NOTES

CONSTITUTIONAL LAW

VOID FOR VAGUENESS: AN ESCAPE FROM STATUTORY INTERPRETATION

In the recent case of *Winters v. New York*[1] the Supreme Court of the United States held invalid a New York statute which regulated the sale of publications "principally made up of criminal news . . . or stories of deeds of bloodshed, lust or crime."[2] The New York Court of Appeals had limited this broad language to forbid the dissemination of publications in which accounts of lust and crime were "so massed as to become vehicles for inciting violent and depraved crimes against the person."[3] Mr. Justice Reed, speaking for the Court, found the standard prohibiting publication too uncertain and indefinite to give adequate notice to distributors acting under it. Accordingly, the challenged section of the statute was invalidated under the Fourteenth Amendment. In its vagueness, it violated procedural due process and the rights of free speech and press.[4]

1. 68 S.Ct. 665 (1948).
2. N. Y. Penal Law §1141(2).
3. People v. Winters, 294 N.Y. 545, 550, 63 N.E.2d 98, 100 (1945).
4. The Court's opinion is difficult to place squarely on a particular constitutional ground. Mr. Justice Frankfurter, in dissenting, treats the majority opinion as invalidating the statute for indefiniteness because it falls "within the prohibitions of the 'vague contours' of the Due Process Clause." Winters v. New York, 68 S.Ct. 665, 674 (1948). However, the gist of Mr. Justice Reed's opinion and the cases he relies on seem to indicate that the fault of the statute's vagueness was its possible application to activities protected by the guarantees of free speech and press. Winters v. New York, supra at 671. Two questions arise from this interpretation:
   (1) Does the dictum, p. 671, distinguishing the Court's attitude as to statutes "not entwined with limitations on free expression" with statutes so entwined, indicate an intention by the Court to indulge in a distinction as to vague statutes like the distinction enunciated by the Court in the Carolene Case? See United States v. Carolene Products Co., 304 U.S. 144 n.4 (1938); Wechsler, "Stone and the Constitution," 46 Col. L. Rev. 764, 793 et seq. (1946).
   (2) Does a constitutional requirement analogous to "standing to sue" limit the effect of this opinion? In order to raise a question of the constitutionality of a provision, the challenger must be of a class against whom the provision would work a denial of due process. Hatch v. Reardon, 204 U.S. 152 (1907). Cf. United States v. Wurzbach, 280 U.S. 396, 399 (1930). In the instant case, defendant raised the question of vagueness in the context of a First Amendment argument. The issue of "standing to sue" was not discussed. How material to his case was the presence of the free

The frequency with which the doctrine of "void for vagueness" has been raised by parties and discussed either by the Supreme Court or by individual justices[5] in recent years warrants re-examination of the subject, particularly since many of the best contributions[6] to the copious literature in the field are now old.

If any one formulation of the rule against indefiniteness can be given, it is that a man of average intelligence should be able to determine beforehand what conduct is prohibited.[7] When faced with the problem of ruling on the applicability of an allegedly vague statute a court might: refuse to apply the statute to the instant case;[8] "construe" the statute so as to give it sufficient meaning and then apply or refuse to apply it[9] (compare the instant case in the state court); declare the statute void for that case and all others (compare the instant case in the United States Supreme Court).

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speech and press element, i.e., could a defendant challenge the statute solely on the ground of vagueness? See 29 Calif. L. Rev. 548 at 551 (1941) where this question is posed and illustrated by the following situation: a statute prohibiting driving a car "at an excessive speed" could clearly be attacked as too vague by a defendant prosecuted for driving 35 miles per hour in a residential zone. Query: could a defendant who drove through the same zone at 80 miles per hour successfully raise the same issue of vagueness?

5. E.g., Black, J., dissenting in Williams v. North Carolina, 325 U.S. 226, 261 (1945); Rutledge, J., concurring in Screws v. United States, 325 U.S. 91, 113 (1945); Rutledge, J., dissenting in Robinson v. United States, 324 U.S. 282, 286 (1945).
6. Aigler, "Legislation in Vague or General Terms," 21 Mich. L. Rev. 831 (1922) is the best article in the field. The best student note is in 45 Harv. L. Rev. 160 (1931). For competent recent treatment, see 26 Tex. L. Rev. 216 (1947); 33 Va. L. Rev. 203 (1947).
7. The jurisprudential foundation from which this rule would seem to spring is the basic principle *nulla poena sine lege*, i.e., no man should be punished unless there is a law to cover his offense. See Hall, "General Principles of Criminal Law" 19 (1947).
8. See State v. Parker, 183 Minn. 588, 237 N.W. 409 (1931) where the court reversed a conviction under a statute which prohibited the erection of a building on a lot so that there would be a dwelling at the rear of another building on the same lot. The court said that the use of the word "lot" made the description of the offense sought to be created too indefinite and uncertain.
9. This approach leads into the field of statutory construction and its "rules" of procedure. The primary consideration in this field is the doctrine of strict construction: penal laws are "strictly construed in favor of the accused," and statutes "in derogation of the common law" are "strictly construed." It has been suggested that no rule of construction ever determined the decision of a court, but at most helped frame the issues. See Horack, "Constitutional Liberties and Statutory Construction," 29 Iowa L. Rev. 448 at 453 (1944).

Prior to the nineteenth century "void for vagueness" was probably never used.[10] Indeed, in England the absence of a doctrine of judicial supremacy would make it difficult for a court *explicitly* to invalidate the product of the legislative branch. Instead, British courts resorted to canons of construction to give "content" to vague statutes. These canons ranged from "construing the statute strictly" to "avoiding interpretations which would produce collaterally absurd or mischievous results."[11] Obviously, prolonged application of a canon of construction could circumvent the will of the legislature just as surely as would an articulate declaration that the statute was "void for vagueness." The *result* therefore, would be the same as that reached in the *Winters* case by a single decision. But the *technique* was, in a sense, more subtle. For example, the court would "strictly construe" a statute requiring that notice of a certain offense be proclaimed "in two market towns near the place where the offense was committed" to mean "those towns nearest the place of commission of the crime."[12] Since notice was not so given, defendant was released because not legally convicted. On the other hand, a court would, by an "interpretation" of an amendment to a statute, uphold the conviction of the defendant thereunder, because the court found the intention of the legislature was to include acts such as defendant's, although the amendment taken literally was close to gibberish.[13]

Nor is there any record of the application of "void for vagueness" in Colonial practice in the seventeenth and eight-

10. Writers in the field seem to be in some conflict as to whether: (1) English courts believed they at least had the power to invalidate acts of Parliament, (2) English courts actually did invalidate acts of Parliament. See Plucknett, "Bonham's Case and Judicial Review," 40 Harv. L. Rev. 30 (1926); Pound, "Common Law and Legislation," 21 Harv. L. Rev. 383 (1908); Radin, "Early Statutory Interpretation in England," 38 Ill. L. Rev. 16 (1943); Von Mehren, "The Judicial Conception of Legislation in Tudor England," in "Interpretations of Modern Legal Philosophies" 751 (Sayre ed. 1947).

11. 1 Bl. Comm. 91.

12. Rex v. Harvey, 1 Wils. K.B. 164, 95 Eng. Rep. 551 (1747). Cf. Lloyd v. Rosbee, 2 Camp. 453, 170 Eng. Rep. 1216 (1810).

13. The King v. Vasey, 2 K.B. 748 (1905). The court cited Maxwell's "Interpretations of Modern Legal Philosophies" 751 (Sayre ed. language of a statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship, or injustice, presumably not intended, a construction may be put upon it which modifies the meaning of the words, and even the structure of the sentence." Id. at 750.

eenth centuries. The Privy Council appears never to have resorted to the "vagueness" reasoning, although it invalidated Colonial legislation for other reasons.[14] Neither *The Federalist* nor the records of debates of the Constitutional Convention and the ratifying conventions indicate that the concept was considered a serious issue, if an issue at all.[15]

The doctrine, as an explicit technique, seems to be indigenous to the United States. Its genesis lies in scattered cases which arose before the Civil War. Two early federal cases referred to vagueness by way of dictum. *The Enterprise*[16] concerned an appeal from condemnation of a ship and its cargo under a statute[17] which denied clearance to a vessel unless laden under inspection. The statute made the clearance subject to the same restrictions and penalties (*among* which was condemnation) "as are provided by law for the inspection of merchandise imported into the United States. . . . " Mr. Justice Livingston found it impossible to tell whether it was meant to punish the act of loading secretly by any other sanction than denial of clearance. Hence the court could not persuade itself that there was ground for forfeiture.[18] In *United States v. Sharp*[19] a statute made it a misdemeanor to "make a revolt in the ship."[20] Circuit Judge Washington said that although he had a fair idea in his own mind of what was meant, yet he was "not able to support it [the statute], by any authority to be met with, either

14. E.g., a Connecticut statute was held void, on appeal, by the Privy Council ". . . as being contrary to the law of this realm, unreasonable, and against the tenor of their charter." Winthrop v. Lechmere (1727), see 1 Thayer, "Cases on Constitutional Law" 136 (1895); Haines, "The American Doctrine of Judicial Supremacy" c.3 (2d ed. 1932).

15. However the provisions against ex post facto laws (U.S. Const. Art. I, §9(3) and §10(1) indicate concern as to the jurisprudential aspects. Cf. Crosskey, "The True Meaning of the Constitutional Prohibition of Ex-Post-Facto Laws," 14 U. of Chi. L. Rev. 539 (1947) where the argument is made that the clauses were intended to cover civil as well as criminal laws.

16. 8 Fed. Cas. 732, No. 4, 499 (C.C.D.N.Y. 1810).

17. 2 Stat. 499 (1808).

18. There seems to be some disagreement as to whether the case rests upon the doctrine of strict construction or whether it illustrates the doctrine of "void for vagueness." See 45 Harv. L. Rev. 160 and n.2 (1931). Cf. Horack, "Cases on Legislation" 780 and n.1 (1940). It is believed that close reading will show that its does fit the latter category although some federal cases cito it for the strict construction rule.

19. 27 Fed. Cas. 1041, No. 16,264 (C.C.D.Pa. 1815).

20. 1 Stat. 112 (1790).

in the common, admiralty, or civil law. If we resort to definitions given by philologists, they are so multifarious . . . that I cannot avoid feeling a natural repugnance, to selecting from this mass of definition, one, which may fix a crime upon these men, and that too of a capital nature; when, by making a different selection, it would be no crime at all. . . . "[21] Partly for these reasons judgment was arrested and the indictment under the statute quashed.

The earliest state case discovered which mentioned vagueness was a North Carolina case of 1833, where the court was faced with the construction of a private law. In dictum the court said that "Whether a statute be a public or a private one, if the terms in which it is couched be so vague as to convey no definite meaning to those whose duty it is to execute it, either ministerially or judicially, it is necessarily inoperative. The law must remain as it was, unless that which professes to change it, be itself intelligible."[22] However no further use of this dictum was made until after the Civil War, when the case is cited as authority for the court's statement that " . . . a statute must be capable of construction and interpretation; otherwise it will be inoperative and void. The court must use every authorized means to ascertain and give it an intelligible meaning; but if after such effort it is found to be impossible to solve the doubt and dispel the obscurity, if no judicial certainty can be settled upon as to the meaning, the court is not at liberty to supply, to make one."[23]

The doctrine was also receiving content in other states. Indiana was one of the first clearly to consider the effect of indefinite language in a statute. Indiana courts in a series of decisions from 1856 to 1861[24] struggled with statutes con-

21. Fed. Cas. No. 16,264 at 1043 (C.C.D.Pa. 1815).

22. Drake v. Drake, 15 N.C. 110, 115, 116 (1833). However, the court immediately distinguished the rules of construction for private laws from the rules applicable to public laws. As to the latter, the court said it was informed of "The grievance, the old law, and the defect in it . . . [which] furnish the means of discovering the intention of the Legislature, notwithstanding a defective expression of it . . . . But with private acts, it is entirely different. . . . No latitude of construction is admissible. . . . " Ibid.

23. State v. Partlow, 91 N.C. 550, 553 (1884). The statute involved referred to "Mount Zion church in Gaston county." Since there were two such churches in that county, and since the testimony of a senator as to which church was meant was held to be incompetent, the court declared the statute void.

24. Hackney v. State, 8 Ind. 494 (1856); McJunkins v. State, 10 Ind. 140 (1858); Jennings v. State, 16 Ind. 335 (1861); cf. Marvin v. State, 19 Ind. 181 (1862).

taining such terms as "public indecency" and "nuisance." While most of the language in those cases was dicta, and soon repudiated,[25] the practice thus began of looking closely to determine whether statutes were sufficiently clear to give adequate notice of the offense charged. The Indiana Constitution itself has a "plain-wording" provision which has been interpreted as requiring definiteness in statutory language.[26]

The principle as it thus emerged from the pre-Civil War era continued to develop as it was applied to a variety of situations,[27] particularly those involving new economic regulations. A typical example of the use of the concept in the economic field is a state decision, *Louisville & N.R. Co. v. Commonwealth,* holding that an action could not be maintained to recover penalties under a statute making an "unreasonable" rate of fare unlawful.[28]

As economic interests resorted to the federal courts for the protection of the Fourteenth Amendment against state regulatory legislation, those courts too were faced with the challenge of "vagueness."[29] As a federal tool, the doctrine seems to stem from a statement of Mr. Justice Brewer in the *Dey* case that ". . . no penal law can be sustained unless its mandates are so clearly expressed that any ordinary person can determine in advance what he may and what he may not do under it."[30] The statement was relied on and expanded in

25. Wall v. State, 23 Ind. 150 (1864); cf. State v. Oskins, 28 Ind. 364 (1867).

26. Ind. Const. Art. IV, §20: "Every act and joint resolution shall he plainly worded, avoiding, as far as practicable, the use of technical terms." Finding this requirement humorous is unavoidahle, for the provision gravely enjoins indefinitely worded statutes in terms of utmost "indefiniteness."

27. For state cases dealing with the problem of vagueness during this period, see 38 Harv. L. Rev. 963, 964 and n.4 (1925). For a list of words subject to the attack of indefiniteness, see Aigler, op. cit. supra n.6, at 847 et seq.

28. 99 Ky. 132, 35 S.W. 129 (1896).

29. One of the earliest lower federal court decisions concerned with economic regulation was Louisville & N. R.R. v. R.R. Comm. of Tenn., 19 Fed. 679 (C.C.M.D.Tenn. 1884). A state statute authorizing the commission to fix rates so as to prevent the taking of unjust and unreasonable compensation was held void as too indefinite. The court said that proof of unreasonableness would be a jury question, making defendant's guilt or innocence dependent on the jury and not on the construction of the act.

30. Chicago & N. W. Ry. v. Dey, 35 Fed. 866, 876 (C.C.S.D.Iowa 1888) where section 23 of the Iowa Freight Rate Act was held to be sufficiently definite to justify an equitable action thereunder.

the *Tozer* case four years later.[31] It should be emphasized that at this time the concept was still primarily a principle of construction and had not yet received the sanctity of being associated with the constitutional requirement of due process.[32] But it seems a coincidence of some moment that the device of invalidating a statute for vagueness should develop on the federal level concurrently with the growth of the tool of substantive due process.[33]

Brewer's dicta, while sitting on circuit,[34] seemingly influenced the Supreme Court in following decisions.[35] In *United States v. Brewer*[36] the same intimation as to the need

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31. Tozer v. United States, 52 Fed. 917 (C.C.E.D.Mo. 1892). Brewer, J., citing the Dey case, supra n.30, said, "But, in order to constitute a crime, the act must be one which the party is able to know in advance whether it is criminal or not. The criminality of an act cannot depend upon whether a jury may think it reasonable or unreasonable. There must be some definiteness and certainty." Tozer v. United States, supra at 919. A conviction under section 3 of the Interstate Commerce Act was reversed, the clause being too indefinite.

32. It has been suggested that it is doubtful that "lack of meaning should ever have been viewed as the equivalent of lack of constitutionality . . . it seems a permissible conclusion that where the legislature has failed to make itself understood, its unarticulated commands cannot be enforced." Gellhorn, "Administrative Law, Cases and Comments" 160 (2d ed. 1947). None of the texts of the period discussed vagueness in term of unconstitutionality. See Endlich, "Commentary on the Interpretation of Statutes" 353 (1888); Sedgwick, "Statutory and Constitutional Law" (2d ed. 1874); Sutherland, "Statutory Construction" §140, esp. p.184 (1891).

33. The writer recognizes that the phrase "substantive due process" may mean that doctrine by which the First Amendment is incorporated into the Fourteenth Amendment in order to protect civil liberties. This principle was not enunciated until the case of Gitlow v. New York, 268 U.S. 652 (1925). The phrase, "substantive due process" as used here, refers to the economic content which was read into the Fourteenth Amendment by such cases as Chicago, M. & St. P. Ry. v. Minn., 134 U.S. 418 (1890) and Reagan v. Farmer's Loan & Trnst Co., 154 U.S. 362 (1894), and which was denounced by Mr. Justice Holmes, dissenting, in Lochner v. New York, 198 U.S. 45, 74 (1905).

34. Supra n. 30.

35. An earlier Supreme Court case had incidentally skirted the question. The Civil Rights Act of 1870 was held inoperative because too broadly worded and hence beyond Congressional power as conferred by the Fifteenth Amendment. United States v. Reese, 92 U.S. 214 (1876). Chief Justice Waite, in dictum, said, "Every man should be able to know with certainty when he is committing a crime." Id. at 220.

36. 139 U.S. 278 (1891). "Laws which create crimes ought to be so explicit that all men subject to their penalties may know what acts it is their duty to avoid." Id. at 288. The Court cited as authority for the quoted sentence the cases of United States v. Sharp, supra p.275, and United States v. Lacher, 134 U.S. 624 (1890). The latter case upheld a conviction under an ambiguously drawn federal sta-

of definiteness for validity was stated. Eighteen years later in the first *Waters-Pierce* case[37] the Court faced the problem squarely for the first time. A corporation argued, *inter alia,* that the Texas anti-trust laws deprived it of procedural due process of law by being "so vague, indefinite, and uncertain as to deprive them [the laws] of their constitutionality."[38] The Court sustained the state statute over this objection, and distinguished the *Dey, Tozer* and *Louisville v. Commonwealth* decisions.[39] No comment was made on the quiet appearance of a new constitutional doctrine, i.e., that an indefinite statute violates the due process clause of the Fourteenth Amendment. The breadth of the language in the *Dey* case was explicitly limited, however, by Mr. Justice Holmes in the case of *Nash v. United States.*[40] He said that " . . . the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree."[41]

The doctrine was officially received into the Supreme Court's bosom five years later in another anti-trust case, *International Harvester Co. v. Kentucky.*[42] The Court there invalidated three statutes which had been construed together by the Kentucky court as prohibiting combinations fixing

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tute. Chief Justice Fuller in a fully annotated passage outlined the considerations which a court should entertain when faced with an eliptical penal statute. "As contended on behalf of the defendant, there can be no constructive offenses, and before a man can be punished, his case must be plainly and unmistakably within the statute. But though penal laws are to be construed strictly, yet the intention of the Legislature must govern in the construction of penal as well as other statutes, and they are not to be construed so strictly as to defeat the obvious intention of the Legislature." Id. at 628.

37. Waters-Pierce Oil Co. v. Texas, 212 U.S. 86 (1909).

38. Id. at 108.

39. Supra n.30, n.31, n.28. The ground for the distinction was that in those three cases the statutes which were invalidated made guilt depend on a jury's finding, whereas the Texas statute did not give such broad power. The distinction seems rather fine, but the Sherman Act had previously been sustained in Northern Securities Co. v. United States, 193 U.S. 197 (1904), helping to pave the way for state statutes.

40. 229 U.S. 373 (1913) where the Sherman Act, construed to prohibit "undue" restraints of trade, was sustained against a charge of vagueness.

41. Nash v. United States, 229 U.S. 373, 377 (1912). The most recent reiteration of this frequently quoted passage appears in Mr. Justice Frankfurter's dissent in the Winters case.

42. 234 U.S. 216 (1914). Cf. companion case of Collins v. Kentucky, 234 U.S. 634 (1914).

prices other than at the "real value" of the article. Mr. Justice Holmes distinguished his decision in the *Nash* case,[43] saying that here the combination is forced "to guess at its peril" as to an imaginary rather than an actual state of facts.[44] He said that in the *Nash* case the statute had been upheld because the combination was required only to estimate as to a matter of degree.[45]

Once established, the primary use of the doctrine continued to lie in the field of economic regulation. An Idaho statute regulating grazing of sheep on a "range" was sustained as sufficiently definite.[46] Yet part of the federal price control statute of the first World War[47] was invalidated as too indefinite.[48] The phrase "unreasonable price" was held to forbid no *specific* criminal act.[49] Similarly, a state

43. Supra n.40.

44. A commentator uses this distinction to classify the "vagueness" cases into two types: the "Nash" line and the "International Harvester" line. See 38 Harv. L. Rev. 963 (1924). Cf. Miller v. Strahl, 239 U.S. 426 (1915) where the Court uses this distinction and places its decision under the "Nash" line. Id. at 434.

45. International Harvester Co. v. Kentucky, 234 U.S. 216, 223, 224 (1914).

46. Omachevarria v. Idaho, 246 U.S. 343 (1918). As to the contention that the Idaho statute did not provide boundaries of a "range" the Court said, "Men familiar with range conditions and desirous of observing the law will have little difficulty in determining what is prohibited by it." Id. at 348. Cf. Mutual Film Corp. v. Ind. Comm. of Ohio, 236 U.S. 230 (1915) where plaintiff contended that the motion picture censorship statute violated his guaranteed right of free speech under the Ohio Constitution, and constituted an invalid delegation of power to an administrative board because it furnished too general a standard. The Court, in sustaining the statute, said ". . . its terms, like other general terms, get precision from the sense and experience of men . . . ." Id. at 245, 246. Gellhorn, op. cit. supra n.32 at 160, suggests that the degree of indefiniteness may be considerably greater in an administrative statute which takes on content by agency action before the individual is affected by it.

47. 41 Stat. 297 (1919). (Lever Act).

48. United States v. Cohen Grocery Co., 255 U.S. 81 (1921). Cf. companion case of Weeds v. United States, 255 U.S. 109 (1921) and see 19 Mich. L. Rev. 337 (1921). The battle is still raging over price regulation and "vagueness." The word "cost" is the primary object of attack. See Thatcher, "The Constitutionality of the Unfair Practices Act," 30 Minn. L. Rev. 559 at 568-577 (1946). Cf. 32 Iowa L. Rev. 125 (1946); Blum v. Engelman, 57 A.2d 421 (Md. 1948) where injunctive provisions of the Maryland Unfair Sales Act were upheld.

49. The distinction as to civil and criminal actions under the Lever Act, supra n.47, was abolished when the "rule" of the Cohen Grocery case, supra n.48, was extended to invalidate, as too vague, the civil action aspect of the Lever Act. Small Co. v. American Sugar Refining Co., 267 U.S. 233 (1925).

"prevailing-wage" statute was held void for lack of sufficient definiteness.[50] A state anti-trust statute was set aside on the ground of vagueness,[51] but a state rent law was upheld on the theory that any alleged indefiniteness went only to the statute's criminal sanctions which were not in issue.[52] However, a state highway statute was invalidated for indefiniteness,[53] as were penal provisions under a state statute regulating petroleum production.[54] A conviction for transporting a stolen airplane under the National Motor Vehicle Theft Act[55] was set aside because the law did not give fair warning that such conduct was prohibited.[56] The most recent case in the field of economic regulation was that arising from a challenge of the Lea Act[57] as contravening the due process clause of the Fifth Amendment for want of certainty. The statute was upheld because "wilfullness" was a required ingredient[58] of criminal violation. Mr. Justice Black said, "That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense."[59]

A parallel line of cases developing during the same period illustrates the use of the doctrine of "void for vagueness" in the area of civil liberties. In *Fox v. Washington*,[60]

50. Connally v. General Construction Co., 269 U.S. 385 (1926).
51. Cline v. Frink Dairy Co., 274 U.S. 445 (1927).
52. Levy Leasing Co. v. Siegel, 258 U.S. 242 (1922). For a criticism of the grounds on which the Court reconciled this case with its decision in the Small case, supra n.49, see 38 Harv. L. Rev. 863 (1925).
53. Smith v. Cahoon, 283 U.S. 553 (1931).
54. Champlin Refining Co. v. Corporation Comm. of Okla., 286 U.S. 210 (1932).
55. 41 Stat. 324, 18 U.S.C. §408 (1919).
56. McBoyle v. United States, 283 U.S. 25 (1931).
57. 60 Stat. 89, 47 U.S.C. §506(a)(1) (1946).
58. Consideration of the effect of the requirement of wilfullness as a means of making a statutory standard more definite is beyond the scope of this note. The problem has arisen with some frequency. See Seven Cases v. United States, 239 U.S. 510 (1916); Hygrade Provision Co. v. Sherman, 266 U.S. 497 (1925); Omaechevarria v. Idaho, 246 U.S. 343 (1918); United States v. Ragen, 314 U.S. 513 (1942) (where Mr. Justice Black follows the "Nash" line of reasoning, cf. supra n.44, and distinguishes the International Harvester and Cohen Grocery Co. cases); Gorin v. United States, 312 U.S. 19 (1941); Screws v. United States, 325 U.S. 91 (1945).
59. United States v. Petrillo, 332 U.S. 1, 7 (1947), 26 Tex. L. Rev. 216.
60. 236 U.S. 273 (1915).

Mr. Justice Holmes upheld a state statute making it a crime to publish wilfully[61] any printed matter tending to disrespect for law. The state court had construed the statute to mean an *actual* breach of the law, thereby removing the element of too great indefiniteness.[62] Similarly, a criminal syndicalism statute was upheld as containing a sufficient definition of the activities proscribed,[63] and an indictment under the Federal Corrupt Practices Act[64] was sustained against the charge that the phrase "political purpose" was too vague.[65] However, the Court struck down a conviction under an antique Georgia statute, relying in part on the ground that the statute as construed by the Georgia court did not furnish a sufficiently ascertainable standard of guilt.[66] Two years later another state statute was invalidated because the word "gang" was found to be "so vague that men of common intelligence must guess at its meaning."[67] But a conviction under the Espionage Act of 1917[68] was sustained, the Court finding the statute sufficiently definite because "intent" was required.[69] The Court expressed three views as to the effect of the element of intent in a federal statute[70] which had been attacked as too vague in the *Screws* case.[71] Mr. Justice Douglas, joined by Chief Justice Stone and Justices Black and Reed, remanded the case because the trial court's charge to the jury did not define "wilfully" to mean "specific intent."[72] Mr. Justice Rutledge joined as to disposal of the case, but both he and Mr. Justice Murphy felt that the statute as applied to the case was clearly constitutional. Mr. Justice Roberts, with whom Justices Frankfurter and Jackson concurred, believed that the statute contained no ascertainable standard of guilt. And now in the *Winters*

61. See supra n.58.
62. Contra: Stromberg v. California, 283 U.S. 359 (1931).
63. Whitney v. California, 274 U.S. 357 (1927).
64. 43 Stat. 1053, 18 U.S.C. §208 (1925).
65. United States v. Wurzbach, 280 U.S. 396 (1930).
66. Herndon v. Lowry, 301 U.S. 242 (1937).
67. Lanzetta v. New Jersey, 306 U.S. 451 (1939), 23 Minn L. Rev. 823. Cf. State v. Klapprott, 127 N.J.L. (Sup. Ct.) 395, 22 A.2d 877 (1941) and see 42 Col. L. Rev. 857 (1942).
68. 40 Stat. 217, 50 U.S.C. §31 (1917).
69. Gorin v. United States, 312 U.S. 19 (1941). Cf. supra n.58.
70. 48 Stat. 1064 (1934), as amended, 60 Stat. 89, 47 U.S.C. §506 (Supp. 1946).
71. Screws v. United States, 325 U.S. 91 (1945).
72. Cf. supra n.58.

case the Court has invalidated a statute regulating publications so massing accounts of violence as to incite to crime. The Court felt that the statute established contours of criminality so hazy that it abridged the rights of free speech and press, and failed to measure up to constitutional procedure.

Before assessing the soundness of the *Winters* decision, it might be well to ask if any consistent principle emerges from the cases enumerated above. Certain rough classifications do appear: (1) in the post-Civil War days before definiteness became a constitutional requirement, "void for vagueness" occasionally helped shape the Court's decisions, but did not directly decide them, (2) after the doctrine acquired a constitutional blessing with the *International Harvester* case[73] its influence spread into the civil liberties field. But no *consistent* distinction can be drawn between the effect of vagueness in economic matters and the effect of vagueness in areas sheltered by the Bill of Rights. Presence of one of the following factors may affect the fate of a statute: the requirement of "wilfullness" or "intent" in a criminal statute; the use of words having a "common law" or "familiar" background; the content acquired through administrative regulation under the statute; the state court construction of the statute; the scope given the jury in determining whether a violation of the statutory standard occurred; civil sanctions as opposed to criminal penalties under the statute; or the character of the statute as determined by the subject matter on which it operates—all these distinctions appear.[74]

One's foremost impression is of the capriciousness with which the doctrine of "void for vagueness" has been argued by parties and used by courts. One writer, referring to the similarity between the doctrine and substantive due process, has said that "Significantly, knowable criteria in 'common experience' [a requirement frequently demanded by the Court if a statute is to avoid the hazard of vagueness] have been found wanting in interpreting only those statutes which sought to limit the free play of economic forces."[75] Although "vagueness" has expanded into the civil liberties field, the *implications* of this statement seem still

73. Supra n.45.
74. See Aigler, op. cit. supra n.6; Freund, "Legislative Regulation" c.8 (1932).
75. 45 Harv. L. Rev. 160 at 162, 163 (1931).

to be true today. If the Court is indeed indulging in an unconscious method curiously like that of "substantive due process" it is deplorable. Mr. Justice Reed indicates that a distinction exists for him as to statutes affecting free speech.[76] Mr. Justice Frankfurter intimates that he believes the majority in the *Winters* case were reading into the decision their own predilections, psychological or social.[77]

If this hypothesis is correct, then the use of the doctrine of "void for vagueness" is subject to all the arguments brought to bear against the once rampant tool of "substantive due process."[78] Yet the problem is not an easy one, particularly where, as here, potential infringements of rights guaranteed by the First Amendment exist.[79] It might be argued strenuously that a statute making it a crime to utter words creating a "clear and present danger"[80] would be unconstitutional. Its invalidity could be urged from the standpoint of vagueness. However, could it not be as strongly argued that the statute was invalid because it conflicted with the First Amendment by restricting legitimate activity? It is likely that the prohibition would dam up *permissible* free expression simply because of the statute's enactment.[81]

Another disagreeable aspect of a statute like that of New

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76. Supra n.4 (1).

77. Winters v. New York, 68 S.Ct. 665, 679 (1948).

78. See Borchard, "The Supreme Court and Private Rights," 47 Yale L. J. 1051 (1938).

79. Mr. Justice Reed sounds a well taken warning: "The present case as to a vague statute abridging free speech involves the circulation of only vulgar magazines. The next may call for decision as to free expression of political views in the light of a statute intended to punish subversive activities." Winters v. New York, 68 S.Ct. 665, 671 (1948).

80. Schenck v. United States, 249 U.S. 47, 52 (1919).

81. There may be occasions, however, where it is desirable to limit activity, even though legitimate, by the enactment of a statute worded in "constitutional" terms. Cf. Price Municipal Corp. v. Jaynes, 191 P.2d 606 (Utah 1948). An ordinance, in the language of the Fourth Amendment, provided that the right of the people of the City of Price to be secure in their persons, houses, papers and effects against unreasonable searches and seizures should not be violated. A violation thereof was made a misdemeanor. Characterizing the ordinance as a mere policy statement, the Utah Supreme Court held it void for vagueness. However, perhaps it would be desirable to sustain a statute of this type. True, it places a burden on those acting under it, and those engaged with enforcing it, to ascertain whether certain activity will constitute a violation. But is it not precisely within this field that people should act at their peril, since, in acting, they may violate the civil liberties of others.

York is its conduciveness to only sporadic enforcement.[82] In lying dormant the statute does not acquire a more definite meaning, if this is a requisite. Moreover, persons who may come under the statute's ban have no way of knowing when the ax will fall—although the advent of a new political administration is frequently a warning signal. These objections do not go primarily to any vagueness in the wording of the statute, *qua* statute, but to its enforcement by state authorities. It is suggested that a sounder attitude, both from the viewpoint of proper judicial activity, and from the viewpoint of social desirability, would be to outlaw the amorphous constitutional doctrine of "void for vagueness" as a judicial tool.[83] Civil rights can be protected by other, existing constitutional guarantees[84] and judicial techniques,[85] and cases will be decided squarely on their merits.[86] The use of federal legislative history[87] gives content to, and indicates the purpose of, most federal statutes which lack clarity. However, the legislative history of a state statute is frequently inaccessible. Construction, by the state court, of the statute should be done in the traditional manner of looking to the over-all "legislative intent." Should the statute as construed be challenged in the United States Supreme Court, the Court should determine the case *on its merits* in relation to established constitutional guarantees, rather than evade the constitutional issues on the ground of "vagueness."

82. Cf. Winters v. New York, 68 S.Ct. 665, 673 (1948).
83. The distinction between a completely meaningless statute and one which is "vague" or ambiguous should again be emphasized. Cf. supra n.32. The recent case of United States v. Evans, 68 S.Ct. 634 (1948) illustrates the refusal of the Court to enforce a statute because meaningless. The Court did not feel obligated to refer to any particular constitutional provision, but withheld enforcement solely because it could not ascertain Congress' intention, even though it closely examined the legislative history of the statute. The statute defined more than one offense, but provided a penalty for only one of the named offenses. An indictment brought under the section was accordingly dismissed because the Court said it would have to "legislate" in order to provide a penalty for the offenses charged, and this was not a judicial function. It would seem that the defect of this statute was its too great specificity, although it is of the type which some courts might term too "vague."
84. E.g., the First Amendment. Cf. supra n.33.
85. E.g., the doctrine of strict construction of penal statutes.
86. Cf. Mr. Justice Black's opinion for the Court in United States v. Petrillo, 332 U.S. 1 (1947).
87. See Frankfurter, "Some Reflections on the Reading of Statutes," 47 Col. L. Rev. 527, 543 (1947).