of deeds of bloodshed, lust or crime in some type of periodical] similar to that here involved."[782]

J. Treatises

Courts will often resort to consulting treatises when reviewing alleged statutory indefiniteness.[783] In *United States v. Gadreau*,[784] discussed in earlier sections,[785] the defendant raised a vagueness claim in a federal Racketeer Influenced & Corrupt Organizations Act ("RICO")[786] prosecution where a Colorado commercial bribery statute that was used as a predicate offense was challenged on due process grounds.[787] Here, the defendants were alleged to have conspired to engage in a violation of the state commercial bribery statute by giving money to an executive in a public service company in order to have him award contracts to a supply company in which they had a legal interest.[788] This Colorado statute provided that a violation occurs whenever a person "solicits, accepts, or agrees to accept any benefit as consideration for knowingly violating or agreeing to violate a duty of fidelity to which he is subject as . . . [a]gent or employee . . . or . . . [o]fficer . . . of an incorporated association."[789] After being charged under RICO[790] in federal district court, the defendants argued the "knowing[ly] violat[ing] . . . a duty of fidelity" language in the Colorado statute was void for vagueness.[791] The United States Court of Appeals for the Tenth Circuit disagreed.[792] The Tenth Circuit stated that the "authorities are unanimous that an officer or agent breaches his duty of loyalty to his corporation or principal by accepting bribes to compromise his principal's interests."[793] After examining pas-

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781. *Winters*, 333 U.S. at 511.

782. *Id.*

783. *See, e.g., Gaudreau*, 860 F.2d at 362 (consulting treatise to ascertain agent's duty toward principal); *cf.* Rogers v. Tennessee, 532 U.S. 451, 464-67 (2001) (discussing that common law murder required victim's death to occur within a year and a day (citing FRANCIS WHARTON, LAW OF HOMICIDE § 18, at 19-20 (3d ed. 1907)); however, this "year and a day" rule is no longer valid and defendant could not claim lack of notice regarding change in Tennessee law).

784. 860 F.2d 357 (10th Cir. 1988).

785. *See supra* notes 317-22, 401-20 and accompanying text.

786. 18 U.S.C. § 1962(d) (1986).

787. *Gaudreau*, 860 F.2d at 358.

788. *Id.* at 358-59.

789. *Id.* at 359 (quoting COLO. REV. STAT. § 18-5-401 (1986)).

790. *Id.* (citing 18 U.S.C. § 1962(d) (1986) (making it illegal to engage in a "pattern of racketeering" to benefit an "enterprise" with which one is "associated")).

791. *Id.* at 358.

792. *Id.*

793. *Id.* at 362.

sages from Fletcher's *Cyclopedia of the Law of Private Corporations*[794] and the *Restatement (Second) of Agency*,[795] the court of appeals ruled that the language in question carried a clear meaning.[796] Here, the defendants had conspired with the public service official to engage in a "pattern of commercial bribery," for which they were properly charged.[797]

As with other potential sources of "notice," it may turn out that examination of a respected treatise *supports* a vagueness claim.[798] In *Bouie v. City of Columbia*,[799] a United States Supreme Court decision, two black college students conducted a "sit in" demonstration at a drug store lunch counter in Columbia, South Carolina.[800] At first, no one approached the students to take their food order.[801] Then, a store employee placed a "no trespassing" sign in the area where they were seated.[802] Local police were called by the store manager and asked the two students to leave.[803] When the students refused, they were arrested for several offenses, including "criminal trespass."[804] This South Carolina offense was defined as an "entry upon the lands of another . . . after notice from the owner or tenant prohibiting such entry."[805] Following their convictions, a

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794. *Id.* (quoting 3 WILLIAM MEADE FLETCHER, FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 884, at 348, 351-52 (perm. ed., rev. vol. 2002)).

795. *Id.* at 363 n.15 (citing RESTATEMENT (SECOND) OF AGENCY § 391 (1958)).

796. *Id.* at 362-63.

797. *Id.* at 359, 362-63.

798. *See, e.g.*, Papachristou v. City of Jacksonville, 405 U.S. 156, 161 n.4, 162 (1972) (noting that "vagrancy" laws were a remnant of archaic feudal laws designed to discourage movement of workers from their home area in search of improved work conditions (citing 3 JAMES F. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 203, 206, 266-75 (London, MacMillan 1883); 4 WILLIAM BLACKSTONE, COMMENTARIES *169) (municipal vagrancy ordinance unconstitutionally vague)); Keeler v. Superior Ct. of Amador County, 470 P.2d 617, 620 nn. 4,6, & 7, 629 (Cal. 1970) (finding common law required murder victim be born alive and not merely a fetus (citing 3 EDWARD COKE, INSTITUTES *58, HENRY DE BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND, III, ii, 4 (np. nd.); 3 JAMES F. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 32 (London, MacMillan 1883); 1 WILLIAM BLACKSTONE, COMMENTARIES *129-30; 1 MATTHEW HALE, PLEAS OF THE CROWN 433 (London, T. Payne 1778); 1 WILLIAM HAWKINS, PLEAS OF THE CROWN ch. 31, § 16 (London, Eliz. Nut 4th ed. 1762)) (defendant lacked notice murder statute included killing a fetus)); People v. Greer, 402 N.E.2d 203 (Ill. 1980) (determining the common law meaning of murder and that it had not included the killing of a fetus (referring to 3 EDWARD COKE, INSTITUTES *50; 1 WILLIAM BLACKSTONE, COMMENTARIES *129-30; 1 MATTHEW HALE, PLEAS OF THE CROWN 433 (London, T. Payne 1800))); State v. Soto, 378 N.W.2d 625, 628, 630 (Minn. 1985) (common law insisted that victim of homicide be a person "born alive" and not a fetus (citing WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., HANDBOOK ON CRIMINAL LAW 530-32 (1972); 2 CHARLES E. TORCIA, WHARTON'S CRIMINAL LAW § 114, at 95-96 (1979); 40 C.J.S. *Homicide* § 2(b) (1944)) (accused had no notice vehicular homicide statute encompassed death of fetus)).

799. 378 U.S. 347 (1964).

800. *Bouie*, 378 U.S. at 348.

801. *Id.*

802. *Id.*

803. *Id.*

804. *Id.* at 349 (citing S.C. CODE ANN. § 16-386 (Law. Co-op. 1960)). The other arrests either did not result in convictions or resulted in convictions reversed on appeal. *Id.* at 348-49.

805. *Id.* (quoting S.C. CODE ANN. § 16-386 (Law. Co-op. 1960)).

due process vagueness challenge was advanced on the ground that the two students lacked notice.[806] These petitioners emphasized that they received no "notice . . . prohibiting such entry" either before they entered the drug store or before they sat in the restaurant booth.[807] However, the South Carolina Supreme Court ruled the statute not only covered the act of entry after notice not to enter was given, but also the act of *remaining* on the premises following notice to leave.[808] In its review, the United States Supreme Court stated that the two students had *not* been provided with notice that the statute encompassed *remaining* on another's property after being asked to leave.[809] The Court noted that the South Carolina law—which predated the South Carolina Supreme Court's interpretation of the trespass statute, holding that *remaining* on another's premises *was* prohibited—provided "petitioners no warning whatever that this criminal statute would be [so] construed."[810] Indeed, the "clear language and consistent judicial interpretation to the contrary, . . . incorporating a doctrine found only in civil trespass cases" belied the government's contention that fair notice had been provided in advance.[811] In support of its conclusion that these petitioners *at best* had notice that their conduct amounted to *civil* trespass, but certainly *not* criminal trespass, the Court not only referred Clark and Marshall's *On the Law of Crimes*[812] in the text of their opinion, but also cited to Wharton's *Criminal Law and Procedure* and Hochheimer's *Law of Crimes and Criminal Procedure*.[813] The Court concluded these petitioners could not be held to have notice of the South Carolina Supreme Court's *post-conviction* "unforeseeable and retroactive judicial expansion of narrow and precise statutory language" reflected in the criminal trespass statute and, as such, the decisions of the lower courts were reversed.[814]

K. Literature/Periodicals

Courts will even look to literature in order to determine the meaning of a particular phrase or a word in a statute.[815] An opinion illustrating the

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806. *Id.* at 349-50.

807. *Id.* at 350.

808. *Id.*

809. *Id.* at 360-63.

810. *Id.* at 359.

811. *Id.*

812. *Id.* at 358 (citing WILLIAM L. CLARK & WILLIAM L. MARSHALL, A TREATISE ON THE LAW OF CRIMES 607 (5th ed. 1952)).

813. *Id.* at n.6 (citing 2 RONALD A. ANDERSON, WHARTON'S CRIMINAL LAW AND PROCEDURE § 868, at 735 (1957); LEWIS HOCHHEIMER, THE LAW OF CRIMES AND CRIMINAL PROCEDURE, INCLUDING FORMS AND PRECEDENTS §§ 360-63 (2d ed. 1904)).

814. *Id.* at 352, 355, 363.

815. *See, e.g.*, Papachristou v. City of Jacksonville, 405 U.S. 156, 164 (1972) (referring to Walt Whitman, *Song of the Open Road, available at* http://www.bartleby.com/142/82.html (last visited Feb. 27, 2003); Vachel Lindsay, *I want to Go Wandering, available at* http://dlib.-stanford.edu:6520/text/ampo.html (last visited Apr. 19, 2003); HENRY DAVID THOREAU,

use of literature for interpretative guidance is *Muscarello v. United States*,[816] a decision that was discussed in several earlier sections.[817] In this case, the United States Supreme Court consolidated two cases[818] in order to address the question of whether the words "carries a firearm" as it appears in the federal criminal code is limited to the carrying of firearms on the person.[819]

In the first of these two cases, defendant Muscarello was arrested for selling marijuana, which he had carried in his truck to the location of the sale.[820] When police officers searched his truck, they found a handgun locked in the glove compartment.[821] The defendant admitted during plea provisions that he carried a gun for protection.[822] However, later the defendant retracted his statement and insisted that, in any event, having a handgun in the truck's glove compartment did not constitute the "carrying" of a firearm within the statutory meaning of the word "carries."[823] In the second case, defendants Cleveland and Gray-Santana placed several guns in a bag and then put the bag in the trunk of their car.[824] They then drove the car to a potential drug-selling location where they hoped to steal drugs from drug dealers.[825] At the scene, federal agents apprehended the two individuals and searched their car.[826] The agents discovered the guns and arrested the defendants.[827] All of these defendants were convicted of trafficking in illicit drugs while carrying a firearm contrary to federal law, whereupon they appealed.[828]

Two different United States Courts of Appeals concluded that the defendants were guilty of violating the federal criminal code because they had "'carrie[d]' guns during and in relation to a drug trafficking

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EXCURSIONS 251-53 (Boston, Houghton Mifflin, 1893), while ruling municipal vagrancy ordinance vague); Commonwealth v. Sexton, 680 N.E.2d 23, 27 (Mass. 1997) (quoting State v. Reed, 790 P.2d 551, 552 (Or. Ct. App. 1990) (quoting CERVANTES, *supra* note 612), while determining concrete pavement could constitute a "dangerous weapon" for purposes of assault and battery with a dangerous weapon and proscribed by state law).

816. 524 U.S. 125 (1998).

817. *See supra* notes 452-61, 482-99 and accompanying text.

818. United States v. Muscarello, 106 F.3d 636 (5th Cir. 1997); United States v. Cleveland, 106 F.3d 1056 (1st Cir. 1997).

819. *Muscarello*, 524 U.S. at 126-27. The provision of the federal criminal code, which defendants challenged, imposes a five year mandatory incarceration term upon an individual who "uses or carries a firearm" "during and in relation to" a "drug trafficking crime." 18 U.S.C. § 924(c)(1) (2000).

820. *Muscarello*, 524 U.S. at 127.

821. *Id.*

822. *Id.*

823. *Id.*

824. *Id.*

825. *Id.*

826. *Id.*

827. *Id.*

828. *Id.*

offense."[829] The United States Supreme Court granted certiorari to determine "whether the fact that the guns were found in the locked glove compartment, or the trunk, of a car" constituted "carrying" a firearm under the federal statute.[830]

Among other considerations in its analysis, the Court looked to the use of the word "carry" in literature to determine its meaning under the statute.[831] The Court stated:

> The greatest of writers have used the word [to include conveyance in a vehicle]. *See, e.g.*, the King James Bible, 2 Kings 9:28 ("[H]is servants carried him in a chariot to Jerusalem"); *id.*, Isaiah 30:6 ("[T]hey will carry their riches upon the shoulders of young asses"). Robinson Crusoe says "[w]ith my boat, I carry'd away every Thing." D. Defoe, Robinson Crusoe 174 (J. Crowely ed. 1972). And the owners of Queequeg's ship, Melville writes, "had lent him a [wheelbarrow], in which to carry his heavy chest to his boarding-house." H. Melville, Moby Dick 43 (U. Chicago 1952). This Court, too, has spoken [in our written opinions] of the "carrying" of drugs in a car or in its "trunk."[832]

The Court further acknowledged:

> These examples do not speak directly about carrying guns. But there is nothing linguistically special about the fact that weapons, rather than drugs, are being carried. Robinson Crusoe might have carried a gun in his boat; Queequeg might have borrowed a wheelbarrow in which to carry not a chest, but a harpoon. And, to make certain that there is no special ordinary English restriction (unmentioned in dictionaries) upon the use of "carry" in respect to guns, we have surveyed modern press usage, albeit crudely, by searching computerized newspaper databases—both the New York Times data base in Lexis/Nexis, and the "US News" data base in Westlaw. We looked for sentences in which the words "carry," "vehicle," and "weapon" (or variations thereof) all appear. We found thousands of such sentences, and random sampling suggests that many, perhaps more than one-third, are sentences used to convey the meaning at issue here, *i.e.*, the carrying of guns in a car.[833]

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829. *Id.*

830. *Id.* The Court acknowledged that there were two different meanings of the word "carry" that might be applicable in this case. *Id.* at 128. One meaning used the word as to "'carry' firearms in a wagon, car, truck, or other vehicle that one accompanies." *Id.* The second way the word "carry" can be used is in a specialized way, for example, "'bearing' or (in slang) 'packing' (as in 'packing a gun')." *Id.* The Court declared that the first meaning was the primary meaning of the word "carry" and concluded that Congress intended for the statute to use that meaning. *Id.*

831. *Id.* at 128-29.

832. *Id.* at 129 (citing California v. Acevedo, 500 U.S. 565, 572-73 (1991); Florida v. Jimeno, 500 U.S. 248, 249 (1991)).

833. *Id.*

The Court then turned to ordinary newspaper usage:

> The New York Times, for example, writes about "an ex-con" who "arrives home driving a stolen car and carrying a load of handguns," and an "official peace officer who carries a shotgun in his boat[.]" The Boston Globe refers to the arrest of a professional baseball player "for carrying a semiloaded automatic weapon in his car." The Colorado Springs Gazette Telegraph speaks of one "Russell" who "carries a gun hidden in his car." The Arkansas Gazette refers to a "house" that was "searched" in an effort to find "items that could be carried in a car, such as . . . guns." The San Diego Union-Tribune asks, "What, do they carry guns aboard these boats now?"[834]

The Court conceded that the word 'carry' had several meanings but determined that the uses of the word 'carry' in the aforementioned literary examples were the *primary* uses of the word "carry."[835] The Court concluded that "the relevant linguistic facts are that the word 'carry' in its ordinary sense includes carrying in a car and that the word, used in its ordinary sense, keeps the same meaning whether one carries a gun, a suitcase, or a banana."[836]

Another example of a court turning to literature to emphasize or determine the meaning of a statutory word or phrase is *State v. Reed*,[837] decided by the Oregon Court of Appeals. In this case, the defendant hit his girlfriend using his fists, the force of which knocked her down onto the sidewalk.[838] The defendant then repeatedly hit her head against the concrete.[839] The defendant was thereafter indicted for "unlawfully and knowingly [causing] physical injury to [the victim] by means of a dangerous weapon, to wit: concrete, by banging her head repeatedly against the concrete."[840] After the trial court found the defendant guilty, the defendant appealed.[841] The defendant argued on appeal that the concrete sidewalk, a stationary object, could not be considered a "dangerous weapon."[842] The Oregon Court of Appeals noted that the Oregon weapons statute contained a definition of "dangerous weapon" that used lan-

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834. *Id.* at 129-30 (internal citations omitted) (noting that THE NEW YORK TIMES MANUAL OF STYLE AND USAGE restricts "[t]imes journalists and editors to the use of proper English"); *see Foreword to* THE NEW YORK TIMES MANUAL OF STYLE AND USAGE, A DESK BOOK OF GUIDELINES FOR WRITERS AND EDITORS (L. Jordan rev. ed., 1976).

835. *Muscarello*, 524 U.S. at 130-31.

836. *Id.* at 131.

837. 790 P.2d 551 (Or. Ct. App. 1990).

838. *Reed*, 790 P.2d at 551.

839. *Id.*

840. *Id.*

841. *Id.*

842. *Id.* However, the defendant conceded that if he had taken a piece of concrete in his hand and used that piece of concrete to hit his girlfriend on her head, then the concrete would be considered a dangerous weapon. *Id.*

guage referring to *any* object which had the capacity to kill or cause serious bodily injury.[843] The court reasoned that "no matter how harmless [the concrete sidewalk] may appear when used for its customary purposes, [it] becomes a dangerous weapon when used in a manner that renders it capable of causing serious physical injury."[844] In this connection, the court considered language from Cervantes' famous literary work Don Quixote—"[w]hether the pitcher hits the stone or the stone hits the pitcher, it will be bad for the pitcher."[845] Based on this reasoning, namely, that the key issue was whether the object in question had the capacity to hurt another human being, the court upheld the trial court's decision.[846]

VI. OTHER RULES OF THUMB

Frequently, a court will uphold a statute against a vagueness challenge based not on the fact that the court can refer to a particular source to hold that the defendant had adequate notice, but more on the fact that the statute survives scrutiny when examined under the lens of what may be described as a judicial rule of thumb. These rules of thumb include considerations such as whether the statute proscribes an activity which is *malum in se* or *malum prohibitum*,[847] whether the statute carries the potential of intruding upon a constitutional right,[848] whether the defendant enjoyed a more circumspect alternative to engaging in conduct that treaded near the borderline of a criminal law,[849] and whether the statute somehow punished a person because of the person's status rather than because of the person's conduct.[850]

A. Malum Prohibitum/Malum in Se*?*

Occasionally, courts will refer to the distinction between "*malum in se*" offenses and "*malum prohibitum*" offenses in assessing whether a statute is vague.[851] A criminal act is considered *malum in se* where the underlying conduct is inherently wrong by its very nature, based on common morality and natural law principles.[852] A *malum prohibitum* stricture is "an act not inherently immoral but which becomes an offense

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843. *Id.* (quoting OR. REV. STAT. § 161.015(1) (1989), which defines a *dangerous weapon* as "any instrument, article or substance which under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing death or serious physical injury").

844. *Id.* at 551-52.

845. *Id.* at 552 (quoting CERVANTES, *supra* note 612).

846. *Id.*

847. *See infra* notes 851-70 and accompanying text.

848. *See infra* notes 871-92 and accompanying text.

849. *See infra* notes 892-919 and accompanying text.

850. *See infra* notes 920-47 and accompanying text.

851. *See, e.g.*, United States v. Donahue, 948 F.2d 438, 441 (8th Cir. 1991), *cert. denied*, 503 U.S. 976 (1992).

852. *See* M. CHERIF BASSIOUNI, SUBSTANTIVE CRIMINAL LAW 270 (1978).

because its commission is expressly forbidden by positive law."[853] This distinction is useful in the arena of vagueness inquiries in that if a law is *malum in se* or, in plain language, a law that proscribes as illegal conduct any right-minded individual should realize is wrong, the law need not be as precise in its terms as would be the case where the law is *malum prohibitum* in nature. A simple illustration might be in order. All must agree murder is clearly wrong. As such, a murder statute can be cast in rather general terms: the intentional, knowing, or grossly reckless unjustified taking of the life of another human being. However, there is nothing intrinsically wrong with being in possession of an item that turns out to be drug paraphernalia, such as a small pipe or syringe that might be useable to smoke or inject a controlled substance. It is the *association* with illicit drug use that causes a legislative body to criminalize the unauthorized possession of the device. However, inasmuch as there is little, if any, *inherent* wrongfulness involved in regards to possessing the device itself, it is less likely the average citizen realizes possession of such a device is wrong and, as such, more precision will be required in defining exactly what devices are allowed and what ones are forbidden.

In *United States v. Donahue*,[854] the United States Court of Appeals for the Eighth Circuit looked to this rule of thumb, which tolerates less precise definitional language where the underlying conduct is *malum in se*.[855] Here, a defendant had been convicted of "bank robbery" in violation of federal law.[856] The defendant argued on appeal that the bank robbery statute, which read "[w]hoever, by force and violence, or by intimidation, takes . . . from the person or presence of another . . . any . . . money . . . belonging to . . . any bank [commits this offense]," was vague because it did not require proof of intent.[857] The Eighth Circuit quickly responded, stating that "[o]ne does not have to be a rocket scientist to know that bank robbery is a crime; and the statute merely makes *malum prohibitum* (and punishable in federal court) that which already is *malum in se*."[858] Here, because the underlying conduct was *malum in se*, the Eighth Circuit was able to dispose of the defendant's vagueness claim in a single sentence.[859]

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853. People v. Wilkinson, 674 N.E.2d 794, 798 (Ill. App. Ct. 1996) (quoting BLACK'S LAW DICTIONARY 865 (5th ed. 1979)). Indictments alleging a violation of Illinois "official misconduct" prohibition, being *malum prohibitum*, must be cast in precise terms so as to place the accused on notice before trial as to exactly what conduct amounted to a violation. *Id.* at 797 (citing People v. Kleffman, 412 N.E.2d 1057, 1061 (Ill. App. Ct. 1980)).

854. 948 F.2d 438 (8th Cir. 1991).

855. *Donahue*, 948 F.2d at 441.

856. *Id.* at 440 (citing 18 U.S.C. § 2113(a), (d) (1988)).

857. *Id.* at 441 (quoting 18 U.S.C. § 2113(a) (1988)).

858. *Id.*

859. *See id.*

Meanwhile, *People v. Heller*,[860] a New York Court of Appeals decision, illustrates the greater degree of clarity a reviewing court demands when it encounters a vagueness claim lodged against a *malum prohibitum* measure. In that case, the defendants were convicted of violating New York's "obscenity" law.[861] The New York law defined "obscene" as any "material or performance" which (1) "considered as a whole, its predominant appeal is to prurient, shameful or morbid interest in nudity, sex, excretion, sadism or masochism," (2) "goes substantially beyond customary limits of candor in describing or presenting such matters," and (3) lacks "redeeming social value."[862] The defendants claimed a motion picture, *Blue Movie*, and a magazine, *Screw*, were not obscene as the State had alleged and, in any event, that the New York obscenity law was vague.[863] The New York Court of Appeals disagreed.[864] The court stated that the obscenity statute "sufficiently *describes* the conduct sought to be prohibited."[865] The court added:

> It takes no dictionary reference to understand what the words 'nudity', 'sex', 'excretion', 'sadism' or 'masochism' mean. The last three terms, which are descriptive of certain kinds of conduct whether portrayed live, printed or photographically, can be considered Malum in se in terms of Commercial exploitation. It is ludicrous and preposterous to suppose that a person dealing in such material would not understand the prohibitions here. The terms 'nudity' and 'sex' are only Malum prohibitum, of course, since each, to varying extents, could be commercially exploited for valid artistic, scientific, or literary ends. But surely, applying the sense of [the obscenity statute] as a whole, *there can be no doubt as to the narrow area sought to be prohibited.* When sex and nudity, and other sorts of prohibited conduct for that matter, are exploited substantially beyond customary limits of candor and would, as the average man views it, be the predominant element in the material so as to appeal, again predominantly, to lascivious cravings, then there can be no doubt as to what is prohibited. What we are talking about is hard-core pornography.[866]

Obviously, the fact that the legislature not only carefully defined "obscenity" consistent with language previously endorsed by the United States Supreme Court[867] but also defined other terms including "material" and "performance"[868] removed the statute from the reach of the

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860. 307 N.E.2d 805 (N.Y. 1973), *cert. denied*, 418 U.S. 944 (1974).

861. *Heller*, 307 N.E.2d at 807-08 (citing N.Y. PENAL LAW §§ 235.00, 235.05 (McKinney 1967)).

862. *Id.* at 811 (quoting N.Y. PENAL LAW § 235.00(1) (McKinney 1967)).

863. *Id.* at 807, 812-13.

864. *Id.* at 812-13, 815.

865. *Id.* at 812 (emphasis added).

866. *Id.* at 812-13 (emphasis added).

867. *Id.* at 808-11 (discussing at length Miller v. California, 413 U.S. 15 (1973)).

868. *Id.* at 811 (citing N.Y. PENAL LAW § 235.00(2)-(3) (McKinney 1967)).

void-for-vagueness doctrine.[869] The court concluded that "our obscenity statute is *sufficiently specific*" to withstand constitutional challenge.[870]

Donahue and *Heller* offer additional instruction on analyzing a vagueness claim. Thus, rule of thumb number one: if a penal measure is in the nature of *malum in se*, courts tend to tolerate more general language than in the case where the law is of the *malum prohibitum* category, where more detailed, narrow language is likely to be expected.

B. Constitutional Rights Involved?

Although this point was made, or alluded to, in several earlier sections, there is no question but that courts are more demanding of specificity of language in connection with laws that may touch on constitutional rights compared with statutes that carry no such possibility.[871] Indeed, the United States Supreme Court has stated, "[P]erhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights. If, for example, the law interferes with the right of free speech or of association, a more stringent vagueness test should apply."[872] Additionally, the Court has noted that "precision must be the touchstone of legislation . . . affecting basic freedoms."[873]

In *Cox v. Louisiana*,[874] the United States Supreme Court considered charges brought against a defendant who had led a group of students who wanted to protest segregation, discrimination, and the arrests of fellow students. This group had assembled at the Louisiana State Capitol and

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869. *Id.* at 814.

870. *Id.* (emphasis added).

871. Colautti v. Franklin, 439 U.S. 379, 390-91 (1979) (Insistence on "fair notice" and avoidance of "arbitrary and erratic" enforcement "appears to be especially true where the uncertainty induced by the statute threatens to inhibit the exercise of constitutionally protected rights." Here, certain provisions restricting availability of abortions found to be vague. (citations omitted)); Smith v. Goguen, 415 U.S. 566, 573 (1974) ("Where a statute's literal scope, unaided by a narrowing state court interpretation, is capable of reaching expression sheltered by the First Amendment, the [void-for-vagueness] doctrine demands a greater degree of specificity than in other contexts." Here, flag misuse statute vague.); NAACP v. Button, 371 U.S. 415, 432 (1963) ("Standards of permissible statutory vagueness are strict in the area of free expression." Here, state proscription against advising prospective litigants to seek assistance of particular attorneys violates First Amendment.); *see also* Anthony Amsterdam, Note, *The Void for Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 75 (1960) (noting "the doctrine of unconstitutional indefiniteness has been used by the Supreme Court almost invariably for the creation of an insulating buffer zone of added protection at the peripheries of several of the Bill of Rights freedoms").

872. Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498-99 (1982) (citing as examples *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972) (vagrancy statute violates due process); *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972) (anti-noise ordinance challenged on First Amendment grounds not vague although the claim of unconstitutionality "question is [a] close" one)).

873. Aptheker v. Secretary of State, 378 U.S. 500, 514 (1964) (citing *Button*, 371 U.S. at 438).

874. 379 U.S. 536 (1965).

marched to a courthouse where "they sang, prayed and listened" to the defendant's speech.[875] For his efforts, the defendant was arrested on several charges including "disturbing the peace" and "obstructing public passages."[876] Following his conviction, the United States Supreme Court found both charges were contrary to the defendant's First Amendment rights of free speech and assembly.[877] When the Court addressed the "disturbing the peace" charge, it not only saw First Amendment problems but also vague legislation.[878] The Court noted this offense contained two elements: "(1) congregating with others 'with intent to provoke a breach of the peace, or under circumstances such that a breach of the peace may be occasioned,' and (2) a refusal to move on after having been ordered to do so by a law enforcement officer."[879] Acknowledging that the second element was "narrow and specific," the Court pointed out that the Louisiana Supreme Court had interpreted the "breach of the peace" language as meaning "to agitate, to arouse from a state of repose, to molest, to interrupt, to hinder, to disquiet."[880] This statute, said the Court, "as authoritatively interpreted by the Louisiana Supreme Court, is unconstitutionally vague in its overly broad scope."[881] The Court explained:

> Maintenance of the opportunity for free political discussion is a basic tenet of our constitutional democracy. "A statute which upon its face, and as authoritatively construed, is so vague and indefinite as to permit the punishment of the fair use of this opportunity is repugnant to the guaranty of liberty contained in the Fourteenth Amendment."[882]

Thus, the fact that someone might be disturbed or "agitated" by the defendant's unpopular speech was clearly not a sufficient warrant for imposition of the bite of the criminal law.[883]

Crimes which carry no potential for restriction of basic freedoms are less likely to encounter vagueness problems due to lack of narrow and specific language.[884] *United States v. National Dairy Products Corp.*[885] is

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875. *Cox*, 379 U.S. at 536.

876. *Id.* at 544-45, 553 (citing LA. REV. STAT. ANN. § 14:103.1 (West 1962) (disturbing the peace); LA. REV. STAT. ANN. § 14:100.1 (West 1962) (obstructing public passages)).

877. *Id.* at 552, 558.

878. *Id.* at 551.

879. *Id.*

880. *Id.* (quoting State v. Cox, 156 So. 2d 448, 455 (1963)).

881. *Id.*

882. *Id.* at 552 (quoting Stromberg v. California, 283 U.S. 359, 369 (1931)).

883. *Id.* at 551-52.

884. *See, e.g.*, *Vill. of Hoffman* Estates, 455 U.S. at 495-96 (municipal drug paraphernalia ordinance "does not restrict speech as such, but simply regulates the commercial marketing of items that the labels reveal may be used for an illicit purpose. The scope of the ordinance therefore does not embrace commercial speech"); *see also* Jonathan Weinberg, *Vagueness and Indecency*, 3 VILL. SPORTS & ENT. L. J. 221, 258 n.177 (1996) (The "due process vagueness doctrine is relatively forgiving when no First Amendment rights are at stake.").

885. 372 U.S. 29 (1963).

an example of this point. The defendants were charged with violating a provision of the Robinson-Patman Act, which made it a crime to sell goods at "unreasonably low prices for the purpose of destroying competition or eliminating a competitor."[886] The defendants claimed that the language "unreasonably low prices" was unconstitutionally vague.[887] The federal district court granted the defendants' motion to dismiss on this ground, but the United States Supreme Court saw otherwise.[888] The Court began its analysis with the familiar refrain that a "strong presumptive validity . . . attaches to an Act of Congress."[889] Here, the law merely restricted "sales made below cost without [a] legitimate commercial objective and with specific intent to destroy competition."[890] The Court added:

> In this connection we also note that the approach to "vagueness" governing a case like this is different from that followed in cases arising under the First Amendment. There we are concerned with the vagueness of the statute "on its face" because such vagueness may in itself deter constitutionally protected and socially desirable conduct. No such factor is present here where the statute is directed only at conduct designed to destroy competition, activity which is neither constitutionally protected nor socially desirable.[891]

Thus, the vagueness claim failed.[892]

The cases in this section illustrate rule of thumb number two: where an offense carries the possibility of inhibiting constitutional freedoms, precision in language is the watchword; where the stricture in question has no such potential, more general language is tolerated.

C. Circumspect Alternative Available to the Defendant?

Aside from caselaw where precision of language is a *must* because of the possibility that the statute may be stepping on basic constitutional rights, there appear questions in judicial opinions which essentially ask whether there existed a *more circumspect alternative* available to the defendant beyond engaging in questionable conduct which formed the basis for the criminal prosecution. Justice Frankfurter, in dissent in *Winters v. New York*,[893] insisted, "it is not violative of due process of law for a legislature in framing its criminal law to cast upon the public the *duty*

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886. *Nat'l Dairy Prods. Corp.*, 372 U.S. at 29 (quoting 18 U.S.C. § 13a (1958)).
887. *Id.* at 31.
888. *Id.* at 30.
889. *Id.* at 32.
890. *Id.* at 37.
891. *Id.* at 36 (citations omitted).
892. *Id.*
893. 333 U.S. 507 (1948).

of care and even of caution, provided that there is sufficient warning to one bent on obedience that he comes *near* the proscribed area."[894]

In *Nash v. United States*,[895] the United States Supreme Court reviewed two convictions arising out of violations of the federal Sherman Antitrust Act, namely, conspiracy in restraint of trade and conspiracy to monopolize trade.[896] Defendants were involved in marketing turpentine in a manner allegedly designed to destroy competition.[897] The antitrust law had been previously interpreted as prohibiting "only such contracts and combinations . . . , by reason of intent or the inherent nature of the contemplated acts, [that] prejudice the public interests by unduly restricting competition or unduly obstructing the course of trade."[898] The defendants argued "that the crime thus defined by the statute contains in its definition an element of degree as to which estimates may differ, with the result that a man might find himself in prison because his honest judgment"[899] was deemed wrong "by a jury of less competent men."[900] However, the Court disagreed.[901] Justice Holmes, writing for the majority, in his oft-quoted passage, said, "[T]he law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree."[902] He then declared, "The criterion in such cases is to examine whether common social duty would, under the circumstances, have suggested a *more circumspect conduct*."[903] In other words, Justice Holmes was insisting that where defendants were engaging in a variety of tactics to manipulate and control the marketing of this product, perhaps consideration should have been given to proceeding a bit more cautiously by perhaps making inquiry of the officialdom to assess the propriety of their business schemes, rather than push their behavior to the edge of what the law permits thereby risking falling off the edge into the realm of criminal prosecution.[904]

In *Boyce v. United States*,[905] the defendant was charged with violating Interstate Commerce Commission regulations that required "[d]rivers of motor vehicles transporting any explosive, inflammable liquid, inflammable compressed gas, or poisonous gas [to] avoid, so far as practicable, and, where feasible, by prearrangement of routes, driving into or

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894. *Winters*, 333 U.S. at 539 (Frankfurter, J., dissenting) (emphasis added).
895. 229 U.S. 373 (1913).
896. *Nash*, 229 U.S. at 374 (citing "act of July 2, 1890, chap. 647, 26 Stat. at L. 209, U.S. Comp Stat. 1901, p. 3200").
897. *Id.* at 375-76.
898. *Id.* at 376 (citing United States v. American Tobacco Co., 221 U.S. 106, 179 (1911)).
899. *Id.*
900. *Id.*
901. *Id.* at 377-80.
902. *Id.* at 377.
903. *Id.* (emphasis added).
904. *Id.* at 377-80.
905. 342 U.S. 337 (1952).

through congested thoroughfares, places where crowds are assembled, street car tracks, tunnels, viaducts, and dangerous crossings."[906] The defendant successfully moved in the federal district court to dismiss the indictments after arguing the "so far as practicable and where feasible" terminology was unconstitutionally vague.[907] However, the United States Court of Appeals reversed the order to dismiss and the United States Supreme Court affirmed the appellate ruling.[908] The Court noted:

> A criminal statute must be sufficiently definite to give notice of the required conduct to one who would avoid its penalties, and to guide the judge in its application and the lawyer in defending one charged with its violation. But few words possess the precision of mathematical symbols, most statutes must deal with untold and unforeseen variations in factual situations, and the practical necessities of discharging the business of government inevitably limit the specificity with which legislators can spell out prohibitions. Consequently, no more than a reasonable degree of certainty can be demanded. *Nor is it unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line.*[909]

Thus, the *Boyce* Court followed the teachings of Justice Holmes and ruled that the defendant's void-for-vagueness claim had no basis.

Finally, in *Columbia Natural Resources, Inc. v. Tatum*,[910] the United States Court of Appeals for the Sixth Circuit denoted similar reasoning in a civil RICO case.[911] Here, oil and gas lessees brought an action against oil drillers alleging that the drillers had engaged in "claim-jumping schemes," which amounted to federal wire fraud, mail fraud, and Travel Act violations.[912] The plaintiffs' civil RICO claims were predicated on these alleged federal criminal violations that were said to constitute a "pattern of racketeering activity" violative of RICO.[913] However, the district court dismissed the plaintiffs' claims on the theory that what constitutes a "pattern of racketeering activity" under federal RICO was vague.[914] The Sixth Circuit saw the matter differently; pointing out that simply focusing on the language at issue without looking at "the rest of the statute" was inappropriate.[915] The court noted that federal RICO explicitly states that a "pattern" arises where a defendant has engaged in

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906. *Boyce*, 342 U.S. at 338-39 (citing 18 U.S.C. § 835 (1946)).
907. *Id.* at 340.
908. *Id.*
909. *Id.* (emphasis added).
910. 58 F.3d 1101 (6th Cir. 1995).
911. *Columbia Natural Res.*, 58 F.3d at 1101.
912. *Id.* at 1103.
913. *Id.* (citing 18 U.S.C. § 1962(c) (1994)).
914. *Id.* at 1104.
915. *Id.* at 1106.

two predicate offenses within the last 10 years and that the offenses that would qualify as predicate offenses were specified within the RICO statute.[916] The court, in rather stinging remarks, proceeded to dismantle the defendants' claim of vagueness.[917]

> [T]here is a clear standard of conduct initially proscribed by the pattern requirement of RICO. Here the statute clearly has a core; to avoid any possibility of falling under RICO's admittedly broad umbrella, one need only avoid committing an enumerated crime twice within ten years. If one can take the time to avoid committing mail or wire fraud, or extortion, or murder, or any of the other enumerated predicate offenses, all of which are federal or state criminal offenses in their own right, than one can sleep safe in the knowledge that he will not be found to have violated RICO.
>
> The issue, bluntly and simply framed, is whether a person of ordinary intelligence would know that committing dozens if not hundreds of acts of wire and mail fraud, over the course of almost a decade against the same victim, might constitute a pattern of racketeering activity. Since, by its terms it only takes a minimum of two acts, it is simply implausible for a party to claim that it was not aware that committing numerous predicate acts would expose it to potential RICO liability. The statute need not be exact just as price discrimination statutes and antitrust statutes are not exact. *The statute must simply put the party on notice that it is entering a potentially forbidden zone.*[918]

Thus, the Sixth Circuit in effect said the defendants' assertion that they were essentially clueless about what might constitute "a pattern of racketeering activity" was preposterous. They had not inadvertently slipped over the edge; rather, they had deliberately crossed it on numerous occasions.

Hence, rule of thumb number three: if a person is determined to walk the edge of the divide between criminal behavior and legitimate activity, it is fair to ask as to whether this individual's decision to place himself precariously close to the edge makes him a deserving candidate for the bite of the criminal law. Such a person's claim of lack of notice may be countered by a judicial response that questions that person's judgment in choosing to put himself at the edge in the first instance.

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916. *Id.* at 1106-08.
917. *Id.* at 1108-09.
918. *Id.* (emphasis added).

D. Status Criminality?

Criminal statutes that punish a person because of the personal condition[919] or status[920] of an individual rather than for one's conduct[921] are patently unconstitutional. In the seminal case addressing status criminality, *Robinson v. California*,[922] the United States Supreme Court ruled unconstitutional a California statute which punished "being addicted" to narcotics.[923] The Court ruled that punishing a person for being an addict was akin to punishing "a person for being mentally ill, suffering leprosy or being afflicted with venereal disease"—matters over which an individual has little or no control.[924]

In *Lanzetta v. New Jersey*,[925] discussed earlier,[926] a statute was ruled unconstitutionally vague contrary to due process in circumstances where the stricture in question could be described as essentially penalizing little more than one's status.[927] In this pre-*Robinson* ruling, the United States Supreme Court examined a state law that made it an offense to be a "gangster."[928] Specifically, the statute provided that a person "not engaged in any lawful occupation" who was "known to be a member of a gang" and had either been convicted of (1) being a disorderly person three or more times, or (2) any crime anywhere in the United States, "is declared to be a gangster."[929] In its ruling, the Court found the meaning of the words "gang" and "gangster" to be vague.[930] In that connection, the Court observed that "[t]he challenged provision condemns no act or omission."[931] Obviously, then, this measure's criminalization, at least in part, of a person's status contributed to the Court's finding that the statute was void for vagueness.

In *Papachristou v. City of Jacksonville*,[932] also discussed earlier,[933] the United States Supreme Court's ruling finding a municipal "vagrancy"

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919. Robinson v. California, 370 U.S. 660, 661 n.1, 666 (1962) (ruling that a statute prohibiting being addicted to narcotics constitutes cruel and unusual punishment violative of the Eighth Amendment).

920. Farber v. Rochford, 407 F. Supp 529, 530, 533 (N.D. Ill. 1975) (holding an ordinance prohibiting "known prostitute's" from loitering unconstitutional).

921. *See* Powell v. Texas, 392 U.S. 514, 531-37 (1968) (distinguishing *Robinson*, 370 U.S. 660, in a case where chronic alcoholic convicted of public drunkenness, a matter involving individual *behavior* and not merely punishing status).

922. *Robinson*, 370 U.S. at 660.

923. *Id.* at 661 (quoting CAL. HEALTH & SAFETY CODE § 11721 (West 1955)).

924. *Id.* at 666.

925. 306 U.S. 451 (1939).

926. *See supra* notes 550-59 and accompanying text.

927. *Lanzetta*, 306 U.S. at 458.

928. *Id.* at 452.

929. *Id.* (quoting N.J. REV. STAT. § 2:136-5 (1937)).

930. *Id.* at 456-58.

931. *Id.* at 458.

932. 405 U.S. 156 (1972).

ordinance unconstitutionally vague likewise reflected status criminality overtones.[934] The statute in question explicitly stated that the likes of "rogues and vagabonds," "common gamblers," "common drunkards," "habitual loafers," and those "habitually living upon the earnings of their wives or minor children" were to be "deemed vagrants."[935] In the opinion of the Court, "[t]hose generally implicated by the imprecise terms of the ordinance -- poor people, nonconformists, dissenters, idlers -- may be required to comport themselves according to the life style deemed appropriate by the Jacksonville police and the courts."[936] This, said the Court, was constitutionally intolerable.[937]

In a case involving a Chicago municipal ordinance, *Farber v. Rochford*,[938] the United States District Court for the Northern District of Illinois offered a clear illustration of how due process protections contained in the Fourteenth Amendment could be used to successfully attack the constitutionality of a stricture that made it unlawful for a person who was "known to be a narcotics addict" or "known to be a prostitute" or previously convicted of prostitution to, among other things, either "congregate" with others of the same class in a public place or "loaf or loiter" in or about premises where alcoholic beverages were sold.[939] The court struck down the statute as being unconstitutional in the face of due process considerations on the theory that a person's "reputation" was the basis for being subjected to criminal prosecution, rather than the person's acts.[940] Specifically, the court stated this statute "and other ordinances of its ilk . . . suffer from the basic infirmity that they look towards the status of the suspect rather than his conduct as the determinative factor of guilt."[941] In response to the municipality's claim that the statute was actually directed at the act of "congregating" or "loitering by these persons," the court said, "There is no *actus reus* at all required by the ordinance, only [innocent] conduct which, while occasionally an 'adjunct' to illicit behavior, is of itself perfectly defensible."[942] Additionally, that portion of the ordinance that outlawed known narcotics addicts or known prostitutes from *congregating* was found to be contrary to the constitutional right to assemble.[943] As such, the ordinance was considered unconstitutional on its face.[944]

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933. *See supra* notes 95-120 and accompanying text.
934. *Papachristou*, 405 U.S. at 171.
935. *Id.* at 157 n.1 (quoting JACKSONVILLE, FLA., ORDINANCE CODE § 26-57)).
936. *Id.* at 170.
937. *Id.* at 171.
938. 407 F. Supp. 529 (N.D. Ill. 1975).
939. *Farber*, 407 F. Supp. at 530 (quoting CHICAGO, ILL., MUNICIPAL CODE § 192-6).
940. *Id.* at 532.
941. *Id.* at 533.
942. *Id.*
943. *Id.* at 534.
944. *Id.* at 535.

Another Chicago municipal ordinance was found to unconstitutionally focus on the status of the party. *City of Chicago v. Youkhana*,[945] decided by the Illinois Appellate Court, involved the previously discussed Chicago ordinance that prohibited street gang members from loitering in a public place.[946] The appellate court found the ordinance unconstitutional because, among other reasons, it punished a person due to his or her *status* as a member of a gang, instead of for the action of illegal loitering.[947] The Illinois Supreme Court, in the consolidated decision of *City of Chicago v. Morales*,[948] agreed that the ordinance was unconstitutional although it did not reach the status issue.[949] Likewise, the United States Supreme Court found the loitering stricture—"to remain in one place with no apparent purpose"—to be unconstitutionally vague without addressing the status claim.[950]

In any event, the cases in this section reflect rule of thumb number four: where a measure is challenged on vagueness grounds, if it is largely directed at a person's status rather than the person's conduct, that may well tilt the balance in favor of a void for vagueness finding.

CONCLUSION

In this time in American history when the focal point of discussion is accounting and criminal law—Enron, Arthur Andersen Accounting, WorldCom, and even the FBI and CIA in regards to their overlooking evidence of the impending "9/11"—I thought I would bring this review of vagueness, ambiguity, and other uncertainty in American criminal law to a conclusion by momentarily examining the word accounting. My rather dated American Heritage Dictionary defines "accounting" as "[t]he bookkeeping methods involved in making a financial record of business transactions and in the preparation of statements concerning the assets, liabilities, and operating results of a business" and "account" as, among other things, "a precise list or enumeration of monetary transactions."[951] Interestingly, we now find an "accounting," (the noun) or "accounting" (the verb) means many things to many people. In my brief undergraduate excursion into the study of accounting, I was left with the notion that accounting connoted something on the order of mathematical certainty. Now my reading of the newspapers (as well as the vacillating

945. 660 N.E.2d 34 (Ill. App. Ct.), *aff'd sub nom.*, City of Chicago v. Morales, 687 N.E.2d 53 (Ill. 1995), *aff'd*, 527 U.S. 41 (1999).

946. *See supra* notes 134-159 and accompanying text.

947. *Youkhana*, 660 N.E.2d at 42.

948. *Morales*, 687 N.E.2d at 53 (Ill. 1995).

949. *Id.* at 59.

950. *Morales*, 527 U.S. at 65.

951. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (M. Morris, ed., New College ed. 1981).

worth of my stock portfolio) suggests an accounting is whatever the accountant says it is.

So too, with words and phrases in American criminal law. They mean whatever the courts say they mean.[952] Sometimes the statutory language is seen as precise and clear and, at other times, the words being examined are said to be vague, ambiguous, or uncertain. My effort in all of this is to remind those studying this subject that there are never totally clear statutory definitions—hardly any great revelation—but that these are a *smorgasbord* of general principles and guidelines, interpretative sources, and rules of thumb that appear in the caselaw from which courts can pick and choose to uphold or strike down criminal law legislation as they see fit.

Judicial review of criminal law is not an exact science and it never will be. Oftentimes the debates over the meaning of the criminal law may be contentious and, yes, sometimes the judicial outcomes unpredictable. But these exercises, in the end, demonstrate that resolutions of these matters, however imperfect, in American society can and do occur. In an uncertain world where resolution is often sought by terrorist bombings, military invasions, and brutish force, thankfully we arrive at resolution of the meaning of our law peaceably in a court of law.

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952. Almost fifteen years ago, Professor Francis Allen pointed out the demise of true adherence of the principle of legality. *See generally* Francis A. Allen, *The Erosion of Legality in American Criminal Justice: Some Latter Day Adventures of the Nulla Poena Principle*, 29 ARIZ. L. REV. 385 (1987). He attributed this to "fear of, and outrage over, [rising] crime rates;" *id.* at 400, the assignment of the criminal law to "more difficult and complex functions," such as "organized crime," "white-collar" crime and economic regulation; *id.* at 402, and a misguided legislative movement to legislate morality, *id.* at 406, 410-11. Recent events, within this country and outside, can only exacerbate the situation.