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The Medium is the Message: Standards of review in Criminal Constitutional Cases in Florida

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Abstract

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KEYWORDS: Florida, criminal, standards

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I. Introduction: The Scope of This Article

When a court considers constitutional challenges to a criminal law, it should logically begin its task with the selection of the appropriate standard of review. A standard of review is a set of rules of construction, presumptions, and a balancing mechanism designed to intepret the Constitution and the challenged law.[1] Which standard of review will be applied in a given situation depends on the nature of the constitutional problem and the challenged law.

A review of criminal cases in Florida reveals a lack of consistency or uniformity. Courts seem to reach a decision and then search for a particular standard to fit it. Sometimes a court will even announce a decision without using a particular standard of review. The correct standard of review should inexorably lead to a particular result and not be merely the *post hoc* justification for a desired result.[2] Attorneys, judging from the arguments described in the case law, have also selectively used standards of review.

Florida courts have unconsciously implemented one of Marshall McLuhan's axioms — "The Medium is the Message."[3] McLuhan's theory was that the presentation of an idea may be as important as the idea itself and that the method of presentation can have significant im-

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1. *See* Gudridge, *Legislation in Legal Imagination: Introductory Exercises*, 37 U. MIAMI L. REV. 493 (1983); Rhodes, et. al., *The Search For Intent: Aids to Statutory Construction*, 6 FLA. ST. U.L. REV. 383 (1978); 10 FLA. JUR. 2D *Constitutional Law* §§ 18-21 and 6 FLA. DIGEST 2D *Constitutional Law* §§ 11-14 (West's) for a general overview of the components of standards of review.

2. *Compare* Husk v. State, 453 So. 2d 153 (Fla. 1st Dist. Ct. App. 1984), *with* State v. Wershow, 343 So. 2d 605 (Fla. 1977), and self-serving the use of the presumptions of constitutionality/invalidity.

3. *See* MCLUHAN AND FIORE, THE MEDIUM IS THE MESSAGE (1967); MCLUHAN, UNDERSTANDING MEDIA (1964).

pact upon its acceptance by an audience. Courts and lawyers have manipulated the media (standards of review) to produce a desired message (the decision to uphold or invalidate a law). The medium has arguably subsumed the message in Florida criminal constitutional law cases.

The author will discuss the major standards of review and the most significant attendant rules of construction. The author will then discuss the standards used to invalidate unconstitutional laws. An examination of the historical use of the standards of review will illustrate the correct use of standards of review for certain situations as well as provide examples of the self-serving misuse of standards of review. The author will then discuss the significant consequences of the manipulation of standards of review common to challenges to vague and overbroad laws. Lastly, the author will suggest guidelines for Florida's courts and attorneys to follow so that they might properly apply a standard of review to a given case.

II. Methods of Upholding Criminal Statutes: The Presumption of Constitutionality and Attendant Rules of Construction

A. *The Presumption of Constitutionality*

Florida courts often invoke one particular standard of review to uphold a law: the presumption of constitutionality. The presumption of constitutionality has rarely been specifically defined by courts using it. The most common citation of the rule is an incantation of support for the decision to uphold a statute.[4] A statute is presumed to be constitutional; therefore, a court must uphold it.

For example, in *Husk v. State*,[5] the First District Court of Appeal considered a challenge to a statute which authorized the involuntary commitment of a person who was acquitted of a crime by reason of insanity. The *Husk* court invoked the presumption of constitutionality without explanation and noted that Husk had cited no authority to overcome it.[6] This use of the presumption demonstrates the misapplica-

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4. In the following cases the court invoked the presumption of constitutionality without specifically defininig or applying it to the case before it: Bunnell v. State, 453 So. 2d 808 (Fla. 1984); State v. Kinner, 398 So. 2d 1360 (Fla. 1981); Griffin v. State, 396 So. 2d 152 (Fla. 1981).

5. 453 So. 2d 153 (Fla. 1st Dist. Ct. App. 1984).

6. *Id.* at 155.

tion of a standard of review. The holding appears to be a *post hoc* use of a standard to support a desired result. The citation of the presumption of constitutionality masks the unstated actual reasons for the decision.[7]

Appellate courts have produced several subtly different expressions of the presumption. The different expressions of the same standard suggests it is merely a personal philosophical gloss for an already-decided case. For example, some courts have stated that a court should indulge every presumption in favor of validity.[8] However, the courts have not specifically defined the nature of "every presumption." The presumptions could involve inferences of fact, legislative intent, or interpretations of language that render a law constitutional.[9]

In *Powell v. State*,[10] the Florida Supreme Court used the presumption of validity to uphold a law which prohibited reflective or mirror-like materials on motor vehicle windows. The court used the term "every presumption" to mean that all factual inferences were drawn to justify the use of the police power in such a case.[11]

Another view taken by the courts is that a "strong presumption of constitutionality exists." The Florida Supreme Court used this presumption in *State v. Kinner*[12] to uphold a law permitting the involuntary hospitalization of the mentally retarded. The court did not define the phrase "a strong presumption of constitutionality,"[13] and the patent ambiguity of this standard renders it virtually meaningless. A "strong

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7. Husk challenged the finding he was manifestly dangerous and met the criteria for involuntary hospitalization as a person acquitted of a crime by reason of insanity. Husk argued the criteria for involuntary hospitalization were vague. The *Husk* court described this argument as spurious and implied that Husk would have met *any* criteria to judge manifest dangerousness. Therefore, the incantation of the presumption of constitutionality masked this probable explanation for the decision. *See Husk*, 453 So. 2d 153.

8. Griffin v. State, 396 So. 2d 152 (Fla. 1981); Hamilton v. State, 366 So. 2d 8 (Fla. 1978); Carroll v. State, 361 So. 2d 144 (Fla. 1978).

9. *See* Notes 10-18, 54-56 and accompanying text.

10. 345 So. 2d 724 (Fla. 1977).

11. *Id.* at 725.

12. 398 So. 2d 1360 (Fla. 1981).

13. *Id.* at 1363. Although the *Kinner* court did not specifically define strong presumption, it invoked two additional standards: all doubts resolved in favor of constitutionality and an act will not be declared unconstitutional unless it is determined to be invalid beyond a reasonable doubt. *See* State v. Perkins, 436 So. 2d 150 (Fla. 2d Dist. Ct. App. 1983), and Fulford v. Graham, 418 So. 2d 1204 (Fla. 1st Dist. Ct. App. 1982), for other uses of the strong presumption of constitutionality.

presumption of constitutionality" is more an expression of subjective belief than a normative standard of conduct. In *State v. Bales*,[14] the supreme court used this "strong presumption" to uphold a law requiring the licensing of persons who gave massages for a fee. The strong presumption apparently included a rebuttable presumption of the existence of the necessary factual support for a law. However, the *Bales* court did not otherwise define the meaning of a "strong presumption."

In other decisions, the Florida Supreme Court has said that a reviewing court must resolve all doubts in favor of validity. For example, in *Falco v. State*,[15] the supreme court used this standard to uphold a manslaughter statute against a vagueness challenge. In *State v. Lick*[16] the supreme court used this standard to uphold an anti-prostitution statute although the court admitted there was doubt about the statute's constitutionality. Thus, it appears that some Florida courts will use this standard even when they have a real doubt about a statute's constitutionality.

Florida courts have also held that if a statute lends itself to two possible constructions, one unconstitutional and the other constitutional, the court has a duty to choose the constitutional construction.[17] The *Lick* court used this principle to resolve the doubts about the prostitution statute, namely, whether the statute applied only to women and not men. The more balanced view is that a court should only construe a law to uphold it if doing so is consistent with the constitutional rights of the litigants.[18] This view at least acknowledges the need to balance an interpretation to uphold a law with the exercise of constitutional rights. The supreme court in *Delmonico v. State*[19] held the duty to enforce the Constitution is greater than the duty to uphold a law.

These subtle differences involving the presumption of constitutionality cogently illustrate the doctrinal inconsistency in the use of standards of review. Furthermore, a comparison of the facts and circumstances of these cases reveals no logical reason to invoke different standards in similar cases. Instead, the different expressions of the pre-

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14. 343 So. 2d 9 (Fla. 1977).
15. 407 So. 2d 203 (Fla. 1981).
16. 390 So. 2d 52 (Fla. 1980). *See also* State v. Rodriguez, 365 So. 2d 157 (Fla. 1978).
17. *See, e.g.*, Schultz v. State, 361 So. 2d 416 (Fla. 1978); Leeman v. State, 357 So. 2d 703 (Fla. 1978); State v. Dinsmore, 308 So. 2d 32 (Fla. 1975).
18. State v. Bussey, 463 So. 2d 1141 (Fla. 1985); Falco v. State, 407 So. 2d 203 (Fla. 1981); Corn v. State, 332 So. 2d 4 (Fla. 1976).
19. 155 So. 2d 368 (Fla. 1963).

sumption appear to represent the idiosyncratic and subjective philosophical frame of mind of courts which desire to uphold a statute. Consequently, the presumption of constitutionality is predominantly a philosophical instrument used by courts to express the need to uphold a statute.

The presumption of constitutionality does serve one practical function, however. It expresses the axiom that the party challenging a law has the burden of proof.[20] However, the quantum of proof needed to overcome the presumption is unclear under Florida law. In constitutional challenges in civil cases, some courts have used the beyond-a-reasonable-doubt standard.[21] Two courts have even used this standard in criminal cases.[22] Subsequent courts have not followed this approach, however, and the "beyond a reasonable doubt" standard appears to be an anomaly in criminal cases.[23] In general, the majority of courts have chosen not to define the level of proof necessary to rebut the presumption of constitutionality in criminal cases. Therefore, while the presumption of constitutionality has had little pedagogical use for courts, it has provided a strong symbolic medium for a desired message.

The principle that a court presumes the Legislature has enacted constitutional laws has led to an important corollary of the presumption of constitutionality: the doctrine of avoiding constitutional issues if a court can dispose of the case on other grounds.[24] Under this doctrine, a reviewing court does not explicitly use the presumption of validity to uphold a law. The court instead implicitly uses the presumption to avoid deciding a constitutional question.

All courts have an unequivocal affirmative duty to uphold the Constitution.[25] Therefore, if a court is presented with a law that may vio-

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20. *See* State v. Perkins, 436 So. 2d 150 (Fla. 2d Dist. Ct. App. 1983); Fulford v. Graham, 418 So. 2d 1204 (Fla. 1st Dist. Ct. App. 1982); State v. Bales, 343 So. 2d 9 (Fla. 1977).

21. A.B.A. Indus., Inc. v. Pinellas Park, 366 So. 2d 761 (Fla. 1979); Village of North Palm Beach v. Mason, 167 So. 2d 721 (Fla. 1964).

22. State v. Kinner, 398 So. 2d 1360 (Fla. 1981); Davis v. State, 146 So. 2d 892 (Fla. 1962).

23. The author has found only the two cases cited above that have used the beyond a reasonable doubt standard. Most courts have not defined the quantum of proof necessary to uphold/invalidate a law. Many courts have invoked a presumption of constitutionality or exception to it without weighing the level of proof on both sides of the constitutional questions. *See supra* notes 4-18 and accompanying text.

24. *See, e.g.*, State v. Dye, 346 So. 2d 538 (Fla. 1977); Wooten v. State, 322 So. 2d 551 (Fla. 1975); Peoples v. State, 287 So. 2d 63 (Fla. 1973).

25. *See* Delmonico v. State, 155 So. 2d 368 (Fla. 1963), and State *ex Rel.* West

late the Constitution, the court should not try to avoid its duty by invoking the presumption of constitutionality doctrine. A reviewing court should hear the case on its merits. By refusing to address a constitutional issue and deciding the case on other grounds, the reviewing court has indirectly held that the law is otherwise presumptively constitutional.

The avoidance of constitutional questions can also constitute the preferred medium to prevent undesirable or unpopular messages. For example, in *Walsingham v. State*,[26] the Florida Supreme Court used this principle to avoid deciding the validity of the state abortion statute. The *Walsingham* opinion exhaustively discussed the controversial and emotional aspects of the abortion issue.[27] It also acknowledged the societal significance of the constitutional issues of the case.[28] However, the majority avoided deciding the constitutional issues by reversing the case because of erroneous jury instructions.[29] Thus, the supreme court's decision implicitly upheld the abortion statute and left it in effect.[30]

This approach directly ignores the affirmative duty of a court to uphold the Constitution. When the supreme court invokes this doctrine and ignores important constitutional issues, innocent people may suffer the effects of an unconstitutional law until the "right" constitutional case reaches the court.

The use of presumption as an idiosyncratic philosophical tool has created a rule of construction with limited substantive meaning. A presumption that merely states a law is presumed constitutional offers little help on *how* a court can interpret what a law means and then apply that interpretation in a way that upholds a law and the constitution. Therefore, courts have developed other media to support the message of upholding a law. The rules of construction attendant to the presumption of constitutionality, unlike the symbolic and philosophical nature

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v. Butler, 70 Fla. 102, 69 So. 771 (1914), for a discussion of the affirmative duty of a court to uphold the constitution.

26. 250 So. 2d 857 (Fla. 1971).

27. *Id.* at 860-62.

28. *Id.*

29. *Id.* at 862.

30. The *Walsingham* opinion unquestionably *suggested* that the Legislature rewrite the abortion statute to eliminate the constitutional problems. Justices Ervin and Adkins, concurring only in the judgment, decided the statute was unconstitutional. However, the reversal on the grounds of erroneous jury instructions left the statute in effect. The Supreme Court seemed to prefer that the Legislature instead of itself deem the law unconstitutional. *Id.* at 859-64.

of the presumption itself, embody practical rules of construction and interpretation. However, these practical rules share the same philosophical *raison d'etre* with the presumption of constitutionality — uphold a law at all costs. The basic goal of these rules of construction is to give statutory language a constitutional meaning.

III. Rules of Construction Attendant to the Presumption of Validity

After selecting the appropriate standard of review, the task of a court reviewing a constitutional challenge is to determine the literal meaning of the statutory or constitutional language. The solutions to any constitutional questions must logically come from the language of a statute or constitution. Florida courts have developed several rules of construction designed to either give definite meanings to unclear statutory language or, more importantly, to give constitutional judicial interpretations to challenged statutory language. The desired message has most often dictated the precise use of any particular rule of construction. In the use of rules of construction, the medium is sometimes the entire message. A court desiring to uphold or invalidate a law will invoke the rule(s) of construction which will produce a constitutional law while ignoring all other applicable rules of construction.[31]

A. *The Determination of Legislative Intent*

Many constitutional challenges involve the use of vague or overbroad language in a statute. The constitutional challenge will focus on language that: 1) is not clear on its face; or 2) could result in unconstitutional applications. The primary ancillary rule of construction to resolve questions of statutory meaning is the determination of legislative intent. If the facial language of the law is unclear, the legislative intent on the meaning of the law will prevail unless the law as construed violates other constitutional principles.[32] Some courts have stated that legislative intent is the polestar for a reviewing court and the intent must

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31. *See, e.g.*, City of Pompano Beach v. Capalbo, 455 So. 2d 468 (Fla. 4th Dist. Ct. App. 1984), *review denied*, 461 So. 2d 113 (Fla. 1985), *cert. denied*, 106 S. Ct. 80 (1986). The majority and dissent each selected various standards of review to support their respective positions while ignoring the manifest applicability of other standards. *See also* White v. State, 330 So. 2d 3 (Fla. 1976); State v. Mayhew, 288 So. 2d 213 (Fla. 1974).

32. Reino v. State, 352 So. 2d 853 (Fla. 1977).

be given effect even though it may contradict the strict letter of the statute.[33]

If the Legislature has expressly stated its intent or specifically defined the statutory terms, the task of answering a constitutional challenge will be easy.[34] However, the Legislature often does not specifically define statutory language or express its intent. An express declaration of intent or specific definitions would help to eliminate most constitutional deficiencies. However the use of an express declaration of intent or definitions in any particular statute appears to be entirely a matter of legislative discretion and Florida courts rarely criticize the Legislature for failing to provide specific expressions of intent or definitions with a statute.[35]

Ambiguous statutory language or unexpressed intent has led to various rules of statutory construction. The primary goal of these rules is to uphold a law. The first rule is that a court can rebut a challenge of vagueness by divining legislative intent; the law will be constitutional unless the legislative intent otherwise violates the Constitution.[36] The second rule is that a court can determine legislative intent by examining: the whole act and the evil to be corrected; the language of the act, including the title; and the history of the act from enactment to the present state of the law on the subject.[37]

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33. Speights v. State, 414 So. 2d 574 (Fla. 1st Dist. Ct. App. 1982); Parker v. State, 406 So. 2d 1089 (Fla. 1981); State v. Webb, 398 So. 2d 820 (Fla. 1981); *In re* D.F.P., 345 So. 2d 811 (Fla. 4th Dist. Ct. App. 1977). These cases also held that the initial task of a court is to determine legislative intent, and if the statutory language is clear, then there is no need to resort to the rules of statutory construction. The plain language of the statute will be given effect.

34. *E.g.*, State v. Eash, 367 So. 2d 662 (Fla. 2d Dist. Ct. App. 1979), in which the court had to interpret the meaning of Section 944.025, FLA. STAT. (1978) (pretrial felony intervention programs). Section 944.012 clearly stated the legislative intent and the *Eash* court happily noted it was not "forced to glean legislative intent solely from the operative portions of the law or from such bits and pieces as may have been preserved of the legislative proceedings. . . ." 367 So. 2d at 663-64.

35. The closest a Florida court has come to directly criticizing the legislature was in State v. Llopis, 257 So. 2d 17 (1971). In *Llopis*, the court considered whether a law regulating the business conduct of state employees was vague. The *Llopis* court noted, "While we acknowledge a special sympathy for legislation of this nature, which is intended to safeguard the public and insure honesty and integrity in government, our sympathy cannot be allowed to impair our judgment. This statute is vague beyond redemption." *Id.* at 18.

36. *See supra* notes 18, 32-33.

37. Parker v. State, 406 So. 2d 1089 (Fla. 1981); Foley v. State, 50 So. 2d 179 (Fla. 1951).

This broad subject area gives the court the opportunity to select only certain media to reach desired messages. A court wishing to uphold a law or give it a particular interpretation can send this message by selecting the media designed to determine legislative intent.

A good example of a court using the title to interpret a statute is *State v. Webb*.[38] The *Webb* court used the title to decide Florida's "stop and frisk" statute, Florida Statutes section 901.151.[39] The court held that the statute did not give greater constitutional protection to a person stopped and frisked in Florida than was enunciated by the United States Supreme Court in its decisions on this subject. In *Webb*, the title expressly stated the legislative intent and the Florida Supreme Court merely gave effect to the obvious intent of the Legislature.

The Florida Supreme Court has ignored the effect of a title, however, when the title suggests that a law may be unconstitutional. In *State v. Bussey*,[40] the court considered the constitutionality of Florida Statutes § 817.563,[41] which prohibited the sale of an uncontrolled substance in lieu of an offer to sell a controlled substance. The constitutional challenge centered on whether the statute was an act relating to fraud or controlled substances. The district court of appeal found the statute to be a fraud law because of its title and placement in Chapter 817, Fraudulent Practices. The Florida Supreme Court decided that the law was an act dealing with controlled substances and the title and placement in a certain chapter were not conclusive on legislative intent.[42]

The *Bussey* opinion amply illustrates the subjective nature of the use of a title to determine legislative intent; the title can be the expression of intent used to uphold a law or a court can ignore the title because it is not conclusive evidence of intent. The question in *Bussey* remains, despite the *ex cathedra* declaration of the Supreme Court, if the Legislature did not intend section 817.563 to be an anti-fraud measure, why did section 817.563 appear in chapter 817, Fraudulent Practices? The Florida Supreme Court noted that a reviewing court must look at the other established principles of statutory construction, in addition to the title, to determine legislative intent. However, the Florida Supreme Court did not use these established principles. The court

38. 398 So. 2d 820 (Fla. 1981).
39. FLA. STAT. § 901.151 (1981).
40. 463 So. 2d 1141 (Fla. 1985).
41. FLA. STAT. § 817.563 (1981).
42. 463 So. 2d at 1143.

merely substituted its own belief on intent for that of the Legislature. The *Bussey* decision may prove the title to a law is simply what the court decides it means and has no other practical effect.

A review of the legislative and case law history of a statute is a better way to determine legislative intent than subjective extrapolation of intent from a title. The First District Court of Appeal in *Speights v. State*[43] reviewed the history of an act which prohibited the unlawful burning of wild lands by a non-owner of the land to determine if the issue of ownership was an element of proof for the State. Reviewing the law's history back to 1879, Justice Ervin concluded that ownership of the burned land was indeed an affirmative defense based upon the history of the statute. The *Speights* court suggested that courts should feel free to consider all relevant history surrounding a statute, including repealed acts or subsequent sessions of the Legislature.

A review of the legislative history of an act can remove most of the judicial subjectivity associated with judicial determination of legislative intent. However, many statutes do not have an adequate expression of intent or legislative history from which a court can objectively divine intent. The General Index to the Florida Statutes (1985) contains a delineation of statutory construction rules of many different laws. However, few of the listed statutes with expressions of statutory construction or intent are criminal laws. Furthermore, some of the listed expressions of intent on construction of criminal laws are vague. For example, Florida Statutes section 812.037, dealing with the construction of theft, robbery and related crimes, states, "notwithstanding Florida Statutes section 775.021, Florida Statutes sections 812.012-812.037 shall not be construed strictly or liberally, but shall be construed in light of their purposes to achieve their remedial goals."[44] This type of express statement of intent gives a court the opportunity to impose its own subjective interpretation by attempting to achieve "remedial goals."

If the language and title of a statute do not solve the problem of ambiguity, a court may then examine the contents of similar statutes. The doctrine of *in pari materia* attempts to give meaning to one statute by examining the *known* meaning of other similar legislative enactments.[45] If a conflict ostensibly exists between two statutes, a reviewing

43. 414 So. 2d 574 (Fla. 1st Dist. Ct. App. 1982).

44. FLA. STAT. § 812.037 (1985).

45. *See* Speights v. State, 414 So. 2d 574 (Fla. 1st Dist. Ct. App. 1982), and State v. Nourse, 340 So. 2d 966 (Fla. 3d Dist. Ct. App. 1976), for uses of *in pari materia* in criminal cases.

court will also construe the challenged law to reconcile the conflicts. The doctrine of *in pari materia* is based upon common sense but it assumes that the Legislature intended consistent meanings in different sections of laws covering a single field or related subject areas. The doctrine of *in pari materia* clearly gives courts the opportunity to impose a judicial form of consistency and uniformity on laws which appear to have an ambiguous meaning or intent.

Courts and attorneys should whenever possible ascertain legislative intent before defining statutory language. A review of only the statutory language will not always disclose intent because the legislature may give special meaning to words of ordinary meaning. For example, in *Goddard v. State*,[46] the First District Court of Appeal upheld a statute, as applied to a particular situation, by giving the statutory language its plain and ordinary meaning. The Florida Supreme Court quashed that decision because the legislative history indicated an intent to give the language a meaning different than the ordinary meaning. Although the general rule is that statutory language has its common and ordinary meaning, the meaning intended by the Legislature will always prevail.

The problem with ascertaining legislative intent is that most criminal statutes do not have specific expressions of legislative intent. Research of the legislative history or comparison of similar statutes may provide clues on legislative intent. However, the determination of unclear legislative intent gives courts and attorneys the tempting opportunity to substitute their own subjective intent for the unexpressed intent. It is a chance to select a media expressly tailored to a desired message. The judicial interpretation of intent may also result in judicial lawmaking and the frustration of the true legislative intent.

In *Brown v. State*,[47] a case dealing with the public profanity law, Justice Sundberg described the evils of re-writing by judicial interpretation to determine legislative intent and give a law a constitutional meaning. He noted that judicial reconstruction of a law could result in two evils: (1) if the legislative intent is not apparent from statutory language, judicial reconstruction of vague or overbroad statutes could frustrate the true legislative intent; and (2) doubts about judicial competence to authoritatively construe legislation are warranted because a court has neither the legislative fact-finding machinery nor the experience with the particular statutory subject matter to authoritatively con-

46. 458 So. 2d 230 (Fla. 1984).
47. 358 So. 2d 20 (Fla. 1978).

strue a statute.[48]

B. *The "Avoiding Absurd Results" Doctrine for Determining Legislative Intent*

If a court cannot uphold or construe a law by examining the title or legislative history or by using the *in pari materia* doctrine or other rules of construction, it may resort to the "avoiding absurd results" doctrine. This doctrine is illustrated when a court subjectively determines a particular interpretation would lead to an absurd or objectionable result. The reviewing court then tautologically determines that the Legislature would never intend to produce an absurd or objectionable result. Consequently, such result cannot be what was intended. Courts most often use this doctrine to correct overbroad laws or drafting mistakes by the Legislature. For example, in *Dorsey v. State*,[49] a statute required a warrant to listen to wire communications made in whole or in part through the use of facilities for transmission or communications by wire. The language of the statute could have included all forms of broadcast communications. The court decided this was an absurd result.

The courts have also used this doctrine to save provisions of statutes that were changed by later similar statutes.[50] The new statutes would omit a portion of the prior statute and the omission would produce an absurd or unreasonable result. Therefore, the reviewing court construed the new statute to contain the omitted provision.

In *Simmons v. State*[51] the supreme court used the absurd results doctrine to save a statute which stated that "the presiding judge shall charge the jury . . . and must include in said charge the penalty fixed by law for the offense for which the accused is on trial."[52] The court held that the word "shall" meant "may" because a mandatory statute would violate the power of the judiciary and would produce an objectionable result. Thus, the *Simmons* court concluded that the Legislature could not have intended to intrude upon judicial power. Although

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48. *Id.* at 50.

49. 402 So. 2d 1178 (Fla. 1981); *See also In re* J.L.P., 416 So. 2d 1250 (Fla. 4th Dist. Ct. App. 1982).

50. *See, e.g.*, Drury v. Harding, 461 So. 2d 104 (Fla. 1984); Miller v. State, 297 So. 2d 36 (Fla. 1st Dist. Ct. App. 1974).

51. 160 Fla. 626, 36 So. 2d 207 (Fla. 1948).

52. FLA. STAT. § 918.10 (1945).

the ultimate decision in *Simmons* is probably correct, the reasoning is faulty because the Legislature clearly intended to force the judiciary to give penalty instructions.

The correct use of this doctrine is to eliminate interpretations or overbroad language that would conflict with *known* legislative intent or other similar statutes. However, the "avoiding absurd results" doctrine is a potentially dangerous tool. No other rule of construction is as intrinsically subjective.

Once a court identifies the absurd result, it will then replace it with a result that it feels is not absurd. This doctrine allows blatant judicial re-writing of statutory language. On the one hand, courts have acknowledged that the legislature is presumed to know the meaning of the words it chooses for statutes and that statutory language is to be given its plain and ordinary meaning.[53] On the other hand, this standard of review ignores the possibility that the Legislature actually intended the result the court considers absurd. If the result is absurd because it would violate the Constitution, the court has a duty to prohibit such results. A reviewing court should then invalidate the law or eliminate the objectionable language. The court should not merely reject an absurd result and then substitute its own desired result to uphold a law. The true legislative intent should be given effect, even if it results in the invalidation of a law.

C. *The Determination of a Factual Predicate to Support Legislative Intent*

Most laws embody solutions to problems based on historical experience or special factual findings. Criminal laws address problems perceived by the Legislature to be serious enough to justify penal sanctions. Courts have developed a powerful rule of construction designed to uphold laws against challenges that the law: (1) does not address a significant problem worthy of criminal sanctions; or (2) does not achieve its stated purpose. The rule of construction is that a court will presume a factual predicate exists to support the purpose and intent of a law.[54] Even if the statute does not contain an expression of the fac-

53. State v. Cormier, 375 So. 2d 852, 854 (Fla. 1979); Tatzel v. State, 356 So. 2d 787, 789 (Fla. 1978).

54. *See, e.g.*, Fulford v. Graham, 418 So. 2d 1204, 1205 (Fla. 1st Dist. Ct. App. 1982); Cilento v. State, 377 So. 2d 663, 665 (Fla. 1979); State v. Bales, 343 So. 2d 9, 11 (Fla. 1977).

tual predicate, a court must presume the necessary facts were before the legislature when it enacted the law. However, there must be facts based on common experience to support the law.

The factual predicate for a law must actually exist and not be speculative or hypothetical. For example, in *Rollins v. State*,[55] the supreme court invalidated a law which prohibited certain minors from playing billiards in a pool hall without parental permission. The ostensible purpose of the law was to prevent the exposure of minors to gambling and alcohol. However, the law exempted all military personnel, regardless of age. Furthermore, the statute did not prevent minors from playing pool in other places where alcohol or gambling were possibly present. Consequently, the supreme court held the law violated equal protection and had no justifiable purpose.[56]

The presumption of the necessary facts to support a law is usually a good principle. Often a court is incapable of making the factual findings necessary to determine if a law is based on factual reality. However, all criminal laws must be a valid exercise of the police power and must not violate equal protection by discriminating against other individuals in similar situations.[57] Therefore, a court must be able to test whether a law is based on verifiable data or common experience. The lack of express legislative factual findings in many laws make this a difficult task. Many courts, to achieve the desired message of upholding a law, have used the doctrine that a court cannot question the wisdom, need or appropriateness of particular legislation.[58] This view absolves the court of having to determine whether a law is based on fact or does not discriminate.

If the factual basis for a law is not within the common experience of the citizens of the state, courts should require the legislature to make specific factual findings to support the law. Reviewing courts and counsel arguing a case should always consider whether the factual basis for a law is merely hypothetical, based upon common experience, or based upon specific findings by the Legislature.

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55. 354 So. 2d 61 (Fla. 1978).

56. *Id.* at 63-64.

57. *Id. See also* State v. Bussey, 463 So. 2d 1141 (Fla. 1985); State v. Yu, 400 So. 2d 762 (Fla.), *appeal dismissed*, 454 U.S. 1134 (1981); Carroll v. State, 361 So. 2d 144, 146 (Fla. 1978); Powell v. State, 345 So. 2d 724, 725 (Fla. 1977).

58. *See, e.g.*, Hamilton v. State, 366 So. 2d 8, 10 (Fla. 1978); Tatzel v. State, 356 So. 2d 787, 790 (Fla. 1978); State v. Bales, 343 So. 2d 9, 11 (Fla. 1977).

D. *The Selected Media for a Desired Message: the Upholding of a Law*

The above description of the standards of review and rules of construction demonstrates that courts can selectively use the standard of review to achieve desired results. Instead of following a standard which is applicable to a given problem and dictates a particular result, some result-oriented courts have used the standard which best supports the desired outcome. Most courts uphold a law against a constitutional challenge and consequently will choose a standard of review that best fits the message of constitutionality. Courts wishing to invalidate statutes use the same method via different means. The message of unconstitutionality has created several exceptions to the presumption of constitutionality: media designed to uphold constitutional rights and invalidate laws.

III. Methods of Invalidating Unconstitutional Laws: Strict Scrutiny, Unconstitutional as Applied, and First Amendment Cases

Florida courts have developed several exceptions to the presumption of constitutionality. Unlike the oftentimes symbolic nature of the presumption of constitutionality, these exceptions are functional rules designed to protect constitutional rights. However, these rules can also represent *post hoc* support for a decision to invalidate a law. Appellate courts have misused the exceptions in the same manner as the presumption of constitutionality: doctrinal support for a particular decision instead of a process that leads logically to a given conclusion.

The media of unconstitutionality can properly invalidate a law because: (1) the constitutional principles embodied in them outweigh the interests advanced by the law, or (2) even if the statutory interests are substantial, the law cannot operate without violating constitutional rights. Any constitutional case must consider the exceptions to the presumption of constitutionality. A court or lawyer who ignores them does not perform a complete analysis of the constitutional problem. A consideration of only the presumption of constitutionality will inordinately focus on the need to uphold a law while neglecting the need to uphold constitutional principles. On the other hand, a review of the several exceptions to the presumption of constitutionality may convince an undecided or divided court to hold a law unconstitutional. These exceptions also provide psychological and instructional counterbalances to

the mind-set of upholding a law at all costs.

A. *Strict Scrutiny*

The most common media for a message of unconstitutionality is the rule which mandates the strict construction of criminal statutes. The Florida Supreme Court in *State v. Wershow*[59] stated the rule as: If there is doubt about the meaning of a criminal statute, a court must resolve all doubts about the meaning of a criminal statute in favor of the citizen and against the state.[60] This strict scrutiny standard does not exist to invalidate ambiguous or vague statutes. It supplies a rule of construction to clarify unclear statutory language. The strict scrutiny standard is diametrically opposite from the presumption of constitutionality. The resolution of doubts in favor of the citizen will almost invariably result in a finding of unconstitutionality due to vagueness or unconstitutional application. Doubts resolved in favor of the citizen would theoretically result in a constitutional law but courts have not used strict scrutiny in this manner.

Under the strict scrutiny standard, the reviewing court will construe language according to its common, ordinary meanings. If a word or phrase has multiple or ambiguous meanings, a court will not construe the law to uphold it.[61] The attendant rules of construction developed by courts invalidating laws are that a court will neither supply missing essential elements to a law nor amend or change the plain meaning of the words used by the Legislature.

Florida Statutes section 775.021[62] codifies the strict scrutiny standard. It states: "The provisions of this code [Title XLVI - Crimes] and offenses defined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused." Florida Statutes section 775.021 directly conflicts with the "resolve all doubts in favor of constitutionality" standard as well as the "if there are two interpretations of a law, a court must choose the constitutional interpretation" standard. Only a few courts have used Florida Statutes section 775.021 despite its obvi-

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59. 343 So. 2d 605, 608 (Fla. 1977); *See also* State v. Waters, 436 So. 2d 66, 70 (Fla. 1983).

60. 343 So. 2d at 607-608.

61. *See, e.g., Wershow*, 343 So. 2d at 605; State v. Egan, 287 So. 2d 1 (Fla. 1973); State v. Llopis, 257 So. 2d 17 (Fla. 1971); *Ex parte* Amos, 93 Fla. 5, 112 So. 289 (1927).

62. FLA. STAT. § 775.021 (1985).

ous applicability to this area.[63]

The strict scrutiny standard also embodies a significantly different philosophical viewpoint than the presumption of constitutionality. The practical difference is mainly one of attitude in a close case; should a reviewing court resolve doubts in favor of the state (constitutionality) or in favor of the individual (unconstitutionality). The actual use of these two standards will ultimately depend upon whether the court's decision is to uphold the law or invalidate it. The historical use of the "strict scrutiny" and "presumption of validity" standards illustrates that Florida courts have merely selected the medium that fits the desired message. How else could these courts develop two dialectically opposite rules of construction to resolve doubts about meaning or constitutionality? One rule which states "resolve all doubts in favor of constitutionality" co-exists with another which declares "resolve all doubts in favor of the citizen and against the state."

A court, under current practice, could use either rule whenever there is doubt about the meaning or constitutionality of a statute. The rules are not compatible and a court cannot logically apply both in a single case. However, a court should initially consider the two standards and decide which is applicable. If there is doubt about the meaning of a law, a court should strictly construe it. Strict scrutiny is necessary because if there is doubt about the meaning of a law, it is probably vague or overbroad and unconstitutional on its face. If there is no constitutional doubt, a court can construe the law to uphold it. No reported case has discussed the applicability of both rules in a particular case and only a few cases have recognized the presumption of constitutionality and then rejected it.[64] The case law on the use of the two rules is intractably inconsistent. The only rational explanation for this inconsistency is that Florida courts have chosen the appropriate standard to fit the desired message.

This inconsistency is present when courts use strict scrutiny to justify a decision of unconstitutionality instead of as a tool of construction. For example, the Florida Supreme Court has used the standard to invalidate laws prohibiting abortions except when they are necessary to preserve the life or health of the mother,[65] as well as to define malpractice in public office when state officers or employees accept employment

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63. *See, e.g.*, Love v. State, 450 So. 2d 1191 (Fla. 4th Dist. Ct. App. 1984); Valdes v. State, 443 So. 2d 221 (Fla. 1st Dist. Ct. App. 1984).

64. *E.g.*, Marrs v. State, 413 So. 2d 774 (Fla. 1st Dist. Ct. App. 1982).

65. State v. Barquet, 262 So. 2d 431 (Fla. 1972).

which might impair their independence of judgment in their public duties.[66] In each of these cases, the Florida Supreme Court refused to construe the statutes to uphold some of the laws by placing limiting constructions on them. The opinions in these cases discuss and ultimately reject such constructions to uphold the statutes.[67] The supreme court has also used the standard to hold that a statute did not apply in a particular situation.[68]

The decision to invalidate a law has given rise to principles designed to justify a court's refusal to construe a law in order to uphold it. Strict constructionists do not impart special legalistic or common law meanings to statutory language to uphold a law. They merely invoke the doctrine of separation of powers and conclude that such linguistic machinations effectively re-write a law and violate the separation of powers.[69] The question then arises: is it the higher duty of the court to construe a law to uphold it or avoid re-writing a law to uphold it? Another factor also enters into this calculus. Judicial re-writing of a law ignores the doctrine of criminal notice from the plain and ordinary language of the statute.

Courts have usually avoided these conflicts by invoking one standard to support a desired result while ignoring the manifest applicability of other appropriate standards. Although strict scrutiny is supposedly a threshold rule of construction, reviewing courts have invoked it as symbolic support to invalidate a law. Virtually every time the Florida Supreme Court uses strict scrutiny it does so to uphold a trial judge's finding of unconstitutional vagueness.[70] Occasionally, courts discuss the standard and reject it because the law is not vague or the presumption of constitutionality and its rules of construction are *more*

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66. State v. Wershow, 343 So. 2d 605 (Fla. 1977); *see also* State v. Llopis, 257 So. 2d 17 (Fla. 1971), and State v. Buchanan, 191 So. 2d 33 (Fla. 1966), for examples of the use of the strict scrutiny standards.

67. *See Wershow*, 343 So. 2d at 607; *Barquet*, 262 So. 2d at 435-38; *Llopis*, 257 So. 2d at 18-19.

68. *E.g.*, Negron v. State, 306 So. 2d 104 (Fla. 1974); Nell v. State, 277 So. 2d 1 (Fla. 1973).

69. The following cases held it was improper to re-write a law to uphold it: Brown v. State, 358 So. 2d 16 (Fla. 1978); State v. Egan, 287 So. 2d 1 (Fla. 1973); *Barquet*, 262 So. 2d at 431. However, in White v. State, 330 So. 2d 3 (Fla. 1976), the supreme court substantially re-wrote the breach of peace/disorderly conduct statute by adding three new elements to the statute to uphold it against first amendment challenges.

70. *See, e.g., Barquet*, 262 So. 2d at 431.

important.[71] The sometimes subjective and idiosyncratic decision on whether there is doubt about the statute also gives a court the opportunity to reject strict scrutiny.

Logically, a reviewing court should use strict scrutiny every time there is a legitimate claim of doubt about the meaning or scope of a criminal statute. However, in the following areas of admitted significant doubt about statutory meanings— breach of the peace,[72] loitering,[73] lewd and lascivious conduct,[74] or profane language[75]— the supreme court did not use strict scrutiny. The court had already decided to uphold the statutes and the use of strict scrutiny would have invalidated most of these laws.

The policy rationale for strict scrutiny is that the state should not deprive a person of his liberty under ambiguous or vague laws.[76] When there is doubt about the meaning of a law, a court must resolve the doubt in favor of liberty because a doubt resolved in favor of the state will result in a conviction under a law which a court has explicitly admitted was previously ambiguous. Therefore, strict scrutiny should be an indispensable adjunct of the prospective notice requirement of criminal laws.

Courts could sometimes avoid the conflict between strict scrutiny and the presumption of constitutionality by applying strict scrutiny only to the litigants before the court. The court could then either hold the law unconstitutional on its face or construe it to uphold and apply it prospectively only. This view would exonerate the litigants before the court. This procedure would eliminate the conflict between strict construction and the presumption of constitutionality and promote the notice requirements of criminal laws. However, when a court ignores the strict scrutiny standard, changes the meaning of a law to uphold it and applies it retrospectively, it becomes both a *de facto* legislative and *ad hoc* tribunal. Under the present system, appellate courts effectively make new rules and then apply them to individuals who did not beforehand know about them. A review of the use of unconstitutional as applied standard does not reflect a use of the standard to promote the

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71. *E.g.*, Drury v. Harding, 461 So. 2d 104 (Fla. 1984).
72. *See* White v. State, 330 So. 2d 3 (Fla. 1976).
73. *See* State v. Ecker, 311 So. 2d 104 (Fla. 1975).
74. Chesebragh v. State, 255 So. 2d 675 (Fla. 1971).
75. Brown v. State, 358 So. 2d 16 (Fla. 1978).
76. *See Wershow*, 343 So. 2d at 608-9, *quoting* Screws v. United States, 325 U.S. 91 (1944), and United States v. Reese, 92 U.S. 214 (1876).

notice requirement. Courts have instead used the unconstitutional as applied standard as a medium to uphold laws of circumstantial meaning.

B. *Unconstitutional as Applied*

The unconstitutional as applied standard, as historically used, is an adjunct of the rule of upholding a law by judicial construction. This rule produces individual justice but also permits a court to uphold a law. A court can leave a statute in operation by declaring a law unconstitutional only as applied to a limited set of facts.

The Florida Supreme Court first adopted this principle in *In re Fuller*.[77] The court upheld the disorderly conduct statute but also held the state could not apply the law to the facts of that case.

The supreme court repeated this approach in *Gonzalez v. City of Belle Glade*.[78] Gonzalez was a protest marcher who made threatening and annoying comments to police officers. The majority opinion referred to the common law definition of breach of peace/ disorderly conduct, found it did not apply to Gonzalez' conduct and upheld the statute. Justice Boyd wrote a sagacious dissent, joined by Justice Ervin, which criticized the majority's disposition of the case.[79] Justice Boyd noted that the problem with the disorderly conduct statute was that the determination of whether or not a particular act was disorderly depended upon the facts of that particular case. Consequently, a citizen would not know beforehand if a criminal violation had occurred. Courts should seek to enforce specific laws which cover particular conduct, according to Justice Boyd.[80]

The Florida Supreme Court also has used the unconstitutional as applied standard in other cases where the meaning of statutory language depends on the attendant factual circumstances. In *B.A.A. v. State*[81] and *State v. Ecker*,[82] this approach was used to uphold the loitering law but exonerate individual defendants. The supreme court apparently uses this standard to ameliorate definitional problems with certain statutes. The loitering, breach of the peace and disorderly con-

77. 255 So. 2d 1 (Fla. 1971).
78. 287 So. 2d 669 (Fla. 1973).
79. *Id.* at 671-77.
80. *Id.* at 676.
81. 356 So. 2d 304 (Fla. 1975).
82. 311 So. 2d 104 (Fla. 1975), *cert. denied*, 423 U.S. 1019 (1975).

duct laws do not have fixed and categorical meanings. Therefore, courts must give the statutory language meaning on a case-by-case basis. The case-by-case linguistic development of a statute does not necessarily advance the goal of informing all citizens of prohibited criminal conduct. An ordinary citizen must read the reported decisions on these statutes to avoid criminal conduct. The unconstitutional as applied standard does somewhat protect the litigants before it but is too easily used as a medium to uphold vaguely worded statutes. Courts could use this standard to uphold a law by refusing to convict those citizens it decides were unconstitutionally arrested. A citzen convicted under a law later ruled unconstitutional as applied may receive little solace from this decision after an arrest, conviction and several years of appellate litigation. However, courts should not abandon the unconstitutional as applied standard because it is proper when the facts do not fall within the scope of a facially valid statute or the court creates a new statutory definition.

The expansive use of the unconstitutional as applied standard could result in the perpetuation of facially vague statutes. The case-by-case construction of a vague or overbroad law may result in the chilling or deterring of the exercise of fundamental rights. Such laws may impinge upon the exercise of first amendment rights because citizens do not know the line between innocent and criminal conduct. Courts have, therefore, developed another exception to the presumption of constitutionality.

C. *First Amendment Cases*

Florida courts have developed special rules of construction for cases involving the exercise of first amendment rights. In *State v. Elder*,[83] the Florida Supreme Court stated that because of the transcendent value of constitutionally protected speech, statutes regulating expression must be narrowly tailored to further only a legitimate state interest. The *Elder* court acknowledged the usual presumption of constitutionality, but used the stricter standard because of the possible infringement of first amendment rights.

Other courts have also carefully construed laws that potentially prohibit free speech rights. The First District Court of Appeal in *C.C.B. v. State*,[84] invalidated a city ordinance prohibiting begging be-

83. 382 So. 2d 687 (Fla. 1980).
84. 458 So. 2d 47 (Fla. 1st Dist. Ct. App. 1984).

cause the law intruded upon first amendment rights. The begging ordinance did not advance legitimate government interests in the least intrusive manner.[85] In *State v. Ecker*,[86] the supreme court construed the loitering statute and held that the exercise of fundamental rights required a "delicate balance" between the protection of individual rights and the protection of the public.

The use of special rules of construction reflects a policy of great deference to the exercise of first amendment rights. In first amendment cases, a court will not resolve doubts in favor of the state or constitutionality. Under this rule, a court should weigh doubts in favor of the first amendment and balance the possible exercise of rights with the methods used by the criminal statute to prohibit certain conduct. First amendment rights often outweigh even legitimate state interests and preclude the state from prohibiting certain conduct.[87] Attorneys and courts should always review a statute for the potential exercise of first amendment rights. The possible deterrence of first amendment activities may invalidate an otherwise constitutional statute.

D. *The Media for Invalidating a Statute in Conflict with the Media for Upholding a Statute*

Courts have selectively chosen certain media to justify a holding of unconstitutionality. Many of these rules logically conflict with the rules designed to uphold laws. The conflict manifests itself most often in cases of vague or ambiguous statutory language. A court wishing to uphold a law will remove the ambiguity by using one set of standards of review. A court wishing to invalidate a law will use another set of standards. The self-serving use of the standards of review has created significant doctrinal inconsistency and confusion. The selection of certain media for desired messages has also created a problem unique to criminal law: special judicial interpretations of laws that are theoretically designed to give notice to ordinary citizens.

The selective use of standards of review has not fulfilled the doctrinal reasons for standards of review: to help a court interpret the Constitution and statutory language in light of a particular factual situation. The inherent ambiguity of the English language, coupled with the

85. *See, e.g.*, State v. Ashcraft, 378 So. 2d 284 (Fla. 1979); State v. Keaton, 371 So. 2d 86 (Fla. 1979); McCall v. State, 354 So. 2d 869 (Fla. 1978).
86. 311 So. 2d at 104.
87. *See, e.g.*, C.C.B. v. State, 458 So. 2d 47 (Fla. 1st Dist. Ct. App. 1984).

self-serving use of standards of review, has created inconsistent decisions and belittled the doctrine of prospective criminal notice. In their almost limitless zeal to uphold laws, courts have used the rules of construction designed to uphold laws to create legalistic definitions that are often beyond the ken of ordinary citizens. A review of the attempts to interpret vague statutory language demonstrates that the medium completely becomes the message, and the message is often understandable only by the legal profession.

IV. Conflict Among the Presumption of Constitutionality, Strict Scrutiny and the Notice Requirement of Criminal Laws

A. *The Notice Requirement of Criminal Laws*

All criminal laws must give notice to ordinary citizens of common intelligence.[88] The language of a statute must clearly describe prohibited conduct so citizens can avoid criminal behavior before they act in a particular situation. Florida courts have often ignored the notice requirement of criminal laws by manipulating standards of review. A court wishing only to uphold a law will reconstruct or manipulate the language of a statute to make it constitutional. The law which the court has "saved" will probably be applied to the litigants before it. However, the litigants making the constitutional challenge may not have known of the new judicially-created definition at the time of the alleged criminal act. Courts invalidating laws as applied also ignore the notice requirement by defining a statute on a case-by-case basis. These courts exonerate the litigants before it but do little to give prospective violators guidance on the definition of prohibited criminal conduct.

Courts must ultimately determine the meaning of statutory language to decide whether a law is constitutional. Explication of the English language is unavoidable in constitutional cases. Standards of review, if correctly used, balance the need of the courts to construe statutory language with the doctrine of fair notice to citizens. If statutory language was always clear and legislative intent was "known," the conflict between standards of review and the notice requirement would rarely exist. The cardinal rule of construction of statutory language is, appropriately, that unless otherwise defined or limited by intent, statu-

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88. *See, e.g.*, Gardner v. Johnson, 451 So. 2d 477 (Fla. 1984); Lee v. State, 397 So. 2d 684 (Fla. 1981); Slaughter v. State, 301 So. 2d 762 (Fla.), *cert. denied*, 420 U.S. 1005 (1974).

tory language is given its plain and ordinary meaning.[89] However, a review of the history of statutory construction in criminal constitutional cases demonstrates statutory language is rarely plain and ordinary.

B. *The Ambiguous and Synomic Nature of the English Language and the Attempt to Give Language Its "Plain and Ordinary" Meaning*

The initial task of a court considering a constitutional challenge is to determine the literal meaning of statutory language regardless of the standard of review. The standards of review embodied in the presumption of constitutionality, strict scrutiny and other special rules of construction are to help courts in the task of statutory definitions. The inherent ambiguity and synonymic nature of the English language make the job of determining the literal meanings of words a difficult task.[90] The manipulation of standards of review, coupled with the difficulty of defining English, results in special judicial definitions. These judicial definitions are often not the plain and ordinary meanings of words.

1. *Judicial definitions of statutory language*

The manipulation of standards of review to support a desired outcome often accompanies judicial defining of words to uphold a statute. Constitutional challenges often involve vague or overbroad statutory language. A court wishing to uphold the law must construe it to remove the vagueness of overbreath and comply with other applicable constitutional provisions. Courts will then select a standard of review to justify the desired definition. This linguistic machination often results in special judicial definitions. For example, in *City of Pompano Beach v. Capalbo*[91] the majority and dissent engaged in a battle of standards of review to justify a particular definition which either upheld or invalidated a law. The court considered the constitutionality of a city ordinance which prohibited sleeping or lodging in a vehicle on public prop-

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89. *See* State v. Wershow, 343 So. 2d 605 (Fla. 1977), and *supra* note 53.

90. *See* MODERN GUIDE TO SYNONYMS (Hayakawa 2d ed. 1968), where S. I. Hayakawa notes that "English has the largest vocabulary and the most synonyms of any language in the world."

91. 455 So. 2d 468 (Fla. 4th Dist. Ct. App. 1984), *review denied*, 461 So. 2d 113 (Fla. 1985).

erty or streets. Judge Glickstein reviewed the various standards of review for vague or overbroad statutes, and then concluded that under those standards the ordinance was overbroad and gave the police unbridled discretion to make arrests. The ordinance could have also punished innocent people sleeping or napping in a vehicle, moving or stationary, on public property.

Judge Hurley dissented and noted that the court could have avoided the constitutional issues by using other traditional principles of statutory construction. He argued that the majority should have construed the ordinance to remove the constitutional deficiencies.[92] The standards of review invoked by the dissent were: 1) the presumption of validity of an ordinance;[93] 2) "[w]here a literal interpretation leads to an absurd result, the strict letter of the law should yield to the obvious intent of the legislature;"[94] and 3) a court should read the entire statute to determine legislative intent.[95]

Judge Hurley construed the ordinance to prohibit only sleeping with the intent to reside or establish living quarters in the vehicle. There was, however, no legislative history or linguistic etymology to support this definition. The City of Pompano Beach did not expressly state its intentions in the ordinance. Judge Hurley, in his determination to uphold the ordinance, re-wrote the law to give special meaning to words of ordinary meaning. The common meaning of sleep is simply not to rest or sleep with the intent to reside or establish living quarters.[96]

On a motion for rehearing, Judge Glickstein responded to Judge Hurley's arguments.[97] He invoked two additional tenets of statutory construction: a court should not distill legislative intent from pure surmise, and legislative history is an important aid to construction.[98] The majority found no legislative history and refused to engage in the speculative construction used by Judge Hurley. They decided they had no choice but to invalidate the law because the plain language of the ordinance prohibited sleeping in a vehicle.

The definitions created by Judge Hurley in his dissent clearly illus-

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92. *Id.* at 471 (Hurley, J., dissenting).
93. *See* State v. McDonald, 357 So. 2d 405 (1978).
94. State *ex rel.* Register v. Safer, 368 So. 2d 620 (Fla. 1st Dist. Ct. App. 1979); Foley v. State *ex rel.* Gordon, 50 So. 2d 179 (Fla. 1951).
95. *See* State v. Rodriguez, 365 So. 2d 157 (Fla. 1978).
96. *See, e.g.*, WEBSTER'S NEW COLLEGIATE DICTIONARY 1083 (1980).
97. 455 So. 2d at 472-73.
98. *Id.* at 472.

trates the use of special judicial definitions created by manipulation of the standards of review. Such judicial re-writing of a statute may violate the doctrine of separation of powers. Similar to the use of the standards of review, Florida courts have consistently applied the separation of powers doctrine. As the Florida Supreme Court stated in *Hanson v. State*,[99] a reviewing court has a duty to uphold a law "rather than apply a rule of strictness which defects and makes meaningless the fundamentals of legislative power." In one opinion, the supreme court noted that only the legislature has the power to enact substantive law under the Florida Constitution.[100] Consequently, it is the duty of courts to enforce such substantive law when constitutional. Some courts have perhaps misinterpreted this principle and have re-written laws to make them constitutional.

Another school of thought has decided that this type of judicial revision violates the law-making function of the legislature. The supreme court in *Brown v. State*[101] directly considered this doctrine. In *Brown*, the court considered the constitutionality of Florida Statutes section 847.04, the public profanity law. The supreme court had upheld the law five years earlier in *State v. Mayhew*.[102] The *Mayhew* court created special judicial definitions by construing the language to prohibit only language which tended to incite a breach of the peace or inflicted injury. The *Brown* court subtly acknowledged it had invaded the province of the legislature when it re-wrote the law in *Mayhew*.[103]

Justice Sundberg noted that the Florida Constitution requires a precision of language defined by the legislature, not articulated by the courts. He noted that judicial revision of vague laws could additionally frustrate the true intent of the legislature. The invocation of the separation of powers doctrine will depend on the decision to uphold or invalidate a law; a court wishing to uphold a law will re-write it if necessary, a court wishing to invalidate a law will not intrude upon legislative power.

In addition to the manipulation of standards of review to produce judicial definitions, courts have upheld statutory language which embodies legalistic phrases. For example, in *State v. C.H.*,[104] the Fourth

99. 56 So. 2d 129, 131 (Fla. 1952) (*en banc*).
100. Johnson v. State, 336 So. 2d 93 (Fla. 1976).
101. 358 So. 2d 16 (Fla. 1978).
102. 288 So. 2d 243, 251 (Fla. 1973).
103. *Brown*, 358 So. 2d at 20-21.
104. 421 So. 2d 62, 64 (Fla. 4th Dist. Ct. App. 1982).

District Court of Appeal explicated the terms, "consanguinity" and "affinity" in a statute prohibiting aid to a fugitive unless the aider was a relative related by blood or marriage. The trial court had consulted *Black's Law Dictionary* and found several definitions of the terms. The trial court then decided the statute was vague.[105]

The Fourth District Court of Appeal reversed the trial court's holding and upheld the law because the appellate court found the terms had common, ordinary meanings: consanguinity relates only to blood and affinity relates only to marriage.[106] The court held that the statute was not vague because ordinary persons would understand these definitions.

The primary definition of affinity in the dictionary, however, is a close relationship.[107] The dictionary's secondary definition is that a key relationship exists via marriage. Affinity is simply not the common definition of one's in-laws.

It is also doubtful whether the average person would know the definition of consanguinity. Affinity and consanguinity are Latin derivatives selected by legislators and lawyers to replace the common phrases, related by marriage or related by blood. Uncommon, specialized words which may also have common meanings may be understandable to courts but may not be within the vocabulary of the average citizen.

The ardent desire to uphold laws by special judicial definitions has led to the rejection of actual interpretations of statutory language by laypersons. For example, in *Gardner v. Johnson*[108] the supreme court considered the varying definitions given to a statute by different police officers. The different definitions were simply a product of the ambiguity of the words used and the various definitions appeared to be *prima facie* evidence of ambiguous language. The *Gardner* court summarily dismissed the evidence of different definitions and noted "[s]mall variances in the understanding of individual[s] . . . do not necessarily show vagueness."

The multiple definitions that accompany many words could be the basis for a constitutional challenge of vagueness. Yet Florida courts have not often sympathized with the notice problems with words of multiple meanings. For example, in *City of Daytona Beach v. Del*

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105. *Id.* at 63-64.
106. *Id.* at 64.
107. *See* WEBSTER'S NEW SCHOOL AND OTHER DICTIONARY 13 (1974).
108. 451 So. 2d 477, 478 (Fla. 1984).

Percio,[109] the supreme court considered the various interpretations given to a law by several courts. Justice Ehrlich noted that variant interpretations do not necessarily make a law vague.[110] According to Justice Ehrlich, words inevitably contain germs of uncertainty and a law is not vague if it is set out in terms that an ordinary person can understand.

If a word has various definitions, the court should discover and use the prosaic definitions. If there is actual evidence of variant interpretations by laypersons, a court should not blithely ignore them. Different interpretations of a law by ordinary citizens is substantial evidence that a statute is failing to give fair notice to all ordinary citizens of common intelligence. Courts should resist the temptation to use legalistic or idiosyncratic definitions for statutory language. Common definitions actually used by laypersons should be the only definition used by courts in criminal cases. Courts should also avoid subverting the doctrine of criminal notice to the media designed to uphold laws. Any judicial interpretation of a law cannot ignore the requirement of fair notice to all ordinary citizens because legalistic definitions may give notice only to courts and lawyers.

2. *Common Meanings of Words and Special Judicial Definitions: Whether Ordinary Citizens are Aware of or Can Anticipate Special Legalistic Definitions*

Courts may violate the doctrine of notice for criminal laws by manipulating standards of review to create special judicial definitions. Courts rely upon the legal fiction that all persons are presumed to know the law. If a law is clear and would be understandable to ordinary citizens, a person cannot claim that he was unaware of that particular law. However, judicial construction of literal statutory language may create an esoteric set of knowledge known only to courts and lawyers.

Standard dictionary definitions are reliable sources for plain and ordinary language definitions.[111] However, reviewing courts only occa-

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109. 476 So. 2d 197 (Fla. 1985).

110. *Id.* at 200.

111. The following cases have used dictionary definitions: State v. Inciarrano, 473 So. 2d 1272 (Fla. 1985) (defining "interception" on statute prohibiting the interception of oral communications); State v. J.H.B., 415 So. 2d 814, 815 (Fla. 1st Dist. Ct. App. 1982) (construing phrase "dog customarily used for hunting any type of wildlife); Morales v. State, 407 So. 2d 230, 231 (Fla. 3d Dist. Ct. App. 1982) (defining "similitude" in statute prohibiting counterfeit fascimile driver's licenses); State v.

sionally use dictionary definitions. Courts sometimes use standard dictionary definitions, but then alter the standard definition to uphold a law. For example, in *State v. Brown*[112] the Fourth District Court of Appeal construed a law which prohibited the disposal of nonconsumable government property without competitive bidding. The court used a dictionary definition of nonconsumable: the dictionary defined consume as "to do away with completely or to spend wastefully or to use up."[113]

The *Brown* court then upheld the law by changing this ostensibly "common and plain" meaning by defining nonconsumable as capable of being used up or extinguished for its intended purpose. The statute, as construed, was not vague and put all ordinary citizens on notice, according to the court.[114] In reality, the court gave the phrase this definition to limit the scope of the law to criminal activities. The judicial definition is at least narrower than the statutory definition. However, citizens reading the statute alone may forego certain legal activities because of the broad statutory definition.

In *Graham v. State*,[115] the Florida Supreme Court altered the simple definition of "molest" in a law prohibiting molestation of stone crab traps. The common definition of molest is to interfere, annoy or meddle with a thing so as to injure or disturb it. The court accepted this definition but added the phrase an "act done with the intent to molest." As in *State v. Brown*,[116] this definition is more limited than the plain definition. The problem with such limiting constructions is: (1) it may frustrate legislative intent; (2) ordinary citizens may not be aware of the limiting construction and therefore may obey the overbroad statutory language which may include innocent activities; and (3) the defendant before the court may face punishment under the newly-created judicial interpretation.

Although standard dictionary definitions could possibly eliminate the problems caused by judicial interpretations, many courts do not use

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Tsavaris, 394 So. 2d 418 (Fla. 1981) (cresote defined as substance harmful or injurious to health); Graham v. State, 362 So. 2d 924, 925 (Fla. 1978) (defining "molest" in law prohibitng molestation of stone crab traps); State v. Llopis, 257 So. 2d 17, 19 (Fla. 1971) (phrase "might" defined in law prohibiting state employees from accepting outside employment which might impair their independent judgment).

112. 412 So. 2d 426 (Fla. 4th Dist. Ct. App. 1982).
113. *Id.* at 428.
114. *Id.*
115. 362 So. 2d 924 (Fla. 1978).
116. 412 So. 2d at 426.

them. Some courts simply pronounce, *ex cathedra*, that certain language is not vague.[117] Dictionary definitions do not always solve definitional problems. Generic statutory language without specific delineations of prohibited conduct also causes problems. Some statutory language has multiple definitions or numerous synonyms. For example, in *State v. Beasley*,[118] the supreme court construed the riot statute. Like many criminal statutes, the section has no specific definitions of the operative terms. The court, instead of resorting to definitions according to common usage, examined the common law definition of riot.

The "common law" does embody historical and evolutionary meanings of words judicially developed by case decisions. However, the "common law" does not necessarily coincide with the operative vocabulary of the common citizen. In *Beasley*, Justice Overton construed the law to prohibit three or more persons acting with a common intent to mutually assist each other in a violent manner to the terror of the people and breach of the peace.[119] According to Justice Overton, common people would understand a riot to mean a group of people acting defiantly in a violent manner. He also noted the term riot probably has a better understanding by citizens than the terms "disorderly conduct" or "loitering."[120]

The problems with statutes prohibiting riots or loitering is the many definitions of the operative language. The dictionary entry for riot includes five definitions as a noun and three as a verb.[121] Riot also has several recognized approximate synonyms: tumult, unruliness, commotion, disorder, revolt, loudness, uproar, arise, debauch, ratchet, rollich.[122] The *Beasley* court used a common law definition to assist it in choosing from the various definitions of riot; however, this legalistic construction does not comport with the common understanding of riot. While judicially-created definition is narrower than the common one, this judicial definition does not give good notice because the broader common definition of riot may cause citizens to avoid certain conduct because they fear punishment for "rioting."

In instances where words like "riot" offer a broad statutory inter-

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117. *See, e.g.*, State v. J.H.B., 415 So. 2d 814 (Fla. 1st Dist. Ct. App. 1982); State v. Cormier, 375 So. 2d 852, 854 (Fla. 1979).

118. 317 So. 2d 750 (Fla. 1975).

119. *Id.* at 753.

120. *Id.*

121. WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY 1564 (1978).

122. *See* RANDOM HOUSE DICTIONARY OF ENGLISH LANGUAGE 1235-36 (1967); ROGET'S THESAURUS 3456 (1977).

pretation, courts often create drastically limiting definitional changes to make the laws judicially precise and constitutional. Most of these definitional dilemmas would disappear if the Legislature would specifically outline the prohibited conduct. The use of generic descriptive phrases like "riot" is a poor substitute for the intended definition: three or more persons acting with a common intent to mutually assist each other in a violent manner to the terror of the people and breach of the peace.[123]

Generic statutory phrases used in lieu of specific descriptions of conduct give courts the opportunity to manipulate selected media to achieve a given result. Moreover, generic statutory language is not the most egregious example of judicial interpretation of language resulting in violations of the principle of notice to ordinary citizens. The Legislature has created some laws whose meanings inherently change under differing circumstances. These laws *require* judicial interpretation on an *ad hoc* basis to give them any substantive meaning.

3. *Words of circumstantial or relativistic meaning*

The most difficult problem with statutory construction and the notice doctrine is words of circumstantial or relativistic meaning—that is, words whose meanings change with the context. One example is "to breach the peace." If one yells a certain word in a noisy bar it probably will not breach the peace. On the other hand, the same word yelled in a quiet church, courtroom or police station may be a breach of the peace. The meaning of the breach of peace statute invariably depends upon the time, place or situation.[124]

As Justice Boyd noted in *City of St. Petersburg v. Waller*,[125] "It is the context within which the word is used which determines its import. 'For everything there is a season and a time for every matter under heaven.' "[126] The situational meaning of the breach of peace statute has produced several dissenting opinions in cases upholding the law.[127] These dissenters have questioned the need for such a vague and ambiguous statute when the questionable conduct could have been prohibited by more specific laws. The same struggle has occurred in cases involv-

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123. *Beazley*, 317 So. 2d at 752-53.
124. *See* White v. State, 330 So. 2d 3, 5 (Fla. 1976).
125. 261 So. 2d 151 (Fla. 1972).
126. *Id.* at 156.
127. State v. Mayhew, 288 So. 2d 243 (Fla. 1973) (Ervin, J., dissenting); Gonzalez v. City of Belle Glade, 287 So. 2d 669 (Fla. 1973) (Boyd, J. concurring and dissenting in part).

ing the loitering/prowling laws.[128]

The breach of peace/loitering laws, due to the relativistic nature of the statutory language, produced special rules of construction. Florida courts have developed special media to produce the message of ultimate constitutionality for laws of circumstantial meaning. Courts have upheld the laws but found the statute unconstitutionally applied to certain factual situations. In these instances, the reviewing courts found that the circumstances did not fall within the constitutional ambit of the statute. None of these courts addressed the question of notice — whether the defendants arrested or the police who honestly believed they were making valid arrests should have known a particular factual situation did not come within the law. The court's findings of unconstitutional as applied implicitly admit that the statute, on its face, does not give adequate notice.

The supreme court in *City of St. Petersburg v. Waller*[129] stated that the fact that "marginal" factual situations may arise under a statute or ordinance does not, in itself, render an enactment vague. Some other courts have held that it is not necessary to furnish detailed plans of a statutory scheme.[130] This doctrine is borrowed from civil cases where there is no criminal notice requirement. Criminal statutes, on the other hand, should be detailed so that citizens, police, and courts can act in a constitutional manner.

The Florida Supreme Court in *State v. Dye*[131] cynically stated that the prohibition of generic terms would effectively nullify most legislation. The court did not appreciate the intrinsic irony of imprecise language providing sufficiently definite warnings and upheld the challenged law.

These candid admissions of imprecise statutory language may simply reflect the inherent ambiguity of the English language and the impossibility of covering all possible factual situations. However, police, defendants, trial courts, district courts of appeal judges and supreme court justices often disagree with the dispositive definition created by a majority of the supreme court. Language is either precise enough so that most people of common understanding can agree on its meaning or

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128. *See* State v. Ecker, 311 So. 2d 104 (Fla. 1975) (Ervin, Boyd, J.J. dissenting).

129. 261 So. 2d 151 (Fla. 1972), *cert. denied*, 409 U.S. 989 (1972).

130. *See* Scullock v. State, 377 So. 2d 682 (Fla. 1979); Smith v. State, 237 So. 2d 139 (Fla. 1970).

131. 346 So. 2d 538, 542 (Fla. 1977).

it is so ambiguous that reasonable people could differ on its meaning. If reasonable people could differ on the meanings, the supreme court should construe the law to comply with the Constitution; it should then apply the new definitions prospectively. Occasionally the language is not susceptible to a limiting construction and the reviewing court must invalidate the entire statute.[132] Florida courts have rarely admitted that the language chosen by the Legislature is so vague it is beyond judicial repair.[133] Most courts readily attempt to give vague or generic terms special judicial meanings. In the area of public morals and sexual crimes, for example, Florida courts have practiced substantial linguistic engineering.

Sexual practices or public morals present unique problems of circumstantial relativistic meaning. Statutes prohibiting sexual conduct cogently illustrate the conflict between notice to possible violators and the duty to uphold a law in a pluralistic society with many different notions of morality. In *Witherspoon v. State*,[134] Justice Adkins wrote for the supreme court that the ordinary citizens could easily determine the meaning of the phrase "unnatural or lascivious act."[135] This position is debatable because the phrases unnatural and lascivious are value-laden terms whose meaning depends on the moral proclivities of any particular group or individual. Ironically, the same supreme court found the phrase "crime against nature" to be vague. In *Franklin* v. *State*,[136] the phrase was found to lack a specific meaning in light of contemporary understanding.[137]

In *Chesebrough v. State*,[138] the Supreme Court attempted to define the terms "lewd and lascivious." The court noted that the phrases were clear because they were words of common usage. This fact alone does not give specific meaning to words. "Art," "beautiful" and "good" are all words of common usage. However, their meanings inherently depend upon the understandings of the author and audience. Justice Adkins defined the phrase lewdness as the unlawful indulgence of lust, signifying that form of immorality which has a relation to sexual

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132. *See, e.g.*, Marrs v. State, 413 So. 2d 774 (Fla. 1st Dist. Ct. App. 1982); Franklin v. State, 257 So. 2d 21 (Fla. 1971).
133. *See, e.g.*, State v. Llopis, 257 So. 2d 17 (Fla. 1971).
134. 278 So. 2d 611 (Fla. 1973).
135. *Id.* at 612.
136. 257 So. 2d 21 (Fla. 1971).
137. *Id.* at 23-24.
138. 255 So. 2d 675 (Fla. 1971), *cert. denied*, 406 U.S. 976 (1972).

impurity.[139]

The problem with this definition of lewdness is the necessity to redefine it in relativistic, moral terms. This definition also raises the problems of determining the definitions of immorality, unlawful indulgence of laws and sexual purity. The desire to uphold these morality laws has caused judges to use their own individual senses of morality in place of words whose meaning are universally understood. The supreme court in *Tatzel v. State*[140] repeated this approach and upheld a statute prohibiting "licentious sexual intercouse without hire." The court used the "plain and ordinary" dictionary definition of licentious: disregarding accepted rules and standards, morally unrestrained. The court also consulted *Black's Law Dictionary* and then limited the definition to sex in violation of the law. Fornication, sexual intercourse between unmarried persons, or between a married person and an unmarried person, are examples of licentious sex, the court noted. Justice Adkins further stated that while fornication is common today, it was not the province of the law to vary legislative intent merely because of its own belief as to the lack of wisdom of the law.[141]

Justice Boyd dissented because the statute provided no specific guidelines on what sexual conduct was licentious sex.[142] The change in sexual morals from the origin of the "licentious sex without hire" statute[143] could have produced the approach taken in *Franklin v. State*, with the "crime against nature" statute. The term "licentious sex without hire" lacks specific meaning given contemporary understanding, experiences and customs, Justice Boyd wrote.

General notions of lewdness or immorality change from generation to generation. This change produces the problem of whether an arcane criminal law gives adequate notice in light of changed sexual practices. If an ordinary citizen can easily define such terms as lascivious or licentious, the Legislature should be able to specifically outline these acts. The legalistic phrases used by the court are probably not within the common vocabulary of most citizens. However, the supreme court has steadfastly refused to define specifically these sexual terms.

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139. *Id.* at 677-78.

140. 356 So. 2d 787 (Fla. 1978).

141. *Id.* at 789.

142. *Id.* at 790.

143. FLA. STAT. § 796.07(3)(c) (1975). The Florida Legislature repealed this section in 1986.

For example, in *Bell v. State*,[144] the court declined to state the specific acts prohibited by a statute banning lewd and lascivious acts. The court did not decide that sodomy was an unnatural and lascivious act. The court instead took a "we know it when we see it" approach. The court noted it was not necessary to furnish detailed plans and specifications of conduct prohibited by a law.[145] However, such a general rule is inappropriate if the statutory language fails to give notice of all the prohibited acts to citizens of common intelligence.

Despite the *Bell* court's confidence in the linguistic acumen of common citizens, the phrases such as unnatural, deviate, lewd, lascivious, immoral, and licentious have caused other state courts significant definitional problems.[146] Some courts have construed such statutes to prohibit specific conduct.[147] Other state statutes specifically delineate the prohibited conduct to eliminate the definitional problems experienced by Florida courts.[148]

The definitional problems inherent in obscenity laws are even greater than in the "lewd and lascivious" statutes. A community-based and *ad hoc* definition of obscenity as described in *Miller v. Califor-*

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144. 289 So. 2d 388 (Fla. 1973).

145. *Id.* at 390.

146. *See, e.g.*, Commonwealth v. Bonadio, 490 Pa. 91, 415 A.2d 47 (1980) (defining deviate intercourse); State v. Bull, 61 Hawaii 62, 597 P.2d 10 (1979) (defining lewdness); *In re* Smith, 7 Cal.3d 362, 497 P.2d 807, 102 Cal. Rptr. 335 (1972) (defining lewdness); People v. Gilbert, 338 N.Y.S.2d 457, 72 Misc. 2d (Crim. Ct. Kings Cty 1972).

147. Commonwealth v. Bonadio, 490 Pa. 91, 415 A.2d 47 (1980) (limiting deviate sexual intercourse to specific acts committed without consent); Commonwealth v. Hill, 385 N.E.2d 253 (Mass. 1979) (defining unnatural and lascivious as certain acts committed without consent); State v. Bull, 61 Hawaii 62, 597 P.2d 10 (1979) (limiting lewdnes to exposure of sexual organ in public place likely to be seen by another); Connor v. State, 253 Ark. 854, 490 S.W.2d 114 (1973), *appeal dismissed*, 414 U.S. 991 (1973), *reh'g denied*, 414 U.S. 1138 (1974) (specifically defining deviate sexual activity); Commonwealth v. Rhome, 222 Pa. Super. Ct. 4, 292 A.2d 437 (1972) (limiting carnal knowledge and sodomy to contract between sexual organ and anus or mouth).

148. *See, e.g.*, ARK. STAT. ANN. § 41-1801, specifically defining deviate sexual activity; § KY. REV. STAT. ANN. § 510.10, defining deviate sexual conduct; IND. CODE. title 34-45-4-6, specifically defining public indecency; MO. REV. STAT. ch. 17-A, § 566.090, deviate sexual conduct defined; OHIO REV. CODE ANN. § 2907.09, public indecendy defined; PENN. STAT. ANN. ch. 18, § 3124, deviate sexual intercourse defined. A review of the statutes of the 50 states reveals few states define prohibited sexual conduct in terms of lewd, lascivious or licentious sex. *See, e.g.*, Criminal Codes of Alabama, Georgia and Mississippi. These states have statutes prohibiting lewd behavior.

nia,[149] and the Florida obscenity statute[150] only exacerbates the problem of notice to ordinary persons. A finder of fact, through the use of community standards, must judge each work individually to determine whether it is obscene.[151] Until a trier of fact makes a decision based on community standards, it is unclear how a defendant could know a particular work was obscene. Courts have relied on the fiction of a presumption of knowledge of obscenity to solve this problem of notice.[152]

If the state attempts to enforce morality through the criminal law, it must give notice of the prohibited acts to ordinary citizens of common intelligence. Statutes prohibiting immoral or lascivious conduct may not necessarily give notice because of the ambiguous meaning of these words. Conduct that is lascivious and grossly indecent to one person may be only mildly scintillating to another. Specific definitions of the prohibited acts could solve this problem. Specific delineation will fairly give notice to all segments of society and didactically inform individuals of conduct the state wishes to promote and punish.

Attorneys and courts attempting to define statutory language must consider the common historical meaning of words. Common law legal definitions may significantly differ from common usage. The notice requirement of criminal laws mandates statutory definitions that are within the understanding of the average citizen. The contemporary usage associated with statutory language can be determinative in laws dealing with sexual relations or public morals. Public morals have historically changed and attorneys and courts must be aware of changing contemporary sexual customs and morals.

Statutory language that includes words of circumstantial or relativistic meaning give lawyers and courts an opportunity to argue that a given factual situation, not previously defined, falls within a circumstantial meaning. This creates the opportunity for a court to manipulate the media to fit the messages of constitutionality. The decision on whether the novel factual situation fits within the circumstantial meaning necessarily involves judicial re-writing of the law. A court construing such laws essentially re-writes the law each time it decides whether

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149. 413 U.S. 15 (1973).

150. FLA. STAT. ch. 847 (1985); *see* specifically FLA. STAT. § 847.011(11) (1985).

151. *See* Miller v. California, 413 U.S. at 32-37, and State v. Aiuppa, 298 So. 2d 391 (Fla. 1974).

152. *See, e.g.*, Johnson v. State, 351 So. 2d 10 (Fla. 1977); *see also* FLA. STAT. § 847.011(6) (1985).

a new fact pattern fits within the law. Laws of circumstantial meaning provide the ultimate malleable media for courts and lawyers to produce desired messages. These laws significantly violate the doctrine of separation of powers and notice in criminal law. Courts should invalidate them as being vague and overbroad. Such decisions would instruct the Legislature to perform its duty and write constitutional laws understandable to the common citizen.

V. Conclusion: Guidelines for Courts and Counsel

This article has attempted to describe the multitudinous expressions of the standards of review and rules of construction in criminal cases. The only trend in the case law is the lack of a specific trend or precedential uniformity. The author believes the greatest problem in the field of constitutional standards of review is the lack of doctrinal consistency. Appellate courts often appear to be *ad hoc* super-trial courts who decide a case only on the facts of that case without considering either constitutional principles or precedent. Courts seem to reach a decision and then search for a standard of review to fit it. Often, a court reviewing a constitutional issue does not even use a standard of review. Attorneys arguing constitutional and criminal statutory construction cases add to this confusion by only arguing standards of review or rules of construction that comport with their selected arguments. This article will now propose guidelines for courts and attorneys on the use of standards of review and rules of statutory construction. These guidelines will hopefully: (1) help to eliminate subjective decisions; (2) clarify the substantive constitutional and statutory law; (3) provide precedential uniformity so that attorneys and courts can better predict trends and directions in the law; (4) help attorneys and courts apply established principles to new factual situations; (5) assist courts and counsel in creating new substantive law by using an established doctrinal approach to a novel situation and (6) create consistency in standards of review and rules of construction commensurate with the doctrine of notice in criminal laws.

A. *Guidelines for the Courts*

1. *Avoid selecting the medium merely to fit the message*

Courts must resist the temptation to reach a certain result and then select a standard of review to fit it. Courts should use the standard of review appropriate to the facts of a case and the nature of the consti-

tutional issues. After selecting the appropriate standard of review, courts should use it to reach a result dictated by the standard of review and the substantive constitutional law.

2. *Enunciate the appropriate standard of review or rule of construction*

Decisions that simply pronounce a constitutional decision without explanation do not necessarily advance the public's or attorneys' understanding of the case. The articulated thought processes of a court help clarify the decision, assist in the parties understanding of the decision and provide guidance for the future. An unexplained decision may lead to future litigation because of uncertainty over the reasons for or methodology of the decision. Courts should always articulate the standard of review or rule of construction used to reach a decision unless previously articulated in a similar case. Similarly, attorneys should always propose a standard of review or rule of construction to the court; failure to raise a standard of review or assuming the court will use the appropriate rule could lead to a lost cause.

3. *Establish uniform expressions of the standards of review*

The myriad expressions of the presumption of constitutionality lead to decisional confusion. Other standards of review and rules of construction also have several, disparate definitions. The Florida Supreme Court should define these standards in the appropriate case. Appellate judges should resist the temptation to re-formulate the standards in their own idiosyncratic prose each time they decide a case.

Appellate courts should unequivocally establish the burden of proof inherent in these presumptions and rules. The presumptions and rules merely require acceptance of a fact unless rebutted by other evidence. The questions remain: Who must establish the accepted fact? Who must rebut it? What is the quantum of proof necessary to overcome the accepted fact? The presumptions will have only symbolic meaning unless courts assign and define the respective burdens of proof. Courts should remember that in certain cases involving fundamental rights the burden is on the State, and not the challenger of the law.

4. *Avoid substituting judicial intent for unexpressed legislative intent: Determining legislative intent and the avoiding absurd results doctrine*

Some appellate courts, in their boundless zeal to avoid invalidating a law, have unquestionably substituted judicial intent for an unexpressed legislative intent. These courts have either re-written poorly drafted laws or supplied "legislative intent" to make a law constitutional. The "avoiding absurd results" doctrine has permitted the courts to engage in judicial legislation. If the legislature has not expressed its intent or the plain language of the law or its history does not evince the intent, courts should not substitute its judgment for that of the legislature. Appellate courts should not correct the drafting mistakes of the legislative process; the "absurd result" may be exactly what the legislature intended. The "avoiding absurd results" doctrine is significantly subjective and is too easily used to achieve a certain desired result. Appellate courts should not re-write a law and become a "super legislature" that corrects the mistakes of the legislature or keeps it from achieving absurd results. The courts should interpret the laws and uphold the Constitution. If that duty requires the invalidating of a law, the courts should not hesitate.

5. *Use specific historical definitions of words and prospective applications of new definitions to satisfy the notice requirement of criminal law*

Many courts have blithely ignored the notice requirement of criminal laws in an attempt to uphold a statute. Courts should use the common, historical definitions of words. Criminal laws must give notice to ordinary, common citizens. Citizens must know the nature of criminal conduct *before* they act in a particular way. Dictionary definitions will help to insure the use of common meanings. The use of common law or decisional definitions often embodies legalistic or elitist definitions beyond the knowledge of ordinary citizens. The greatest violation of the notice requirement is the retrospective application of *new* definitions. If a court interprets the meaning of a law and creates new definitions to uphold it, it should not apply the new definitions to the litigants before it. It is logically inconsistent to create a new definition and then apply it to an individual who was previously unaware of it.

6. *Avoid judicial re-writing of vague laws*

Courts have sometimes substantially rewritten or added new elements to vague laws to uphold them. This judicial reconstruction blatantly violates the principle of the separation of powers. If a law is vague and overbroad and a court cannot limit or construe the language to uphold it, the court should not re-write it or add to it. A refusal to re-write poorly drafted laws will honor the notion of separation of powers and inform the legislature that it must pass laws that give adequate notice of prohibited conduct. Courts should also not use the un-constitutional as applied standard to uphold vague and ambiguous laws.

B. *Guidelines for Counsel*

Attorneys should pay close attention to the above-described guidelines for the courts. Counsel can use these rules to select the appropriate standard of review, anticipate the direction a court might go and shape arguments to fit the court and the case. In addition to these rules, the following guidelines should help lawyers locate and argue the appropriate standards of review.

1. *Select the standard of review or rule of construction first*

Once an attorney has identified the substantive issues in a case, she should begin research on the standard of review or rule of construction. The standard of review will thereafter direct and mold the research of the substantive issues. If a lawyer researches the substantive issues first and then attempts to find the appropriate standard of review, he will probably use the type of *post hoc* and deterministic reasoning often used by the appellate courts. The standard of review should *lead* to the answer in the substantive law and not be merely a way to *present* the answer.

2. *Determine the burden of proof embodied in the standard of review or rule of construction*

Lawyers would rarely neglect to argue the burden of producing evidence or persuasion on a substantive issue. The burden of proof in arguing the standard of review should also never be overlooked. For example, a party defending the constitutionality of a law should inform the court that the challenger has the burden of going forward and persuading that the law is unconstitutional. The quantum of proof, if

known, could be the difference in a close case.

3. *Know the exceptions to the presumption of constitutionality*

Attorneys challenging the constitutionality of a law must use the exceptions to the presumption of constitutionality. The proper use of the exceptions can inexorably lead a lawyer and a court to the conclusion of unconstitutionality. Any challenge to the precision of statutory language must begin with strict scrutiny if first amendment rights are effected. Strict scrutiny can lead a court away from the predisposition toward upholding a law by judicial reconstruction.

4. *Use plain and ordinary meanings commensurate with the doctrine of criminal notice*

The case law reviewed in this article amply demonstrates that statutory language and subsequent judicial interpretations are often not within the understanding of common citizens. Challengers and defenders of vague laws must begin with the prosaic, rather than legally esoteric, definitions of words. Lawyers should consult dictionaries and linguistic studies for definitions in addition to statutory and case law sources.