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Unconstitutional Uncertainty An Appraisal

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UNCONSTITUTIONAL UNCERTAINTY — AN APPRAISAL

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One of the more perplexing judicial doctrines is unconstitutional uncertainty, the doctrine which requires that a criminal statute be sufficiently definite to give notice of the required conduct to those who would avoid its penalties and to guide judge and jury in its application. The doctrine is important since its application may result in the unconstitutionality of a statute.

The uncertainty doctrine is inherently perplexing. A judgment that a statute does or does not provide the required definiteness is necessarily subjective. As Justice Frankfurter has pointed out " 'indefiniteness' is not a quantitative concept. It is not even a technical concept of definite components. It is itself an indefinite concept. There is no such thing as 'indefiniteness' in the abstract, by which the sufficiency of the requirement expressed by the term may be ascertained."[1]

There is no sharp line between language which is uncertain and language which is certain. What is uncertain at one time may be certain at another. What is uncertain to one justice may be certain to another. What is uncertain to one justice in the civil liberties area may be certain to the same justice in the economics sphere.[2] Small wonder that it should be suggested that decisions of invalidity are based upon "antagonism to legislative policy rather than uncertainty concerning legislative meaning."[3]

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* See Contributors' Section, Masthead, p. 326, for biographical data. The views expressed here are those of the author and should not be taken to reflect the views of the Department of Justice.

1 See Winters v. New York, 333 U.S. 507, 524 (1948) (dissenting opinion).

2 As Justice Frankfurter suggested in his dissent in Winters v. New York, supra note 1, at 525, "the demands upon legislation, and its responses, are variable and multiform. That which may appear to be too vague and even meaningless as to one subject matter may be as definite as another subject-matter of legislation permits, if the legislative power to deal with such a subject is not to be altogether denied."

3 2 Sutherland, Statutory Construction § 4920 (3d ed. 1943). Some idea of the erratic use put to the doctrine can be gathered from comparison of the cases. Compare, for example, Jordan v. De George, 341 U.S. 223 (1951), where the phrase "crime involving moral turpitude" was held sufficiently certain in a deportation statute, with Musser v. Utah, 333 U.S. 95 (1948), where a conviction for conspiracy to advocate and practice polygamy under a prohibition of "any act injurious to the public health, to public morals, or to trade or commerce . . ." was remanded for further state court action because the statute standing by itself "would seem to be warrant for a conviction for agreement to do almost any act which a judge and jury might find at the moment contrary to his or its notions of what was good for health, morals, trade, commerce, justice or order." Compare United States v. Ragen, 314 U.S. 513 (1942), where the Court upheld a conviction for wilful evasion of income tax laws by deducting more than the statutory "reasonable allowance for salaries," with United States

Small wonder also that commentaries on the doctrine are so few.[4]

No one will deny that a criminal statute should be definite enough to give notice of required conduct to those who would avoid its penalties, and to guide judge and jury in its application and the attorney defending those charged with its violation. Yet who would venture to divine what courts will or will not find uncertain. To understand and rationalize the applications of the doctrine would require a philosopher's stone, for which one may search in vain in the reported decisions. The more time spent in trying to understand the doctrine, the less sure one becomes about its content. Unfortunately no principle of law requires the terms of a judicial doctrine to be sufficiently explicit to inform attorneys when it will or will not be applied.

The pessimistic note of the previous paragraph was purposely sounded. However, there are certain broad conclusions and principles which tentatively can be drawn from an examination of the decisions of the Supreme Court in the uncertainty field. The conclusions drawn here will no doubt be subject to modification as a result of the decisions of the near future.

It has been found useful for present purposes to divide cases where the Court has discussed unconstitutional uncertainty into two groups, which for want of better terminology are called procedural due process uncertainty cases and substantive due process uncertainty cases. This terminology is seldom used by the Court itself.[5]

The procedural due process uncertainty cases are cases where the Court was concerned with statutory language so obscure that it failed to give adequate warning to those subject to its prohibitions as well as to provide proper standards for adjudication. The term is used as a short-hand expression for those uncertainty cases where the Court was occupied with problems of fair notice of a penal sanction to the prospective defendants. Thus if a statute makes it criminal to "waste" oil, a question may arise as to whether the standard "waste" is clear enough adequately to warn prospective defendants of what conduct may result in penal sanctions. Can they reasonably be expected to know what is meant by "waste"?

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v. Cohen Grocery Co., 255 U.S. 81 (1921), where a statute making it criminal to exact an "unjust or unreasonable rate or charge" for necessities was held unconstitutionally uncertain.

[4] The leading general article is Aigler, "Legislation in Vague or General Terms," 21 Mich. L. Rev. 831 (1923); see, for a selected group of other commentaries: Quarles, "Some Statutory Construction Problems and Approaches in Criminal Law," 3 Vand. L. Rev. 531 (1950); Freund, "The Use of Indefinite Terms in Statutes," 30 Yale L. J. 437 (1921); Notes, 62 Harv. L. Rev. 77 (1948), 23 Ind. L. J. 272 (1948).

[5] The Court has itself proposed a classification. "The vagueness may be from uncertainty in regard to persons within the scope of the act, . . . or in regard to the applicable tests to ascertain guilt." Winters v. New York, 333 U.S. 507, 515-516 (1948).

The substantive due process uncertainty cases, on the other hand, are those where the Court was concerned with statutory language so broad and sweeping that it prohibited conduct protected by the Constitution, usually by the principles of the First Amendment. An example would be where a statute prohibited the sale of a magazine "principally made up of criminal news." Here the primary issue is not fair and reasonable notice to the accused, although that may be involved. Rather the issue is whether the language is so broad that the sanctions of the statute may apply to conduct within the protections of the principles of the First Amendment, here to the sale of a type of magazine protected by the principle of freedom of the press.

Ordinarily, the procedural due process cases involve no question of whether the legislative body had a right to make the prohibition; the question is whether it so expressed the prohibition that the prospective defendant and the court which would try him can understand the statute. However, the problem involved in the substantive due process uncertainty cases is whether the legislative body, because of substantive constitutional protections, had a right to prohibit the conduct at all.

The foregoing discussion, although it may assist in the understanding of the terminology which is used here, over-simplifies the problems which are discussed in the various decisions. The substantive and procedural due process uncertainty cases may overlap. By the time a substantive due process uncertainty case reaches the Supreme Court, it may involve not only a broad statute which on its face violates constitutional freedoms, but may also involve interpretations of the statute by various state courts designed to narrow the statute so that it no longer violates the Constitution. The result of the interpretation by the state courts may be to make the statute vague as well as apparently in violation of the principles of the First Amendment.

The present purpose is primarily to examine critically the uncertainty doctrine as expounded and applied in Supreme Court cases. The first two major topics will be devoted to a discussion of the procedural and substantive due process uncertainty cases. During the course of the discussion the attitude of individual members of the Court, particularly those now on the bench, will be noted. At the same time an attempt will be made to estimate the present vitality of each aspect of the doctrine. Thirdly, a brief summary and critique will be made of the rationale and explanations utilized by the Court when it avoids application of the doctrine. Finally, limited suggestions will be offered as to its future uses.

I. Uncertainty as a Violation of Procedural Due Process

A. *Dilemma of Vague Statutes*

The application of a vague criminal statute presents a court with a difficult dilemma. On the one hand, no one should be punished for conduct without knowing that it is criminal. On the other hand, legislative pronouncements should not be lightly nullified.

The very statement of this dilemma suggests at least two alternatives for a court confronted with the application of a vague criminal statute. First, it can assume that the legislature had some purpose in mind, ascertain the purpose, and then apply the statute to the situation at hand. This has been the customary approach of common law courts since *Heydon's Case*,[6] where Lord Coke suggested that the function of a court in applying a statute is to determine the common law prior to enactment of the statute, to identify the mischief and defect for which the common law did not provide, and to discover the remedy and reason for the remedy. He went on:

> . . . then the office of all the Judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and *pro privato commodo*, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, *pro bono publico*.

A second alternative is to refuse to apply the vague statute in any case. To assume that a statue always has meaning may be applauded by some as proper deference to the legislative will. On the other hand, such an approach has disadvantages. It means that the courts may have to struggle with badly drafted statutes in countless cases. Would it not be better for all concerned if application of an obscure statute was refused?

The problem becomes even more complicated when it is contended in a federal court that a state statute is vague. A federal court is naturally reluctant to undertake construction of a state statute. In addition to the two alternatives above suggested, the court might also decide to avoid any general conclusion and limit its holding to a declaration that the statute was not applicable under the particular facts.[7]

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[6] 3 Co. Rep. 7a, 76 Eng. Rep. 637 (1584).

[7] This seems to have been the earlier view of the Court. Thus in United States v. Brewer, 139 U.S. 278, 288 (1891), a federal statute made it a crime for an officer at an election where congressmen were voted upon to neglect to perform the duties imposed by federal or state statutes. A state statute required election officers after the polls had closed to open the ballots and count them. In refusing to read an implication into the statute that this counting was to be done at the polling place the Court said: "Laws which create crime ought to be so explicit that all men subject to their penalties may know what acts it is their duty to avoid. . . . Before a man can be punished, his case must be plainly and unmistakably within the statute."

B. *Early Void for Vagueness Cases*

The foregoing was altogether too brief a discussion of the conflicting policies which must be considered in a case involving a vague criminal statute. The result of this policy conflict, as might be expected, is that decisions which hold statutory standards to be unconstitutionally vague are rare indeed. In only six cases, only one involving a federal statute, has the Supreme Court held a statute void for vagueness.

It was not until 1914 that the Court discovered a fatal uncertainty in a statute. In *International Harvester Co. v. Kentucky,*[8] a corporate defendant had been convicted under state law of having entered into an agreement to control the price of harvesters and thereafter selling them at higher than their "real value." The conviction was under two statutes and a constitutional provision which purported to outlaw price-fixing combinations except those of growers of certain crops. These provisions had been read together by the state courts, and to avoid unconstitutionality had been construed only to outlaw any combination "for the purpose or with the effect of fixing a price that was greater or less than the real value of the article." The "real value" was declared to be the "market value under fair competition, and under normal market conditions." A unanimous Court reversed the conviction. Justice Holmes stated that to determine "real value" as defined was a "problem that no human ingenuity could solve." He said:

> . . . if business is to go on, men must unite to do it and must sell their wares. To compel them to guess on peril of indictment what the community would have given for them if the continually changing conditions were other than they are, to an uncertain extent; to divine prophetically what the reaction of only partially determinate facts would be upon the imaginations and desires of purchasers, is to exact gifts that mankind does not possess.[9]

The next case where the Court found unconstitutional uncertainty

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[8] 234 U.S. 216 (1914); accord, International Harvester v. Kentucky, 234 U.S. 589 (1914); Collins v. Kentucky, 234 U.S. 634 (1914).

The historical basis of the doctrine is outlined in Aigler, supra note 4, and Note, 23 Ind. L. J. 272 (1948). A chronological list of the developmental cases prior to 1914 follows: The Enterprise, 8 Fed. Cas. 732, No. 4,499 (C.C.N.Y. 1810); United States v. Sharp, 27 Fed. Cas. 1041, No. 16,264 (C.C. Pa. 1815); Schooner Paulina's Cargo v. United States, 7 Cranch 52, 61 (U.S. 1812); United States v. Wiltberger, 5 Wheat. 76 (U.S. 1820); United States v. Morris, 14 Pet. 464, 475 (U.S. 1840); United States v. Hartwell, 6 Wall. 385, 395 (U.S. 1868); United States v. Reese, 92 U.S. 214, 220 (1876); Louisville & N. R. Co. v. Railroad Commission of Tennessee, 19 Fed. 679 (C.C.M.D. Tenn. 1884); Railroad Commission Cases, 116 U.S. 307 (1886); Chicago & N. W. Ry. Co. v. Dey, 35 Fed. 866 (C.C.S.D. Iowa 1888); United States v. Lacher, 134 U.S. 624, 628 (1890); United States v. Brewer, 139 U.S. 278 (1891); Tozer v. United States, 52 Fed. 917 (C.C.E.D. Mo. 1892); Waters-Pierce Oil Co. v. Texas, 212 U.S. 86 (1909).

[9] 234 U.S. at 223-224.

involved a federal statute. In *United States v. Cohen Grocery Co.* (1921),[10] the Court found the Lever Act unconstitutional. The Lever Act was the World War I profiteering statute as reenacted in 1919. It penalized hoarding, restricting the supply or distribution, or reducing the production of necessaries. It also punished the exacting of excessive prices for necessaries. The particular provision before the Court in the *Cohen Grocery* case made it unlawful wilfully to "make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries." The indictment alleged that the defendant sold sugar at an unjust and unreasonable rate in violation of the Act. The defendant's demurrer to the indictment was sustained. The Court in affirming held that the statute did not fix an ascertainable standard of guilt. This lack of certainty was said to be evidenced by the confusing variations in the results reached by several lower courts in applying the statute. Chief Justice White also declared:

> Observe that the section forbids no specific or definite act. It confines the subject matter of the investigation which it authorizes to no element essentially inhering in the transaction as to which it provides. It leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against . . . to attempt to enforce the section would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury.[11]

Justices Brandeis and Pitney concurred on the ground that the statute was not intended to apply to the sale of merchandise, but only to services such as hauling and storage, and that it was therefore unnecessary to pass on the constitutional question.

The next procedural due process case where a statute was held unconstitutionally uncertain, and perhaps the leading case, was *Connally v. General Construction Company*[12] decided in 1926. Under the state statute involved, it was a crime for a contractor performing a government contract to pay laborers, workmen and mechanics "less than the current rate of per diem wages in the locality where the work is performed." The language undeniably is vague. What is the "current rate"? Is it the minimum or maximum, or some intermediate amount? If the latter, what

[10] 255 U.S. 81 (1921); accord, Kennington v. Palmer, 255 U.S. 100 (1921); Kinnane v. Detroit Creamery Co. 255 U.S. 102 (1921); Oglesby Grocery Co. v. United States, 255 U.S. 108 (1921); Tedrow v. Lewis & Son Co., 255 U.S. 98 (1921); Weed & Co. v. Lockwood, 255 U.S. 104 (1921); Weeds, Inc. v. United States, 255 U.S. 109 (1921); cf. Small Co. v. American Sugar Ref. Co., 267 U.S. 233 (1925).

[11] 255 U.S. at 89.

[12] 269 U.S. 385 (1926).

intermediate amount—arithmetic mean, median, or something else? Will deviations from the current rate be permitted for semi-retired and inefficient employees? What is meant by "locality"?

The *Connally* case arose on a suit in a federal court to enjoin enforcement of a state statute. The contractor-plaintiff alleged that county attorneys were threatening to enforce the statute which would deprive the plaintiff and its agents of liberty and property without due process of law because of the uncertainty in the statute. There were further allegations that the Commissioner of Labor had made findings that the wages paid to laborers in the vicinity of the town where the plaintiff's project was under way ranged in lows from $3.00 to $4.00 per day, and in highs from $3.00 to $4.05 per day. The Commissioner had determined the "current rate" to be $3.60, and had threatened to prosecute. The plaintiff's scale ranged from $3.20 to $6.50 with only six of eighteen laborers being paid less than $3.60.

The Supreme Court held the statute unconstitutional and impossible to apply in any situation. Justice Sutherland stated the applicable principle in these oft quoted words:

> That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. 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.[13]

Justices Holmes and Brandeis refused to sign this famous opinion. They concurred on the ground that the statute had not been violated by "any criterion available in the vicinity." In other words they refused to hold the statute applicable under the particular facts.

The statute would seem sufficiently certain to permit its application in marginal situations. One can readily suggest cases where there would be no difficulty in applying it. For example, if the contractor was paying twenty cents a day less than the lowest wage in the vicinity there would be a clear violation of the statute. Or, on the other hand, if it were shown that the contractor was paying more than any employer in the area there could be no violation.

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[13] Id. at 391. The Court apparently overlooked the fact that it had earlier held almost identical statutes constitutional. Atkin v. Kansas, 191 U.S. 207 (1903); Elkan v. Maryland, 239 U.S. 634 (1915), affirming Elkan v. State, 122 Md. 642, 90 Atl. 183 (1914). The decision of the Maryland court in the Elkan case was based upon Sweeten v. State, 122 Md. 634, 90 Atl. 180 (1914). The Maryland court has indicated by way of dictum that it would not follow the Connally decision. Ruark v. International Union of Operating Engineers, 157 Md. 576, 146 Atl. 797 (1929).

In *Cline v. Frink Dairy Co.* (1927),[14] a Colorado statute outlawing specified conspiracies and combinations in restraint of trade except where the object and purposes were "to conduct operations at a reasonable profit" was held unconstitutional by a unanimous Court. The exception was said to render the whole statute without a fixed standard of guilt. What constitutes "a reasonable profit" was "an utterly impracticable standard for a jury's decision." The real issue to be submitted to the jury would be whether in their judgment the combination was necessary to enable those engaged in it to operate at a reasonable profit. This was a legislative rather than a judicial judgment. Submission of such a question to a jury would violate the Fourteenth Amendment. The Court thought that the provision outlawing conspiracies and combinations was sufficiently certain; the exception was what made the statute unenforceable.

In *Champlin Refining Co. v. Commission* (1932)[15] a three judge court declared invalid a provision which penalized one who produced "crude oil or petroleum in the State of Oklahoma, in such a manner and under such conditions as to constitute waste," the term waste being defined "in addition to its ordinary meaning [to] include economic waste, underground waste, surface waste, and waste incident to the production . . . in excess of transportation or marketing facilities or reasonable market demands."

The Supreme Court affirmed. After quoting the principle stated in the *Connally* case, the Court noted:

> It is not the penalty itself that is invalid but the exaction of obedience to a rule or standard that is so vague and indefinite as to be really no rule or standard at all.[16]

In applying this principle the Court said:

> The meaning of the word "waste" necessarily depends upon many factors subject to frequent changes. No act or definite course of conduct is specified as controlling and, upon the trial of one charged with committing waste in violation of the Act, the court could not foresee or prescribe the scope of the inquiry that reasonably might have a bearing or be necessary in determining whether in fact there had been waste. It is no more definite than would be a mere command that wells shall not be operated in any way that is detrimental to the public interest. . . .[17]

C. *The Lanzetta Case*

The latest decision in which the Court found statutory standards insufficient came in 1939 in *Lanzetta v. New Jersey*.[18] Three men were

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[14] 274 U.S. 445 (1927).

[15] 286 U.S. 210 (1932).

[16] Id. at 243.

[17] Ibid.

[18] 306 U.S. 451 (1939).

convicted and sentenced to long prison terms under a statute which made it a crime to be a gangster. The term "gangster" was defined to include "Any person not engaged in any lawful occupation, known to be a member of a 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." The decisions in the *Lanzetta* case give no clue to the facts upon which conviction was based. The state court of appeals affirmed rather summarily on the authority of an earlier decision in *State v. Gaynor*.[19] The facts of that case are enlightening. The defendants, non-residents of New Jersey and ex-convicts, were seized while asleep in a secluded hide-out. They were armed with loaded rifles, revolvers, shot guns, grenades, blasting caps, and a gas riot gun with tear gas crystals. Much of this equipment was stolen as were a number of automobile license plates found in their possession.

The state court in the *Gaynor* case declared that the language of the gangster statute could not be fairly categorized as vague or indefinite. The evident aim of the statute was to make penal "the association of criminals for the pursuit of criminal enterprises." However, in passing, the court referred to dictionaries which defined a "gang" as a company of persons acting together for some purpose "usually criminal" or going about together or acting in concert "mainly for criminal purposes." The Supreme Court in the *Lanzetta* case seized upon these dictionary definitions as though they were part of the state court's construction of the statute. It said: "So defined, the purposes of those constituting some gangs may be commendable." In a unanimous decision it held the statute unconstitutional as construed. Mr. Justice Butler said:

> No one may be required at the 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. . . .
> The challenged provision condemns no act or omission; the terms it employs to indicate what it purports to denounce are so vague, indefinite and uncertain that it must be condemned as repugnant to the due process clause of the Fourteenth Amendment.[20]

Little can be added to the previous discussion in the way of a statement of the procedural due process uncertainty doctrine which the Court has developed. The language of a criminal statute must be sufficiently certain to inform those who are subject to it what conduct on their part will render them liable to penalties, and to guide the judge and jury in its application. Two coordinate functions are served: guidance to the individual in

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19 119 N.J.L. 582, 198 Atl. 837 (1938).

20 306 U.S. at 453, 458.

planning his future conduct, and guidance to those adjudicating his rights and duties.[21]

D. *Legal Rationale of Procedural Due Process Uncertainty*

At this point it may be useful to discuss briefly the underlying legal rationale which the Court has developed to justify holding such statutes unconstitutionally uncertain. The Sixth Amendment requires that "in all criminal prosecutions, the accused . . . be informed of the nature and cause of the accusation . . ." The Framers' concern in drafting the Sixth Amendment was not with the definition of statutory crimes; rather it was with the certainty of the common law indictment, with giving fair notice to one accused of a common law crime. With the growth of statutory crimes, statutory notice came to be as important as indictment notice; without statutory certainty the Sixth Amendment would have provided empty protection. What could be more natural than to construe the due process clause of the Fifth Amendment together with the information clause of the Sixth Amendment to require that a statute fix an ascertainable standard of guilt. This was exactly what the Court did in the *Cohen Grocery* case.

Under the due process clause of the Fourteenth Amendment a similar rationale would justify holding a state statute unconstitutionally uncertain. In the *Cline* case, the Court noted the constitutional basis of *Cohen Grocery,* and then went on to say that where state statutes were concerned, the Fourteenth Amendment "requires that there should be due process of law, and this certainly imposes upon a State an obligation to frame its criminal statutes so that those to whom they are addressed may know what standard of conduct is intended to be required."[22]

An alternate constitutional basis for the doctrine is the requirement of separation of powers. If a statute is so uncertain that a court could not enforce it without rewriting it, the court could justify its refusal to do so by merely declaring that it could not usurp the legislative function. This apparently was the basis for decision in *United States v. Evans.*[23] The statute was probably clear enough as to the crime, which was "to bring into or land in the United States, . . . or . . . conceal or harbor" unauthorized aliens, but not so clear as to the punishment which was a fine

21 See Note, 62 Harv. L. Rev. 77 (1948). Somewhat analogous to the procedural due process uncertainty cases are those where the Court has found a presumption to be so arbitrary as to amount to a violation of the due process clause. See e.g., Manley v. Georgia, 279 U.S. 1 (1929) (presumption did not rest upon clearly specified elements); Tot v. United States, 319 U.S. 463 (1943).

22 274 U.S. 445, 458 (1927).

23 333 U.S. 483 (1948).

and imprisonment "for each and every alien so landed or brought in." Congress when amending the statute to prohibit concealing and harboring as well as the landing of aliens had neglected to amend the punishment clause. The Court held that the ambiguity concerning the penalty plus some doubt as to the meaning of the terms "conceal" and "harbor" made it too great a task to determine what penalty was intended for concealing and harboring. It refused to make a judicial determination as a substitute for what it believed to be a legislative function.

The implicit rationale of the *Evans* case is the doctrine of separation of powers, a constitutional doctrine. However, it does not seem necessary even to mention the Constitution in holding a statute uncertain. Why not simply state that the statutory standards are so vague and obscure that adjudication is impossible, and reverse the conviction? If the standards are truly obscure there is no way of knowing of what the defendant was convicted and no proper basis for any appellate review. In the *International Harvester* case where the uncertainty doctrine was first applied, Justice Holmes did not find it necessary to resort to any discussion of the Constitution.[24]

E. *Problem of Borderline Situations*

Some of the language in the *Connally, Cohen Grocery,* and *Cline* decisions seems to suggest that a statute may be objectionable merely because of a possibility that different juries may reach varying results in its application. As a result a make-weight argument is often advanced by defendants to the effect that a statute is unconstitutionally vague because of the possibility of varying results. As might be expected the Court makes short work of such contentions. Obviously few criminal provisions would be constitutional if they were to be condemned merely because in some borderline cases there would be no certainty as to the jury decision. In *Nash v. United States,* Justice Holmes made the familiar statement that "the 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. If his judgment is wrong, not only may he incur a fine or a short imprisonment . . . ; he may incur the penalty of death."[25] Again in *United States v. Wurzbach,* he pointed out that "Whenever the law draws a line there will be cases very near each other on opposite sides. The precise course of the line may be uncertain, but no one can come near it

[24] It was early suggested that no constitutional basis is needed. Aigler, supra note 4. In cases before the International Harvester case, the Court would simply refuse to apply a statute which it thought was uncertain. See, e.g., United States v. Brewer, discussed in note 7, supra.

[25] 229 U.S. 373, 377 (1913).

without knowing that he does so, if he thinks, and if he does so it is familiar to the criminal law to make him take the risk."[26]

The more recent cases are replete with similar expressions. Thus in *United States v. Ragen,* in upholding an income tax evasion conviction for deducting more than a "reasonable" allowance for salaries, the Court noted that the "mere fact that a penal statute is so framed as to require a jury upon occasion to determine a question of reasonableness is not sufficient to make it too vague to afford a practical guide to permissible conduct."[27] And in *Jordan v. De George,* in the course of a determination that a tax fraud was a "crime involving moral turpitude" under the deportation statutes, the Court remarked that it had "several times held that difficulty in determining whether certain marginal offenses are within the meaning of the language under attack as vague does not automatically render a statute unconstitutional for indefiniteness."[28] In view of these cases one must conclude that the presence of difficult borderline or peripheral cases will not invalidate a statute at least where there is a hard core of circumstances to which the statute unquestionably applies and as to which the ordinary person would have no doubt as to its application. [29]

F. *Applications of the Doctrine without Unconstitutionality*

In most of the cases already discussed the uncertainty doctrine was applied in such a way as to hold a statute unconstitutional. However the doctrine can be used in other ways. For example, it can be applied to deny the judicial enlargement of an otherwise acceptable statute. Thus *Pierce v. United States*[30] involved a statute making it criminal to pretend to be an "officer . . . acting under the authority of the United States, or any Department, or any officer of the Government thereof." It was held material error to refuse to instruct that pretending to be an officer of the Tennessee Valley Authority, a Government corporation, would not be within the statutory prohibition. The Court declared that "judicial enlargement of a criminal Act by interpretation is at war with a fundamental concept of the common law that crimes must be defined with appropriate

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26 280 U.S. 396, 399 (1930).

27 314 U.S. 513, 523 (1942).

28 341 U.S. 223, 231 (1951).

29 Other cases containing language to the same effect as that cited in the text are: Winters v. New York, 333 U.S. 507, 534 (1948) (dissenting opinion); United States v. Petrillo, 332 U.S. 1, 7 (1947); Robinson v. United States, 324 U.S. 282, 286 (1945); Hygrade Provision Co. v. Sherman, 266 U.S. 497, 502 (1925); International Harvester Co. v. Kentucky, 234 U.S. 216, 223 (1914).

30 314 U.S. 306 (1941).

definiteness." [31] It refused to hold that the impersonation of an officer of a Government corporation was within the statutory prohibition.

Another such case, in the economic field, was *Smith v. Cahoon.*[32] There a state statute prescribed a comprehensive scheme to regulate "auto transportation companies," defined to include both public and private carriers for hire. The Supreme Court held that such a scheme as applied to a private carrier for hire was beyond the power of the state. It was then contended that a severability provision saved parts of the statute, such as an insurance provision, as applied to the private carrier. But the Court said that separation of the valid portions of the statute was a problem for the state courts; "until such separation has been accomplished by judicial decision, the statute remains with its inclusive purport, and those concerned in its application have no means of knowing definitely what eventually will be eliminated and what will be left." The Court went on to say that even if it could be said that the provisions of the statute could be severed so as to provide one scheme for common carriers and another for private carriers, until such severance could be determined by competent authority the statute would be void for uncertainty.

> Either the statute imposed upon the appellant obligations to which the State had no constitutional anthority to subject him, or it failed to define such obligations as the State had the right to impose with the fair degree of certainty which is required of criminal statutes.[33]

The uncertainty doctrine has seldom been utilized by the Court except where penal sanctions were involved. In *Levy Leasing Co. v. Siegel,*[34] it was suggested that the doctrine is not even applicable in civil cases. The case involved a World War I rent control statute making it a partial defense to a rent action that "such rent is unjust and unreasonable and that the agreement under which the same is sought to be recovered is oppressive." It was urged that the standard was too indefinite to satisfy the due process clause. The Court in summarily disposing of this contention said:

> The standard of the statute is as definite as the "just compensation" standard adopted in the Fifth Amendment to the Constitution and therefore ought to be sufficiently definite to satisfy the Constitution. *United States v. Cohen Grocery Co.* . . ., dealing with definitions of crime, is not applicable.[35]

However, in *Small v. American Sugar Refining Co.,*[36] three years later,

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[31] Id. at 311.

[32] 283 U.S. 553 (1931)

[33] Id. at 564. Seemingly, however, the statute was perfectly valid and applicable to public carriers for hire.

[34] 258 U.S. 242 (1922).

[35] Id. at 250.

[36] 267 U.S. 233 (1925); cf. Cline v. Frink Dairy Co., 274 U.S. 445, 463-464 (1927) (discussing the non-penal provisions of the statute discussed in the text at note 14 supra).

the Court refused to follow the *Levy Leasing* case. The case involved an action for breach of contracts, one defense being that the contracts were illegal because of the Lever Act. The defense was demurred to on the ground that the Lever Act had earlier been held void for vagueness in the *Cohen Grocery* case. The Court distinguished the *Levy Leasing* case, noting that the statute in that case had been held to supply a sufficient standard. It then held that the *Cohen Grocery* case was applicable. "The ground or principle of the decisions, was not such as to be applicable only to criminal prosecutions. It was not the criminal penalty that was held invalid but the exaction of obedience to a rule or standard which was so vague and indefinite as really to be no rule or standard at all."[37]

There seems to be no reason why application of the doctrine should be limited to criminal statutes. The scope of the due process clauses goes beyond *penal* deprivations of life, liberty or property. However, since the *Small* case, apparently the doctrine has been applied by the Supreme Court in non-criminal cases only where deportation statutes were involved.[38]

The Court has been reluctant to strike down delegations of legislative powers to administrative officials under vague or indefinite standards even when penal sanctions were involved. In no case since 1936 has a congressional delegation of powers to an administrative agency been found unlawful.[39] Thus in *United States v. Rock Royal Co-operative Inc.*,[40] the standard for milk price-fixing by the Secretary of Agriculture was that the price should reflect the "price of feeds, the available supplies of feeds, and other economic conditions which affect the market supply and demand, for milk." The penal order in question of which the Secretary asked enforcement fixed a fluctuating area milk price based only upon wholesale butter prices. The Secretary, in the face of the statutory standard, had taken only a single factor into account in his price determination. Furthermore he had evidently made a determination that wholesale butter prices were included in the vague phrase "other economic conditions." The Court in upholding both the order and the delegation declared: "we cannot say that it is beyond the power of Congress to leave this determination to a designated administrator, with the standards named."

The dissenting opinions pointed out that the statute clearly allowed the administrator "to prescribe according to his own errant will and then to execute," [41] that it was "evident that the Secretary is to form a judgment

37 267 U.S. at 239.

38 Jordan v. De George, 341 U.S. 223 (1951).

39 See the excellent discussion of the general problem of standards in delegation in Davis, Administrative Law c. 2 (1951).

40 307 U.S. 533 (1939).

41 Id. at 582.

by balancing a price-raising policy against a consumer-protection policy, according to his views of feasibility and public interest."[42]

It may seem difficult to read the *Rock Royal* opinions without feeling indignant and outraged. However, there is something to be said for the principle involved (even if it is difficult to agree with its application under the particular facts). Where statutory sanctions are purely of prospective effect, it may be unnecessary to require the same definiteness as where the penal sanction comes only after the issuance or violation of an injunction or other court order. If there can be no deprivation of life, liberty or property until a court order is issued and violated, the statutory language can be quite vague; it is the order itself which should be specific.[43] Conversely, however, if such deprivation can happen, for example where the statute permits an injured private person to sue for treble damages, even before any court enforcement order, it seems rather obvious that statutory definiteness must be required if due process is to be regarded.[44]

G. *Recent Procedural Due Process Cases*

Cases involving contentions that standards are vague still come before the Court. Four such cases, all decided in 1952 and 1953, may assist in showing the current temper of the justices.

In *Boyce Motor Lines, Inc. v. United States*,[45] the Court considered a penal regulation of the Interstate Commerce Commission which required operators of motor vehicles transporting explosives and other dangerous substances to "avoid, so far as practicable, and, where feasible, by prearrangement of routes, driving into or through congested thoroughfares, places where crowds are assembled, street car tracks, tunnels, viaducts, and dangerous crossings."[46] The corporate owner of a truck which exploded in the Holland Tunnel was indicted for violating the regulation, and successfully urged in the district court that the words "so far as practicable, and, where feasible" made the standard of guilt conjectural.[47] The Court of Appeals for the Third Circuit reversed.[48] The Supreme Court upheld the regulation by a six to three decision. Justice Clark speaking for the majority recognized the existence of a requirement of certainty but refused to find the regulation in question

42 H. P. Hood & Sons v. United States, 307 U.S. 588, 605 (1939) (this dissenting opinion also is part of the Rock Royal opinions).

43 FTC v. Morton Salt Co., 334 U.S. 37, 54 (1948); cf. Labor Board v. Express Pub. Co., 312 U.S. 426, 433 (1941) (injunction).

44 But cf. Federal Trade Commission v. Ruberoid Co., 343 U.S. 470 (1952).

45 342 U.S. 337 (1952).

46 49 Code Fed. Reg. § 197.1(b).

47 90 F. Supp. 996 (D. N.J. 1950).

48 188 F.2d 889 (3d Cir. 1951).

unconstitutional. Three members of the Court, Justices Jackson, Black and Frankfurter, thought that the regulation did not provide a definite standard upon which a trucker could calculate his duty.

In *United States v. Spector*[49] the federal statute involved made it a crime for an alien ordered deported to "willfully fail or refuse to make timely application in good faith for travel or other documents necessary to his departure." The district court held the statute unconstitutionally vague and indefinite because it did not specify the nature of the travel documents necessary for departure nor indicate to which country or to how many countries the alien should make application.[50] The Supreme Court reversed, upholding the statute by a five to three decision. Justice Douglas, speaking for the majority felt that the statute on its face met the constitutional tests of certainty and definiteness. Justice Black dissented on the ground that the statute was void for vagueness. Justice Jackson, joined by Justice Frankfurter, dissented on the ground that no provision was made for a judicial trial of the validity of the deportation order.[51]

Another case decided in 1952 was *United States v. Cardiff*,[52] where the Court refused to accept a liberal construction of a badly drafted statute. The president of a company was convicted of violating Section 301(f) of the Federal Food, Drug and Cosmetic Act.[53] Section 301(f) prohibited "refusal to permit entry or inspection as authorized by Section 704." Section 704 authorized entry and inspection of certain types of plants at reasonable times, "after first making request and obtaining permission of the owner, operator, or custodian."[54] The facts were that authorized agents had asked permission to enter and inspect the defendant's factory and he had refused such permission.

The Government urged the Court to interpret the Act to prohibit a refusal to permit entry or inspection at any reasonable time, that otherwise the Act would have no real sanctions. The Court noted this argument, and also noted that on its face the Act prohibited only refusal to permit inspection if permission had previously been granted, which would seem to make revocation of permission criminal no matter when it had been granted.

The Court affirmed reversal of the conviction by an eight to one decision (Justice Burton dissenting without opinion). The Court dis-

[49] 343 U.S. 169 (1952).

[50] 99 F. Supp. 778 (S.D. Cal. 1951).

[51] This question was not raised by appellee, nor briefed or argued by either party.

[52] 344 U.S. 174 (1952).

[53] 52 Stat. 1040 (1938), 21 U.S.C. § 301 et seq. (1952).

[54] 21 U.S.C. § 374 (1952).

cussed the Government's contention which it said was contrary to the express words of the statute:

> However we read §301(f) we think it is not fair warning . . . to the factory manager that if he fails to give consent, he is a criminal. The vice of vagueness in criminal statutes is the treachery they conceal either in determining what persons are included or what acts are prohibited. Words which are vague and fluid . . . may be as much of a trap for the innocent as the ancient laws of Caligula. We cannot sanction taking a man by the heels for refusing to grant the permission which this Act on its face apparently gave him the right to withhold. That would be making an act criminal without fair and effective notice. . . .[55]

United States v. Gambling Devices,[56] decided in 1953, is also of interest since it casts some light on the views of Chief Justice Warren. In that case, the Court by a five to four vote sustained three judgments dismissing two indictments and a libel proceeding brought under the "Slot Machine Act."[57] Section 3 of the Act is undoubtedly ambiguous. It requires manufacturers of and dealers in specified gambling devices to register with "the Attorney General . . . in such district," and to file certain reports "in the district." Nothing on the face of the statute shows what "district" is referred to, although the legislative history shows that under the Act as originally drafted, it was contemplated that the reports would be filed with the collector of internal revenue in each collection district. When it was decided to require that the reports be filled with the Attorney General, the phrases "in such district" and "in the district" were inadvertently allowed to remain in the bill which was enacted. The Attorney General issued a regulation to clarify the ambiguity.

The indictments and libel were drawn on the theory that the registration and reporting requirements of the statute were applicable to all manufacturers and dealers of slot machines whether or not they engaged in interstate commerce. Justices Jackson, Frankfurter and Minton refused, however, to permit the statute to apply to manufacturers and dealers engaged only in intrastate commerce. They adopted the narrow construction of the trial courts. They felt that this construction made it unnecessary to decide whether the Act could constitutionally apply to intrastate manufacturers and dealers under the commerce clause. They also felt that this construction made it unnecessary to reach the vagueness issue. They voted to affirm the judgments below which had dismissed the indictments and the libel. Justices Black and Douglas joined with them in voting to affirm the judgments. They thought, however,

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[55] 344 U.S. at 176-177.

[56] 346 U.S. 441 (1953).

[57] 64 Stat. 1134 (1951), 15 U.S.C. §§ 1171-1177 (1952).

that because of the ambiguity in the Act, it was unconstitutionally vague. A manufacturer or dealer could not know what "district" was referred to. Nor could this vagueness be corrected by the Attorney General's regulation.

Justice Clark, with Chief Justice Warren, and Justices Reed and Burton concurring, wrote the minority opinion. He thought the Act was sufficiently certain. Aside from Section 291 of Title 5 of the United States Code which provides that the Attorney General shall be at the seat of the Government, he thought it was common knowledge that the Attorney General was located in Washington, D. C. He said:

> No doubt the forgotten words in the Act provide room for quibbling; and the lawyer who is looking for litigation, or whose client seeks to avoid compliance with the law, can paint a picture of uncertainty and frustrated effort to fathom the unfathomable intent of Congress. But to me it is certain that, with or without the regulations, a person honestly seeking to comply with this law would inevitably have succeeded, without undue mental strain in determining the statute's import and without uncertainty as to his chances of remaining within the bounds of the law.[58]

Justice Clark simply could not see the Act as "a trap for the unwary." Finally, he argued that in view of the established tie-up between slot machines and national crime syndicates, it is within the power of Congress to require all manufacturers and dealers of such devices to register and report, whether or not they engage in interstate commerce.

H. *Evaluation of Present Vitality*

Aside from *Lanzetta* and perhaps *International Harvester,* it is hard to read the procedural due process uncertainty cases without a feeling that their value as precedents, at least on the merits, may be subject to a considerable doubt. They are generally cases involving economic regulation, decided before the mid-Thirties. It is naive to believe that the Court would now find any insurmountable constitutional difficulties in a statute which made it criminal to produce petroleum "in such a manner and under such conditions as to constitute waste." Yet that is exactly what the Court did in the *Champlin* case without a word of dissent even from Justices Brandeis, Stone or Cardozo. The *Connally, Cohen Grocery* and *Cline* cases are subject to the same reservation. Perhaps the rather primitive statutes involved in the *International Harvester* case might be found objectionable by the present Court, although the results under the Robinson-Patman Act might suggest a contrary result.

The *Lanzetta* case stands apart from the others. Justice Frankfurter classes it as somewhat of an aberration since it involved a statute designed

[58] 346 U.S. 458 (1953).

to meet problems similar to those at which vagrancy statutes are directed. "These statutes are in a class by themselves in view of the familiar abuses to which they are put. . . . Definiteness is designedly avoided so as to allow the net to be cast at large, to enable men to be caught who are vaguely undesirable in the eyes of police and prosecution, although not chargeable with any particular offense."[59] The *Lanzetta* statute is almost as objectionable as an ancient Chinese statute which read: "Whoever is guilty of improper conduct, and of such as is contrary to the spirit of the laws, though not a breach of any specific part of it, shall be punished at least forty blows; and when the impropriety is of a serious nature, with eighty blows."[60] As construed by the state courts and understood by the majority of the Supreme Court it was a grant of blanket authority to law enforcement officers to incarcerate unemployed ex-convicts. The objection to the statute was to its breadth rather than to its obscurity. As viewed by the Court it gave unbridled license to the police and district attorneys to imprison a class of citizens. In this respect it resembles statutes held unconstitutional in the substantive due process cases shortly to be discussed, because of the breadth of the prohibition rather than because of the vagueness of standards. It also resembles the statutes held invalid which gave administrative officials the power to license not only punishable speech and assembly, but also constitutionally protected activities.

The *Lanzetta* case therefore is somewhat of a freak. Furthermore it is the only case since 1932, where the Court has expressly found statutory standards unconstitutionally uncertain. The current reluctance to hold economic and other statutes "not entwined with limitations on free expression" vague, as well as a similar reluctance to hold any federal statutes unconstitutional, has been frankly recognized by the Court.[61]

It seems unlikely that the Supreme Court as presently constituted will hold a statute unconstitutional because of vague standards except as an extreme measure, as in the *Lanzetta* case, the only such case since 1932. However, the docrine still has considerable vigor. Two justices, Frankfurter and Black, seem to be willing to apply the doctrine to hold a statute unconstitutional.[62] Justice Reed has occasionally dissented where a

[59] Winters v. New York, 333 U.S. 507, 540 (1948) (dissenting opinion).

[60] Quoted by Justice (then Circuit Judge) Brewer in Chicago & N.W. Ry. Co. v. Dey, 35 Fed. 866, 876 (C.C.S.D. Iowa 1888). The Uniform Code of Military Justice, 64 Stat. 142 (1950), 50 U.S.C. § 728 (1952), makes criminal the following: ". . . all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces . . ."

[61] Winters v. New York, 333 U.S. 507, 517 (1948); Jordan v. De George, 341 U.S. 223, 245 (1951) (dissenting opinion).

[62] In addition to their dissents in the Boyce and Spector cases, see Jordan v. De George, 341 U.S. 223, 232 (1951) (dissenting opinion).

majority thought a statute was sufficiently certain.[63] Furthermore, there are situations, as in the *Cardiff* case, where the doctrine will be applied in such a way as practically to nullify a statute, without expressly declaring it unconstitutional. Only Justice Burton dissented in *Cardiff*. One cannot say that the doctrine is dead. Counsel are well justified in continuing to urge it.

II. Uncertainty as a Violation of Substantive Due Process

There remain to be considered the substantive due process uncertainty cases, those where the statute was so broad and sweeping as to prohibit conduct protected by the Constitution.[64] This is an area where the Supreme Court, at least in the twenty years since the mid-Thirties, has seemingly recognized its special competence.[65] As might be expected it is an area where the uncertainty doctrine has considerable vitality. However, even in this area the Court is reluctant to hold statutes unconstitutionally uncertain. There have been but three cases, all involv-

63 See, e.g., United States v. Petrillo, 332 U.S. 1, 16 (1947); cf. his dissents based upon a strict construction argument in United States v. Hood, 343 U.S. 148, 152 (1952), and United States v. Sullivan, 332 U.S. 689, 705 (1948).

64 Substantive due process uncertainty has roots in earlier cases. In United States v. Reese, 92 U.S. 214 (1876), the Court refused to construe a broad federal statute narrowly so as to apply only in areas where Congress had the power to legislate. Again in the Trade-Mark Cases, 100 U.S. 82 (1879), the Court refused narrow construction to a broad statute beyond the power of Congress (trade mark legislation framed to apply to intra as well as interstate commerce) on authority of United States v. Reese, supra. In James v. Bowman, 190 U.S. 127 (1903), the Court had before it a federal statute which purported to punish individuals hindering the right of suffrage guaranteed by the Fifteenth Amendment. The statute was beyond the power of Congress because the Fifteenth Amendment was held to apply only to state action. In refusing narrow construction so that the statute would apply to congressional elections, an area where Congress did have the power to legislate, the Court said (at 142): ". . . it is all-important that a criminal statute should define clearly the offense which it purports to punish, and that when so defined it should be within the power of the legislative body enacting it . . . courts are not at liberty to take a criminal statute, broad and comprehensive in its terms and in these terms beyond the power of Congress and change it to fit some particular transaction which Congress might have legislated for if it had seen fit" In Yu Cong Eng v. Trinidad, 271 U.S. 500 (1926), a Philippine statute aimed at tax evasion forbade the keeping of account books "in any language other than English, Spanish or any local dialect." The statute, being aimed at Chinese merchants, was in violation of the equal protection clause, so the Philippine courts interpreted it only to require keeping those books reasonably adapted to the needs of taxing authorities in the specified languages. The Supreme Court refused to accept this construction because it created "a vague requirement, and one objectionable in a criminal statute." The Court said (at 518): "We are likely thus to trespass on the provision of the Bill of Rights that the accused is entitled to demand the nature and cause of the accusation against him; and to violate the principle that a statute which requires the doing of an act so indefinitely described that men must guess at its meaning, violates due process of law." The Court then cited Connally, Cohen Grocery, International Harvester, and United States v. Reese, supra, relying principally upon the latter.

65 See, e.g., Winters v. New York, 333 U.S. 507, 517 (1948).

ing state statutes, where unconstitutionality of a statute was primarily predicated upon substantive due process uncertainty.

A. *Stromberg v. California*

In *Stromberg v. California*,[66] decided in 1931, there was a conviction under a state statute which made it criminal to display a red flag for any of three purposes: "[1] as a sign, symbol or emblem of opposition to organized government or [2] as an invitation or stimulus to anarchistic action or [3] as an aid to propaganda that is of a seditious character." The information upon which the conviction was based alleged display of a red flag for the three forbidden purposes, stating them, of course, conjunctively rather than disjunctively as in the statute. The trial court instructed the jury that the defendant could be convicted if she had displayed the red flag for any one or more of the three purposes. At the defendant's request the court also instructed in effect that she had an unlimited right to advocate peaceful changes in the government, and to adopt a flag signifying such a purpose, and that such a display could not be unlawful. The defendant's comsel not only made no objection to the instructions as given, but also stated in open court that he was satisfied that they were correct, and that his client waived any error on that account. His briefs and arguments before the Supreme Court were based upon the theory that the statute was unconstitutional in its entirety.

The Court's decision, however, was based upon the doctrine of unconstitutional uncertainty. The state appellate court had recognized that the portion of the statute which forbade display of the red flag for the first purpose, that is "as a sign, symbol or emblem of opposition to organized government," was subject to a construction which would include display as a symbol of peaceful and orderly opposition. Furthermore, under one of the instructions of the trial court, conviction was permitted if the flag was displayed solely for that forbidden first purpose. The Court held that under the statute as construed by the state appellate court there could be no conviction for display of the red flag for the first purpose, that is as a symbol of opposition to organized government. As a result, the instruction that the defendant could be convicted if she displayed the red flag for any of the three purposes was erroneous, since under that instruction, because of the general verdict, there was no way of knowing whether the conviction had rested solely upon the first purpose. The Court said:

> 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 [free political

[66] 283 U.S. 359 (1931).

discussion] is repugnant to the guarantee of liberty contained in the Fourteenth Amendment.[67]

A bitter dissenting opinion by Justice Butler pointed out that the majority had isolated one part of the charge to the jury and construed it as if it stood alone. He felt that in the light of other instructions, particularly the instruction that the defendant had an unlimited right to display the red flag to signify a purpose of advocating peaceful changes in the government, the error could not possibly have been prejudicial.

B. *Herndon v. Lowry*

The next such decision came in 1937 in *Herndon v. Lowry*.[68] In that case a state insurrection statute was declared unconstitutional as construed and applied, by a five to four decision.

Insurrection was defined under the statute as "any combined resistance to the lawful authority of the State, with intent to the denial thereof, when the same is manifested or intended to be manifested by acts of violence." The conviction was based upon acts which included soliciting members for the Communist party, conducting meetings of a party cell, and possessing party literature. The trial court instructed that there could be no conviction unless there was evidence that "immediate serious violence" was expected or advocated. The defendant argned before the state supreme court on appeal that there was no evidence upon which to base such an instruction. That court held that "imminence" of the use of force was not required under that statute, that intended use of force was sufficient, and sustained the conviction.

Under the "clear and present danger" doctrine as then understood, the statute as construed and applied was a prior restraint upon speech and other activity protected under the Fourteenth Amendment by the principles of the First Amendment, and was therefore unconstitutional. Justice Roberts for the Court said:

> Proof that the accused in fact believed that his effort would cause a violent assault upon the state would not be necessary to a conviction. It would be sufficient if the jury thought he reasonably might foretell that those he persuaded to join the party might, at some time in the indefinite future, resort to forcible resistance of government. . . .
> The statute, as construed and applied, amounts merely to a draguet which may enmesh anyone who agitates for a change of government if a jury can be persuaded that he ought to have foreseen his words would have some effect in the future conduct of others. No reasonably ascertainable standard of guilt is prescribed. So vague and indeterminate are the bound-

[67] Id. at 369.

[68] 301 U.S. 242 (1937).

aries thus set to the freedom of speech and assembly that the law necessarily violates the guarantees of liberty embodied in the Fourteenth Amendment.[69]

C. *The Winters Case*

The next case is the leading case of *Winters v. New York*[70] decided in 1948 after being argued three times. The two opinions are notable discussions of the uncertainty doctrine. They undoubtedly contain the best analysis to date of the chameleonic facets of the doctrine both in the procedural and substantive due process areas.

The *Winters* case involved a conviction under a state statute making it criminal to possess with intent to sell a publication "principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime." The defendant was charged with possession with intent to sell an obscene, lewd, lascivious, filthy, indecent and disgusting magazine principally made up of the forbidden classes of items. The New York Court of Appeals stated that the legislative purpose of the statute was based upon the fact that collections of pictures or stories of criminal deeds of bloodshed or lust "unquestionably can be so massed as to become vehicles for inciting violent and depraved crimes against the person." The publications found in the defendant's possession were clearly of the type the statute was designed to reach.[71] The court held, therefore, that it was unnecessary to decide whether the statute extended to publications made up of accounts of criminal deeds not characterized by bloodshed or lust.

The Supreme Court by a six to three decision held that the statute violated the due process clause of the Fourteenth Amendment. Justice Reed for the majority said: "On its face . . . [the statute] covers detective stories, treatises on crime, reports of battle carnage. . . . It does not seem to us that an honest distributor of publications could know when he might be held to have ignored such a prohibition." The statute was held unconstitutional upon the authority of the *Stromberg* and *Herndon* cases. Justice Reed also stated:

> It is settled that a statute so vague and indefinite, in form and as interpreted, as to permit within the scope of its language the punishment of incidents fairly within the protection of the guarantee of free speech is void, on its face, as contrary to the Fourteenth Amendment. . . . A failure of a

[69] Id. at 262-264.

[70] 333 U.S. 507 (1948).

[71] It contained "a collection of crime stories which portray[ed] in vivid fashion tales of vice, murder and intrigue . . . embellished with pictures of fiendish and gruesome crimes, and . . . besprinkled with lurid photographs . . . bear[ing] such titles as 'Bargains in Bodies,' 'Girl Slave to a Love Cult' . . ." People v. Winters, 268 App. Div. 30, 48 N.Y.S. 2d 230 (1944).

> statute limiting freedom of expression to give fair notice of what acts will be punished and such a statute's inclusion of prohibitions against expressions, protected by the principles of the First Amendment, violates an accused's rights under procedural due process and freedom of speech or press.[72]

The minority of the Court, Justices Frankfurter, Jackson and Burton, did not question the existence of these principles; however, they doubted their applicability under the particular facts. They implied that the Court should show a little more respect for a statute which had stood for more than 60 years, and was in effect in nineteen other states in similar form

D. *Procedural Due Process Cases Distinguished*

Stromberg, Herndon and *Winters* are the only substantive due process cases where the uncertainty doctrine was applied to hold a statute unconstitutional. To class these cases with *Connally* and like cases would certainly be improper. They are completely distinguishable. The *Stromberg* conviction was reversed because of the chance that the jury might have based guilt upon display of the red flag as a symbol of peaceful and orderly opposition to organized government. The *Herndon* conviction was reversed because the jury might have felt justified in convicting if it thought that the defendant might reasonably foretell that those who joined the Communist party might at some future time resort to forcible resistance to the government. Winters was freed because the statute under which he was convicted might have been applied to forbid possession of detective stories, crime treatises and reports of battle carnage. In each case a majority of the Court was fearful that the particular statute could be applied to forbid conduct protected by the privileges of freedom of speech and assembly under the due process clause of the Fourteenth Amendment. Whether the particular defendant on trial was guilty of acts which could have been punished under a narrowly drawn statute without violating those privileges was considered irrelevant to the decisions.

Seemingly it was the broad reach of the statute that disturbed the Court in each of the three cases. Although the Court spoke of "vague" language, its real concern was the broad or sweeping language that could be applied to permit conviction for acts protected by the principles of the First Amendment. In other words "vagueness" in this area is different from the obscurity of standards that is forbidden by the procedural due process certainty requirement. The problem of standards, of procedural due process, if present at all was subordinate. The rule of these latter cases is that a statute cannot be drawn in terms so broad as to permit

[72] 333 U.S. 507, 509-510 (1948).

conviction for acts protected by the Constitution, particularly acts protected by the principles of the First Amendment.

The vice of such statutes is that their broad language may throttle protected conduct. They have a coercive effect since rather than chance prosecution people will tend to leave utterances unsaid even though they are protected by the Constitution. Furthermore, even a successful defense to an action under such a statute may be expensive. To allow every defendant to raise the question of constitutionality, even he who could constitutionally be punished for his utterances under a properly drawn statute, may speed termination of the restriction.[73]

E. *Is the Substantive Due Process Uncertainty Doctrine Necessary?*

The question may occur, why bother to talk about uncertainty and vagueness in these cases. The uncertainty if any is a minor objection when compared to the breadth of the language. The statute on its face and as construed prohibits protected conduct. Why not merely hold it unconstitutional under the principles of the First Amendment? Why bother with any "vagueness" phraseology? Interestingly enough the Court in *De Jonge v. Oregon*,[74] decided three months before the *Herndon* case, reached an equivalent result without ever using the terms "vagueness," or "uncertainty." In the *De Jonge* case a criminal syndicalism statute had been construed to permit conviction of a defendant who had done no more than assist in the conduct of a lawful public meeting, conducted however under the auspices of the Communist party. The Court held that the statute as construed and applied under the particular indictment was an unconstitutional interference with freedom of speech and assembly. It had earlier upheld similar statutes and doubtless was desirous of avoiding the necessity of overruling or distinguishing earlier decisions. It did however mention in passing the "broad reach of the statute" as construed and applied.[75]

More recently in *Terminiello v. Chicago*[76] the Court reached a similar result without discussing the uncertainty doctrine. In that case the statute made aiding or assisting in making a "breach of the peace" a misdemeanor. The defendant was convicted of making a speech which provoked a hostile mob, incited a friendly one, and threatened violence between the two. The trial court charged that under the statute "breach of the peace" consisted of any "misbehavior which violates the public

[73] See Note, 61 Harv. L. Rev. 1208 (1948); cf. Thornhill v. Alabama, 310 U.S. 88 (1940).
[74] 299 U.S. 353 (1937).
[75] Id. at 362.
[76] 337 U.S. 1 (1949).

peace and decorum," and that the "misbehavior may constitute a breach of the peace if it stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance." This portion of the charge was not objected to or even argued to be erroneous. However, the Supreme Court held that a conviction resting on such a charge could not stand. It based reversal upon the *Stromberg* case because under the general verdict the conviction might have rested upon unconstitutional portions of the statute.

It would seem unnecessary to use the terminology of void for vagueness in cases like *Stromberg, Herndon* and *Winters*. The doctrine is of doubtful value in this area since any statute is void which as construed permits the punishment of incidents protected by the guarantees of the First Amendment, not just the so-called vague or indefinite statutes. The result can be more simply reached by stating that the statute as construed and applied violates the principles of the First Amendment as embodied in the Fourteenth Amendment. To borrow from terminology used elsewhere, these might be called "spurious" uncertainty cases, the procedural due process cases being "true" uncertainty cases.

F. *Recent Substantive Due Process Uncertainty Cases*

The decision in *Beauharnais v. Illinois*[77] rendered in 1952 may assist in showing the current temper of the Court in the *Winters* area. The case involved a statute which made it a crime to sell or publish any lithograph, moving picture, play, drama, or sketch which "portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion which . . . exposes the citizens of any race, color, creed or religion to contempt, derision, or obloquy or which is productive of breach of the peace or riots." The defendant was convicted of publishing a lithograph in the form of a petition to Chicago city officials to halt encroachments by Negroes. The publication contained the following: "If persuasion and the need to prevent the white race from being mongrelized by the negro will not unite us, then the aggressions . . . rapes, robberies, knives, guns and marijuana of the negro, surely will."[78]

The statute is analogous in language, although not in purpose, to the statute involved in the *Winters* case. Yet it was held constitutional in a five to four decision. Justice Frankfurter as spokesman for the majority (he had written the minority opinion in *Winters*) upheld the statute against contentions that it violated liberty of speech and of the

[77] 343 U.S. 250 (1952).

[78] Id. at 252.

press. He summarily denied the contention that it was so broad that the general verdict might have been based upon constitutionally protected conduct. Justice Jackson dissented because of rulings of the trial court which precluded the defenses of truth, fair comment and privilege, as well as because of lack of clear showing that there existed a clear and present danger that a breach of the peace might have resulted. Justice Black, with Justice Douglas concurring, dissented upon the ground that the statute violated the First Amendment. Justice Reed, also with Justice Douglas concurring, dissented upon the ground that the judgment might well have rested upon the vague words "virtue," "derision," and "obloquy," which would permit within their scope punishment of incidents secured by the guarantee of freedom of speech.

Justice Reed's opinion was reminiscent of that of the majority in the *Stromberg* case. He quoted the statute after striking out all of the terms which were sufficiently definite. So stated the statute and indictment made it criminal to portray in a lithograph a "lack of virtue of a class of citizens . . . which . . . exposes [them to] derision, or obloquy." He then proceeded to demonstrate that the words "virtue," "derision," and "obloquy," are words of varying meanings which could include conduct protected by the First Amendment. On the basis of this construction he concluded that the statute was unconstitutional. He did not consider whether the term "lack of virtue" can be given meaning other than in context with the terms "depravity, criminality, unchastity," which precede it. Yet, it would seem that to read it otherwise is to distort its meaning, as well as to ignore the background of race riots which brought about enactment of the statute.

It is interesting to compare the line-up of the Court in *Winters* and *Beauharnais*. Justices Frankfurter and Burton thought that both statutes were constitutional, while Justices Reed, Black and Douglas thought both were unconstitutional. Chief Justice Vinson and Justice Jackson changed sides. The Chief Justice thought the statute in *Winters* unconstitutional, but sided with the majority in *Beauharnais*. Justice Jackson thought the statute in *Winters* constitutional but dissented in *Beauharnais*. However, although his position in the latter case seemed inconsistent with his position in the former, the language of his opinions was not. Justices Murphy and Rutledge voted for unconstitutionality in *Winters*. Their successors, Justices Minton and Clark, sided with the majority in *Beauharnais*, thus holding the balance which resulted in the holding of constitutionality.

One comes from reading the *Beauharnais* opinions with a feeling that the current members of the Court, albeit with dissent, probably would have reached a different result than that reached in the *Stromberg, Hern-*

don and *Winters* cases, or at least would have decided them with little discussion of uncertainty. The majority in *Beauharnais* rather summarily dismissed the uncertainty argument, devoting most of its discussion to the problem of freedom of speech and the power of the state to restrict it in dealing with local problems. Only Justices Reed and Douglas showed any real concern with uncertainty. The implication of the decision would seem to be that if such a statute is struck down by the current Court it will be upon the ground that it violates the principles of the First Amendment, unadorned by any discussion of void for vagueness.

Another important 1952 decision was *Joseph Burstyn, Inc. v. Wilson,*[79] where the Court struck down the administrative censoring of a motion picture as "sacrilegious." The statute required a license to exhibit a motion picture and permitted rejection of a film found to be "obscene, indecent, immoral, inhuman, sacrilegious, or . . . [to] tend to corrupt morals or incite to crime." The censor first granted then revoked the license of the distributor of "The Miracle," a story of a simple-minded goatherdess who thought that the stranger who seduced her and caused her preguancy was St. Joseph. The New York Court of Appeals in upholding the censor had defined "sacrilegious" so broadly as to give almost unlimited control. In a brief decision the Supreme Court held that under the First and Fourteenth Amendments, a state could not permit censorship of a motion picture by an administrative official upon a finding that it was "sacrilegious." It stated that it was unnecessary for it to decide whether a state might censor a motion picture for obscenity under a clearly drawn statute. The Court avoided the use of any "vagueness" language, but spoke instead of the "broad and all-inclusive definition of 'sacrilegious' given by the New York courts."

The result in the *Burstyn* case suggests that there is still an important role for the doctrine of *Stromberg, Herndon* and *Winters* in the area of providing standards for the exercise of administrative discretion. Where a statute gives an administrator authority to license speech and assembly it must at least provide standards for the exercise of his discretion if constitutional objections are to be avoided. This is quite a contrast with the procedural due process cases, particularly in the economic controls area, where almost any delegation however vague will be upheld.

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[79] 343 U.S. 495 (1952). See Kunz v. New York, 340 U.S. 290 (1951), where the Court struck down refusal to give a permit for religious meeting to one who "ridicule[s] or denounce[s] any form of religious belief"; cf. Saia v. New York, 334 U.S. 558 (1948). In Gelling v. Texas, 343 U.S. 960 (1952), on authority of the Burstyn case, another motion picture licensing statute was struck down, the standard being whether the picture was "of such character as to be prejudicial to the best interests of the people of said City."

III. Avoidance of the Uncertainty Doctrine.

In the foregoing discussion it has been suggested that application of the uncertainty doctrine is far from automatic or even frequent. There have been many more cases where uncertainty contentions were overruled than where they were accepted. Some discussion of those cases is important in appraising the doctrine.

At least four rationales or explanations are utilized by the Supreme Court when it refuses to find a statute unconstitutionally uncertain. These are:

a. *Construction* of the statute in such a way as to avoid uncertainty;

b. Finding that a requirement of *scienter* (sometimes written into the statute by construction) clarifies the statute;

c. Finding *external standards* which clarify the uncertain statutory standards; and

d. Finding that the statute is not uncertain in *comparison with other statutes* earlier held constitutionally certain.

A. *Construction*

The most important rationale or process utilized by the Court to avoid uncertainty is interpretation. Both substantive and procedural due process uncertainties may be circumvented in this manner. Construction will give definiteness to vague standards. A narrow interpretation will remove objectionable breadth of application. Where a federal statute is concerned the Court itself may utilize construction to render the statute more certain. However, when dealing with a state statute it feels bound by the construction of the state courts.

The danger of utilizing construction to remove uncertainty is the possibility of ex post facto application. If a statute as drafted is so vague that its scope cannot be foreseen, it would seem to be unfair to apply it to past acts upon the basis of a subsequent interpretation. "It would be hard to hold that, in advance of judicial utterance upon the subject, [defendants] . . . were bound to understand the challenged provision according to the language later used by the court."[80] The philosophy of the cases involving prior restraints upon First Amendment freedoms is to permit even one who could be held under a narrowly drawn statute to raise the uncertainty objection. It seems contrary to this philosophy to permit a statute to be applied retrospectively after it has been narrowly construed to avoid constitutional difficulties. Until the time of the narrow

[80] Lanzetta v. New Jersey, 306 U.S. 451, 456 (1939); accord, Smith v. Cahoon, 283 U.S. 553, 563-565 (1931).

construction the statute may constitute a serious restraint upon freedom of speech.

Nevertheless, it apparently is settled that a state court's interpretation of a statute is binding upon the federal courts. The construction of a statute is a ruling on a question of state law which is as binding upon the Supreme Court as though the precise words had been written into the statute.[81] The Court assumes that the defendant in the case before it "at the time he acted, was chargeable with knowledge of the scope of subsequent interpretation."[82] Even a contention that the construction is contrary to the terms of the statute is unavailing.[83] There are a number of important cases where state courts have been upheld in construing vague or general statutes to avoid application of the uncertainty doctrine.[84] This is not to say that the Court may not go ahead and hold a statute unconstitutionally uncertain even in the face of a narrow construction. Thus if it can locate any flaw or inconsistency in the language of the state courts which have construed and applied the statute it may utilize such a defect as a basis for holding the conviction unconstitutional, as in the *Stromberg* and *Terminiello* cases.

The construction approach to remedying uncertainty is also available where federal statutes are concerned. Perhaps the most famous example of its utilization was in *Screws v. United States*.[85] The Civil Rights Acts make it a crime wilfully under color of law to subject any inhabitant because of his color or race "to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States." Screws, a sheriff, was charged with beating a Negro prisoner to death thereby depriving him of his constitutional rights to be tried in accordance with due process of law and not to be deprived of life without due process of law. It was objected that the

81 Poulos v. New Hampshire, 345 U.S. 395, 402 (1953); Terminiello v. Chicago, 337 U.S. 1, 4 (1949); Winters v. New York, 333 U.S. at 514-515.

82 Winters v. New York, supra note 81.

83 Minnesota v. Probate Ct., 309 U.S. 270 (1940). The state court had taken the words "psychopathic personality," defined as "existence . . . of emotional instability, or impulsiveness of behavior . . . as to render such person irresponsible for his conduct with respect to sexual matters and thereby dangerous to other persons," and construed it to apply only to persons "who, by an habitual course of misconduct in sexual matters, have evidenced an utter lack of power to control their sexual impulses and who, as a result, are likely to attack or otherwise inflict injury, loss, pain, or other evil on the objects of their uncontrolled and uncontrollable desire."

84 In addition to Minnesota v. Probate Ct., supra note 83, see, Cole v. Arkansas, 338 U.S. 345 (1949); Kovacs v. Cooper, 336 U.S. 77, 84-85 (1949); Chaplinsky v. New Hampshire, 315 U.S. 568, 572-574 (1942); Cox v. New Hampshire, 312 U.S. 569, 575-576 (1941); Fox v. Washington, 236 U.S. 273 (1915).

85 325 U.S. 91 (1945).

statute provided no ascertainable standard of guilt because of the conflicting and changing views of the Supreme Court as to the meaning of the due process clause. The Court upheld the constitutionality of the statute, but reversed the conviction. Justice Douglas, joined by Chief Justice Stone and by Justices Reed and Black, held that to construe the statute to require a wilful intent to deprive a person of a federal right made definite by decision or by other rule of law would save it from any charge of uncertainty. However, these justices were still forced to vote to reverse the conviction for a new trial, since the court below had not properly instructed the jury (upon the basis of this new concept as to the meaning of the statute). Justice Rutledge thought the statute constitutional as applied. However, he concurred in the judgment of reversal in order that there might be a disposition of the case. Justice Murphy also thought the statute constitutional as applied, and dissented; he would have affirmed the conviction. Justices Roberts, Frankfurter and Jackson rendered a joint dissent on the ground that the statute was unconstitutionally vague. In other words, four justices thought the statute should be construed to require a special intent, two thought it was all right as it was, and three thought it was unconstitutionally vague.

The Supreme Court has also recoguized a power to construe broad federal statutes narrowly so as to avoid a holding of substantive due process uncertainty, at least where this may be done in consonance with the legislative purpose. For example, consider the Taft-Hartley Act requirement that every officer of a union which wishes to utilize the benefits of the Act make an affidavit "that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports [*sic*] any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods." The only penal sanction of that portion of the Act is that the wilful and knowing false making of such an affidavit is criminal. The Court avoided constitutional objections aimed at the breadth of the requirement by holding that the belief required to be negated by the oath is a belief "in violent overthrow of the Government *as it presently exists* under the Constitution *as an objective,* not merely as a prophesy." (emphasis supplied)[86]

The very important case of *United States v. Harriss,*[87] decided in 1954, is illustrative of the current reaction of the Court to utilizing interpretation to assist in upholding a rather vague statute. This case involved

[86] Communications Assn. v. Douds, 339 U.S. 382, 406-408 (1950); cf. United States v. C.I.O., 335 U.S. 106, 120-121 (1948).

[87] 347 U. S. 612 (1954).

dismissal of a criminal information brought under the Federal Regulation of Lobbying Act,[88] upon the ground that the Act was unconstitutional. The defendants were charged under Sections 305 and 308 of the Act with failure to report the solicitation and receipt of contributions to influence the passage of certain legislation, and failure to register.

The key section of the Act is Section 307 which makes it applicable to any person (other than certain political committees) who "directly or indirectly, solicits, collects, or receives money or any other thing of value to be used principally to aid, or the principal purpose of which person is to aid, in the accomplishment of any of the following purposes:

"(a) the passage or defeat of any legislation by the Congress of the United States.

"(b) to influence, directly or indirectly, the passage or defeat of any legislation by the Congress of the United States."

Section 305 and 308 require such persons (with specified exceptions to Section 308 in the case of public officials, newspapers, and persons who merely appear before committees) to register and render certain reports. These were the sections under which the *Harriss* information was brought.

It is readily apparent, that the application of the Act raises problems both of substantive and procedural due process. On its face it is broad enough to constitute an abridgement of First Amendment rights, the rights of freedom of speech, publication and petition. Furthermore, the terms "directly or indirectly," "principal purpose," and "principally" make application of the statute uncertain.

Despite these problems, the Supreme Court, in a five to three decision (Justice Clark taking no part), upheld the constitutionality of the statute by a process of interpretation. The Court, in an opinion by Chief Justice Warren, held that the Act applies only to lobbying in its commonly accepted sense, "to direct communication with members of Congress on pending or proposed federal legislation." The word "principal" was used to exclude from the scope of the Act those contributions and persons having only an incidental purpose of influencing legislation. If one of the "main purposes" was to influence the passage or defeat of legislation, the person or contribution would be within the scope of the Act. Thus construed Sections 305 and 308 were held to meet the constitutional requirements of definiteness, and not to violate the freedoms guaranteed by the First Amendment.

Justice Douglas (with Justice Black concurring) dissented upon the ground that the Act on its face was so broad that it interfered with First

[88] 60 Stat. 812, 839 (1946), 2 U.S.C. §§ 261-270 (1952).

Amendment prohibitions. One who wrote a letter or made a speech or published an article could not know from the language of the Act when he was close to the prohibited line. He felt that the Court had rewritten the Act and actually added and subtracted words to produce the result attained. He concluded:

> No construction we give it today will make clear retroactively the vague standards that confronted appellees when they did the acts now charged against them as criminal. . . . Since the Act touches on the exercise of First Amendment rights, and is not narrowly drawn to meet precise evils, its vagueness has some of the evils of a continuous and effective restraint.[89]

Justice Jackson also dissented giving as his main reason the extent to which the Court had rewritten the Act, in effect leaving it touching upon only part of the practices which the Congress had deemed sinister. He also noted that the Court had rejected the broad interpretation contended for by the Government and adopted its own narrower construction. This, he thought, helped to demonstrate that the Act was "mischievously vague."

No federal statute in the substantive due process area has ever been held unconstitutionally uncertain. The *Harriss* case demonstrates the process which will probably be followed when the Court is faced with a federal statute which impinges on First Amendment freedoms. The Court will struggle to narrowly construe the statute to avoid the constitutional objection. Of the present membership of the Court, five justices—Chief Justice Warren, Justices Reed, Burton, Frankfurter and Minton—were willing to adopt the construction approach in the *Harriss* case.

B. *Scienter.*

A second important rationalization used to avoid application of the uncertainty doctrine is to find that scienter is an element of the offense and that the statute as a result is sufficiently clear. The presence of scienter has been found siguificant in many cases, and in no cases where it has been found and discussed has the statute in question been held unconstitutionally vague.[90]

The effect of scienter upon an otherwise uncertain statute has been stated in various ways. The Court has said that "since the constitutional vice in a vague or indefinite statute is the injustice to the accused in placing him on trial for an offense, the nature of which he is given no fair warning, the fact that punishment is restricted to acts done with knowl-

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89 347 U.S. at 633.

90 Wilfullness was required by the Lever Act held unconstitutional in the Cohen Grocery case. The Court in that case did not allude to this factor. Since the case came up on a demurrer to the indictment there was of course no instruction as to the type of intent required.

edge that they contravene the statute makes this objection untenable."[91] Again, in *Screws v. United States,* the Court suggested that "where the punishment imposed is only for an act knowingly done with the purpose of doing that which the statute prohibits, the accused cannot be said to suffer from lack of warning or knowledge that the act which he does is a violation of law. The requirement that the act must be willful or purposeful may not render certain, for all purposes, a statutory definition of the crime which is in some respects uncertain. But it does relieve the statute of the objection that it punishes without warning an offense of which the accused was unaware."[92] Again, in *Dennis v. United States,*[93] the Court was required to determine the constitutionality of portions of the Smith Act which made it criminal knowingly and willfully to "advocate, abet, advise, or teach the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence." The Court in holding the statute sufficiently certain said that the vagueness argument was particularly nonpersuasive when advanced by petitioners, who had been found by the jury to intend forcible overthrow of the Government as speedily as circumstances would permit. The statutory standard, although "not a neat, mathematical formulary . . . well serves to indicate to those who would advocate constitutionally prohibited conduct that there is a line beyond which they may not go—a line which they, in full knowledge of what they intend and the circumstances in which their activity takes place, will well appreciate and understand."[94]

This rationalization has a plausible sound, but will it stand analysis? First consider the substantive due process cases. The so-called uncertainty in those cases is caused by broad language which on its face would punish acts which cannot constitutionally be prohibited. When the element of scienter is added, some of the difficulty may disappear. Only those with a bad purpose can be punished. If the class of persons with the requisite bad purpose who do the prohibited acts happens to include only those who can constitutionally be punished, the statute is not too broad. The requirement of scienter then effectively restricts the otherwise broad application of the statute and it is not a prior restraint upon First Amendment freedoms. Under certain circumstances then, scienter may assist in avoiding substantive due process uncertainty.

The procedural due process cases are much more troublesome. If a

91 Communications Assn. v. Douds, 339 U.S. 382, 413 (1950).

92 325 U.S. 91, 102 (1945).

93 341 U.S. 494 (1951).

94 Id. at 515-516.

statute is so vague as to have no meaning, it is a contradiction in terms to say that guilty knowledge or evil purpose cures the vagueness. One cannot know or have an evil purpose to do what is unknowable. What would the element of scienter have added to the facts of the *International Harvester* case? Justice Holmes said that to determine "real value" was a "problem that no human ingenuity could solve," it would require men "to divine prophetically . . . and . . . exact gifts that mankind does not possess." If the statute was that vague, could an additional element of scienter have cured it?

A minority of the Court recognized the logical defects of the scienter refinement to the uncertainty doctrine in the procedural due process area, in the classic joint dissent in the *Screws* case.[95] To Justices Roberts, Frankfurter and Jackson, the suggestion that the vagueness of the statute was cured by holding it applicable only where the defendant had the "requisite bad purpose" amounted "to saying that the black heart of the defendant enables him to know what are the constitutional rights deprivation of which the statute forbids, although we as judges are not able to define their classes or their limits . . ." The definiteness required by the Constitution "is a definiteness defined by the legislature, not one argumentatively spelled out through the judicial process which, precisely because it is a process, cannot avoid incompleteness. A definiteness which requires so much subtlety to expound is hardly definite." The opinion went on:

> It is as novel as it is an inadmissible principle that a criminal statute of indefinite scope can be rendered definite by requiring that a person "willfully" commit what Congress has not defined but which, if Congress had defined, could constitutionally be outlawed. . . . If a statute does not satisfy the due-process requirement of giving decent advance notice of what it is which, if happening, will be visited with punishment, so that men may presumably have an opportunity to avoid the happening . . ., then "willfully" bringing to pass such an undefined and too uncertain event cannot make it sufficiently definite and ascertainable. "Willfully" doing something that is forbidden, when that something is not sufficiently defined according to the general conceptions of requisite certainty in our criminal law, is not rendered sufficiently definite by that unknowable having been done "willfully." It is true also of a statute that it cannot lift itself up by its bootstraps.[96]

To illustrate their feeling that scienter as a cure for vagueness is a complete non sequitur, the dissenting justices pointed out that it would be a function of the trial judge to define to the jury the standards imposed by the statute, that is, to instruct the jury as to the range of rights deprivation of which is prohibited by the Constitution. To define the

[95] 325 U.S. 91, 138 (1945).

[96] Id. at 153-154.

vague statutory standards would be a question of law for the trial court. Only after the jury had been instructed as to the meaning of the standards would it determine the factual issue of whether the acts had been wilfully done. The requirement of scienter could not possibly aid the judge in construing the statute, since the presence of that element would not be determined until after he had determined its meaning.

It is difficult to see how a requirement of a specific intent can make vague standards definite. Ordinarily the only proof of intent is circumstantial evidence. For example, in cases under the Civil Rights Acts usually the only evidence to prove intent to deprive the victim of a constitutional right is the fact that the accused was an officer of the law who by inference should have known what he was doing. On the other hand the accused himself may be permitted to testify that he had no intention of depriving anyone of a constitutional right. The evidence may be as consistent with an act of violence growing out of ignorance and race prejudice as with intent to deprive the victim of a constitutional right. Yet the case goes to the jury with an instruction not to convict unless it finds beyond a reasonable doubt that the accused had a deliberate and wilful purpose to deprive the victim of a constitutional right.[97] The jury is aware of the unlikelihood that the accused will ever be tried under state law. The real question before it may well be whether to do rough justice under the Civil Rights Acts or to permit the defendant forever to go unpunished.

Perhaps the explanation of the *Screws* case (and possibly the *Harriss* case as well) lies in the exigencies of the situation rather than in the judicial logic of the opinions. Perhaps, the majority was desirous of attaining a result. The Civil Rights Acts were passed in 1870, at a time when the Southern states were represented only by carpetbaggers. If the Court were to hold the Acts unconstitutional, chances of reenactment with more definite standards are somewhat remote. If Screws, Crews, Williams, Koehler and their ilk are to be punished under a federal statute, the Civil Rights Acts must be upheld.

What then of other procedural due process uncertainty cases where a majority of the Court discussed scienter and found a statute sufficiently certain without provoking a similar dissent?[98] The minority in the *Screws* case noted those cases. They pointed out that in them the uncertainty objection bordered on the frivolous. The statutes involved were said to be

[97] See, e.g., Koehler v. United States, 189 F.2d 711, 714-715 (5th Cir. 1951), cert. denied, 342 U.S. 852.

[98] See, in addition to the cases mentioned in the text, United States v. Ragen, 314 U.S. 513, 524 (1942); Gorin v. United States, 312 U.S. 19, 27-28 (1941); Hygrade Provision Co. v. Sherman, 266 U.S. 497, 501-502 (1925); Omaechevarria v. Idaho, 246 U.S. 343, 348 (1918).

sufficiently certain and the scienter discussion was thrown in "as is the way of opinions." The Court, in those cases, "was saying that the criminal statute under scrutiny, although very specific [*sic*], did not expose any innocent person to the hazards of unfair conviction, because not merely did the legislation outlaw specifically definite conduct, but guilty knowledge of such defined criminality was also required."[99]

In other words, a statute may be vague, but not so obscure that there are no cases in which it cannot be fairly applied. The additional element of scienter makes it seem fairer to apply such a statute to extreme cases. It assists in giving meaning to a statute which has some degree of certainty in its terms. When the Court states that the requirement of scienter makes the uncertainty contention untenable, it may actually mean that the statute is not so vague that it would be unfair to hold one who with a bad purpose violates it. As a result of the requirement of scienter it is easier to draw the line intended by the legislature.

C. *External Standards*

A third rationalization utilized to avoid application of the uncertainty doctrine merits but a brief discussion; it is to find something external to the objectionable language which tends to make it definite.[100] Thus the Court may say that the context of the statute supplies a standard.[101] Or it may find a standard in the very nature of the problems involved. For example, in upholding a statute which made it a crime under certain circumstances to build a fire "near" the public domain, Justice Holmes said: "The word 'near' is not too indefinite. Taken in connection with the danger to be prevented it lays down a plain enough rule for anyone who seeks to obey the law."[102]

The terms may have a technical or other special meaning sufficient to enable those to whom the statute is applicable to understand it. A 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.[103] All that

[99] 325 U.S. 91, 157 (1945).

[100] If the Court wants to find a statute unconstitutional it may apply the reverse of this process, reading the objectionable language out of context as in the Stromberg and Terminiello cases.

[101] Kay v. United States, 303 U.S. 1, 9 (1938).

[102] United States v. Alford, 274 U.S. 264, 267 (1927); cf. Winters v. New York, 333 U.S. at 518; Screws v. United States, 325 U.S. 91, 98-100 (1945); Connally v. General Const. Co., 269 U.S. 385, 391-392 (1926); Hygrade Provision Co. v. Sherman, 266 U.S. 497, 501 (1925).

[103] Connally v. General Const. Co., 269 U.S. 385, 391 (1926); cf. Communications Assn. v. Douds, 339 U.S. 382, 412 (1950); Kovacs v. Cooper, 336 U.S. 77, 79 (1949); Kay v. United States, 303 U.S. 1, 9 (1938); Champlin Rfg. Co. v. Commission, 286 U.S. 210, 242-243 (1932); Hygrade Provision Co. v. Sherman, supra note 102, at 502; Omaechevarria v. Idaho, 246 U.S. 343, 348 (1918).

is needed is a meaning for the words. The dictionary definitions may be in agreement or the words well known,[104] or the terms may have a common law meaning.[105] They may have been used in other statutes.[106]

D. *Comparison with Other Statutes*

An even more unconvincing rationalization is to find that statutes of comparable uncertainty have been held sufficiently certain, therefore the statute in question is valid.[107] Thus in the *Boyce* case the Court relied heavily upon an earlier case where the term "shortest practicable route" had been held sufficiently certain. In that earlier case the basic standard was distance; the trucker was prohibited from carrying more than the prescribed load unless he utilized the shortest practicable route. Only when he exceeded the load limit and departed from the shortest route was he required to find justification in practicability. As the dissenters in *Boyce* pointed out it was completely different to require a trucker to avoid "so far as practicable, and, where feasible" a list of undefined places, some or all of which would be found on every route.

These then are the rationalizations utilized to avoid application of the uncertainty doctrine.[108] The interpretation and scienter approaches are very important. The others are unconvincing from a logical point of view. However, all of these rationalizations are useful, since far more often than not they are accepted by the Court.

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104 Cf. Lanzetta v. New Jersey, 306 U.S. 451, 455 (1939); Lloyd v. Dollison, 194 U.S. 445, 450 (1904).

105 Lanzetta v. New Jersey, 306 U.S. 451, 455 (1939); Champlin Rfg. Co. v. Commission, 286 U.S. 210, 242-243 (1932); Connally v. General Const. Co. 269 U.S. 385, 391 (1926); International Harvester Co. v. Kentucky, 234 U.S. 216, 223 (1914); Nash v. United States, 229 U.S. 373 (1913).

106 Lanzetta v. New Jersey, 306 U.S. 451, 455 (1939). But see Winters v. New York, 333 U.S. 507 (1948).

107 See, e.g., Whitney v. California, 274 U.S. 357, 368-369 (1927).

108 It should be noted that the doctrine of Rescue Army v. Municipal Ct., 331 U.S. 549 (1947), that the Court will refrain from passing on questions of constitutionality of a statute until the case reaches a stage where such a decision is necessary, is inapplicable where a question of uncertainty is raised. The Government argued in United States v. Petrillo, 332 U.S. 1 (1947), that it would be preferable not to decide the constitutional argument on a motion to dismiss, but the Court said (at 5-6): ". . . the motion to dismiss on the ground of vagueness and indefiniteness squarely raises the question of whether the section invoked in the indictment is void in toto, barring all further actions under it, in this, and every other case. . . . Many questions of a statute's unconstitutionality as applied can best await the refinement of the issues by pleading, construction of the challenged statute and pleadings, and, sometimes proof. . . . But no refinement or clarification of issues which we can reasonably anticipate would bring into better focus the question of whether the contested section is written so vaguely and indefinitely that one whose conduct was affected could only guess what it meant."

IV. Revitalization of the Doctrine—A Proposal

In the previous discussion an attempt has been made to outline the uncertainty doctrine as applied in Supreme Court cases. It has been shown to be a doctrine rarely and reluctantly applied to strike down a statute. Originally used to require that statutes supply explicit standards of conduct, it came to be used to invalidate statutes so broad as to punish constitutionally protected conduct. Even in the latter area it seems to have fallen somewhat into discard, although the Court may reach the same result by other routes.

Unquestionably the consequences of protecting the civil liberties of Communists and purveyors of lewd books and motion pictures is to further the civil liberties of us all. But are not economic liberties also important? Business men and corporations perform useful functions. Why not also require definiteness in statutes relating to them? Certainly no one can quarrel with the principle that any statute whether criminal or civil should be sufficiently certain to inform those subject to it of the conduct which is required and to guide the judge and jury in its application. Why not make more frequent use of the doctrine? To hold a statute unconstitutionally uncertain usually is no bar to its legislative revision and clarification. Congress is alert in making readjustments where judicial interpretation is contrary to its purposes.[109] Instead of upholding every statute no matter how vague because of disdain for judicial supremacy or reluctance to interfere with legislative pronouncements, would it not be better simply to refuse adjudication pending legislative clarification? To require statutory certainty is not judicial supremacy. It is the special function of courts to adjudicate. If a statute is vague, why not refuse to apply it until the legislature makes proper adjudication possible?

Most of the contact between business and Government is at the administrative level. Corporations and business men dare not operate without considering applicable administrative regulations. Furthermore, they act in constant fear of possible administrative action should they violate some statute or regulation. Their problems in this respect would be greatly simplified if statutes, regulations and administrative orders were clear and definite.

Two recent cases illustrate possible uses of the uncertainty doctrine in

[109] See, e.g., The McGuire Act, 66 Stat. 631 (1952), clarifying the FTC Act, 15 U.S.C. § 45 (1952), in light of Schwegmann v. Calvert Distillers Corp., 341 U.S. 384 (1951); 59 Stat. 33 (1945), 15 U.S.C. §§ 1011-1015 (1946), adopted as a result of United States v. Southeastern Underwriters Assn., 322 U.S. 533 (1944); and 67 Stat. 476 (1953), amending 21 U.S.C. § 374, adopted in 1953 as a result of United States v. Cardiff, 344 U.S. 174 (1952), discussed supra at note 52.

the economics area. In the *Boyce* case already discussed the Court upheld a vague penal administrative regulation. Justice Jackson, joined by Justices Frankfurter and Black, felt that the Court should deny enforcement to the regulation. He said:

> Would it not be in the public interest as well as the interest of justice to this petitioner to pronounce this vague regulation invalid, so that those who are responsible for supervision of this dangerous traffic can go about the business of framing a regulation that will specify intelligent standards of conduct?[110]

In truth why shouldn't such regulations be stated clearly and definitely? Surely the Interstate Commerce Commission with its vast manpower and experience can draft a regulation which would enable truckers of explosives and other dangerous substances to plan their routes with some assurance that they are complying with the law.

In another case, *Federal Trade Commission v. Ruberoid Co.*,[111] the Court dealt with the problem of a vague administrative order of the Federal Trade Commission. A manufacturer was found to have committed several violations of the Robinson-Patman Act.[112] The Commission's trial examiner recommended a limited and specific cease and desist order, however, the Commission substituted a sweeping order to "cease and desist in discriminating in price: By selling such products of like grade and quality to any purchaser at prices lower than those granted other purchasers who in fact compete with the favored purchasers in the resale or distribution of such products." The order in terms was more general than the Act itself, since it failed even to include the statutory provisos and exceptions. The manufacturer petitioned for review of the order, attacking its breadth. The Commission cross-petitioned for enforcement. The Court of Appeals for the Second Circuit, with Judges Learned and Augustus Hand, and Clark sitting, affirmed the order but denied its enforcement. The Second Circuit excused the breadth of the order for the reason that the Act "is vague and general in its wording and . . . cannot be translated with assurance into any detailed set of guiding yardsticks." In other words that court thought the Act so vague that certainty should not be required of the Commission in its cease and desist orders thereunder. The Supreme Court affirmed.

Justice Jackson, in his dissenting opinion,[113] agreed with the Second Circuit that: "This section of the Act admittedly is complicated and vague

110 Boyce Motor Lines, Inc. v. United States, 342 U.S. 337, 346 (1952).

111 343 U.S. 470 (1952).

112 For sake of brevity Clayton Act § 2, as amended by 49 Stat. 1526 (1936), 15 U.S.C. § 13 (1952), is spoken of here as the Robinson-Patman Act.

113 343 U.S. 470, 480 (1952).

in itself and even more so in its context." However, he would have refused to excuse the Commission on this ground. He pointed out that there are no "public" sanctions under the Act until after the issuance of a cease and desist order punishable by contempt proceedings. The Act should be regarded as an unfinished law which the administrative body must complete before it is ready for application. "The only reason for the intervention of an administrative body is to exercise a grant of unexpended legislative power to weigh what the legislature wants weighed, to reduce conflicting abstract policies to a concrete net remainder of duty or right." The administrative function in such a case is to translate the abstract statute into a concrete cease and desist order. But here the Commission found it administratively more convenient to "blanket an industry under a comprehensive prohibition in bulk — an undiscriminating prohibition of discrimination . . . this not only fails to give the precision and concreteness of legal duties to the abstract policies of the Act, it really promulgates an inaccurate partial paraphrase of its indeterminate generalities. Instead of completing the legislation by an order which will clarify the petitioner's duty, it confounds confusion by literally ordering it to cease what the statute permits it to do."

In the civil liberties area the Court refuses to permit the delegation of administrative censorship or licensing powers without narrow standards. In the economics area, at least in recent years, delegation seems to be permitted no matter how vague the standards, witness the *Ruberoid* case. Assuming that the distinction is valid, does it necessarily follow that the administrator in the economics area is under no obligation to fill in the gaps of the uncertain statute, to make clear the obligations of those to whom the statute is applicable? Justice Jackson's thesis in the *Boyce* and *Ruberoid* cases was to require administrative regulations and orders to be definite, otherwise to deny them judicial sanction. In recent years there has been great progress in the theoretical basis of administrative law. By the Administrative Procedure Act, the practices of administrative rule making and adjudication are controlled and regulated. By the Federal Register Act expensive and comprehensive arrangements have been made to assure that agency rules and orders are widely promulgated. What earthly good is all this if no one can understand the rules and orders after they are issued?

The problems of corporations and business men in a bureaucratic society are by no means confined to administrative regulations and orders. They also are faced with innumerable statutory requirements. The various anti-trust acts are examples. Can a large and aggressive corporation possibly go about its business without violating these acts or at least risk-

ing prosecution? The objective of the Sherman Act is to enforce competition. The objective of the Clayton and Robinson-Patman Acts is to protect individual businesses against the normal effects of competition. Caught in the middle is the corporation, damned under one statute if it is considerate of its competitors, damned under others if it is not. If it establishes a nation-wide uniform pricing system, it runs the risk of prosecution under the Sherman Act. If these prices happen to be the same as those of a competitor, proof of a violation may be ridiculously simple under the doctrine of "conscious parallelism." If it attempts to compete in the traditional fashion by varying its prices to attract customers, it runs the risk of a Commission proceeding, or, even worse, a treble-damage suit. Proof in the Robinson-Patman proceeding is also simple, since a showing of price discrimination in interstate commerce (seemingly any difference in prices for the same articles) is prima facie proof of violation. The vagueness of the Robinson-Patman Act is not only in the problem of its construction in context with the Sherman Act. It also is full of ambiguities and vague provisions. It uses, for example, the terms "discriminate," "price" and competition" without definition, and, as Justice Jackson pointed out in the *Ruberoid* case, prohibits only those "discriminations" which meet three statutory conditions and survive five statutory provisos. The statutes dealt with by Justice Holmes in the *International Harvester* case seem simple in comparison.

The Court in the *Ruberoid* case upheld a vague Federal Trade Commission order issued under the Robinson-Patman Act. What of the standards of the Act itself? Justice Jackson and the Second Circuit thought the Act vague.[114] Justice Jackson's dissent was seemingly based upon the premise that the Court was bound to accept the vague Robinson-Patman Act. He was concerned only with the required certainty of cease and desist orders issued under the Act. He shrugged off the vagueness of the Act by saying that it could be cured by definite orders of the Commission, since there would be no "public" sanction until after the order was issued. But is this an adequate basis for accepting this statutory vagueness? Justice Jackson failed to discuss the very real fact of *private* sanctions. Others than the Federal Trade Commission can enforce the Act. Competitors can enforce it with treble-damage actions without awaiting the benefit of clarifying Commission orders.[115]

114 See also, United States v. New York Great A & P Co., 67 F. Supp. 626, 676-677 (E.D. Ill. 1946), where the court, after a discussion of the "elusive uncertainty" of the Act, doubted that any judge would assert that he knew exactly what is a violation in any and all circumstances.

115 E.g., Sun Cosmetic Shoppe v. Elizabeth Arden Sales Corp., 81 F. Supp. 547 (S.D.N.Y. 1948); see Bruce's Juices v. American Can Co., 330 U.S. 743, 750 (1947).

The Federal Trade Commission and Interstate Commerce Commission are two of hundreds of agencies with which business men are concerned. The *Boyce* and *Ruberoid* cases are merely illustrative of permitted laxity in administrative rule-making and adjudication. As Justice Jackson pointed out in the *Ruberoid* case, the unsound result there was symptomatic of a basic confusion throughout the administrative scheme. One way to attain responsible administrative agencies, to overcome administrative inadequacies, is to surround agencies with strict statutory standards, and to require their regulations and orders to be definite. The procedural due process uncertainty doctrine would be a useful means to that end.