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Legislation - Requirement of Definiteness in Statutory Standards

Robert B. Krueger S.Ed.

University of Michigan Law School

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LEGISLATION—REQUIREMENT OF DEFINITENESS IN STATUTORY STANDARDS—While it is universally recognized that definiteness in statutory standards is a condition prerequisite to the application of a statute, there is no agreement among either the courts or the writers as to the theory behind this requirement. However, common elements in each of the two prevalent theories indicate certain factors which may well be decisive on the question of definiteness in any given case. The purpose of this comment is to explore the practical implications of the interplay of these various factors and theories.

I. *Theories upon which Statutes Are Held Too Indefinite To Be Enforced*

A. *The Inability of the Courts To Apply the Statutes.* Irrespective of any constitutional guarantees¹ designed for the protection of the individual, a statute may be so vague that a court is unable to interpret and apply its standards.² While justification for the court's decision may be camouflaged by reference to the doctrine of "separation of powers"³ or the common law rule that "criminal statutes are to be strictly

¹ Most writers feel that the requirement of definiteness has become solely a matter of constitutional law. While they acknowledge that statutes have been held void for indefiniteness regardless of constitutionality, they regard this either as a historical accident resulting from incorrect application of the common law rule that criminal statutes should be strictly construed or as an anomalous phase in the evolution of the constitutional definiteness doctrine. See 62 HARV. L. REV. 77 (1948); 22 SO. CAL. L. REV. 298 (1949); 2 ALA. L. REV. 301 (1950). But cf. Aigler, "Legislation in Vague or General Terms," 21 MICH. L. REV. 831 (1923). See also generally CRAWFORD, THE CONSTRUCTION OF STATUTES §198 (1940); 2 SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION, 3d ed., Horack, §4920 (1943).

² *State decisions:* Johnson v. State, 100 Ala. 32, 14 S. 629 (1894); Ex parte Andrew Jackson, 45 Ark. 158 (1885); Blackford v. Gibson, 144 Ark. 240, 222 S.W. 367 (1920); Jones v. Lawson, 143 Ark. 83, 220 S.W. 311 (1920); Hallman v. Coker, 147 Ark. 73, 226 S.W. 1054 (1921); State v. Bryant, 219 Ark. 313, 241 S.W. (2d) 473 (1951); Hewitt v. Board of Medical Examiners, 148 Cal. 590, 84 P. 39 (1906); In re Lockett, 179 Cal. 581, 178 P. 134 (1919); Cook v. State, 26 Ind. App. 278, 59 N.E. 489 (1901); Railroad Commission v. Grand Trunk R. Co., 179 Ind. 255, 100 N.E. 852 (1913); State v. Claiborne, 185 Iowa 170, 170 N.W. 417 (1919); In re Hendricks, 60 Kan. 796, 57 P. 965 (1899); State v. Gaitskill, 133 Kan. 389, 300 P. 326 (1931) (in Kansas at that time there was a statute providing for invalidation of vague statutes); Matthews v. Murphy, 23 Ky. L. Rep. 750, 63 S.W. 785 (1901); Succession of Pizzati, 141 La. 645, 75 S. 498 (1917); State v. Ashbrook, 154 Mo. 375, 55 S.W. 627 (1900); State v. Partlow, 91 N.C. 550 (1884); State v. Morrison, 210 N.C. 117, 185 S.E. 674 (1936); State v. Diamond, 27 N.M. 477, 202 P. 988 (1921); State v. Humble Oil and Refining Co., 55 N.M. 395, 234 P. (2d) 339 (1951); Patten v. Aluminum Castings Co., 105 Ohio St. 1, 136 N.E. 426 (1922); State v. Mann, 2 Ore. 238 (1867); Commonwealth v. Bank of Pennsylvania, 3 W. & S. (Pa.) 173 (1842); Wilcox v. Penn Mutual Life Ins. Co., 357 Pa. 581, 55 A. (2d) 521 (1947). See also the dicta in People v. Bergotini, 172 Cal. 717, 158 P. 198 (1916); Dekelt v. People, 44 Colo. 525, 99 P. 330 (1909).

Federal decisions: The Enterprise, (C.C. N.Y. 1810) 8 Fed. Cas. 732, No. 4,499; United States v. Sharp, (C.C. Pa. 1815) 27 Fed. Cas. 1041, No. 16,264; United States v. Reese, 92 U.S. 214 (1875); Louisville & N. R. Co. v. Railroad Commission of Tennessee, (C.C. Tenn. 1884) 19 F. 679 (statute also was held to violate the Fourteenth Amendment of the Federal Constitution but upon arbitrary discrimination grounds); United States v. Brewer, 139 U.S. 278, 11 S.Ct. 538 (1891); Tozer v. United States, (C.C. Mo. 1892) 52 F. 917; Stoutenburgh v. Frazier, 16 App. D.C. 229 (1900); James v. Bowman, 190 U.S. 127, 23 S.Ct. 678 (1903); Czarra v. Board of Medical Supervisors, 25 App. D.C. 443 (1905); United States v. Capital Traction Co., 34 App. D.C. 592 (1910); United States v. Cardiff, 344 U.S. 174, 73 S.Ct. 189 (1952). See also United States v. 1010.8 Acres, (D.C. Del. 1944) 56 F. Supp. 120; Varney v. Warehime, (6th Cir. 1945) 147 F. (2d) 238.

³ In United States v. Reese, 92 U.S. 214 at 221 (1875), where a criminal statute was invalidated for not setting up an applicable standard, it was stated: "We are not able to reject a part which is unconstitutional, and retain the remainder. . . . This would, to some extent, substitute the judicial for the legislative department of the government."

construed,"⁴ the real rationale would seem to be that it is "impossible to solve the doubt and dispel the obscurity"⁵ of the statute. Indeed, it appears that courts have voided statutes not only for vagueness in terms but also for inconsistency in terms, impossibility of performance of the act prescribed,⁶ and sometimes apparently even for unreasonableness.⁷ The Montana court stated in *Hilburn v. St. Paul, M. & M. Ry. Co.*:

"... if an act of the legislature is so vague and uncertain in its terms as to convey no meaning; or if the means for carrying out its provisions are not adequate or effective; or it is so conflicting and inconsistent in its provisions that it cannot be executed, it is incumbent upon the courts to declare it void and inoperative."⁸

The doctrine of invalidation for indefiniteness expounded by these cases seems to have been derived not from a confused view of the rule of strict construction of criminal statutes, as is thought by some writers,⁹ but from the Roman maxim "*ibi jus incertum, ibi jus nullum*"—"where the law is uncertain, there is no law." It is true that many of the earlier cases spoke of strict construction in holding a criminal statute void, but this certainly does not compel the conclusion that the statutes were held void because of a misunderstanding of the construction rule. It seems more likely that the courts interpreted the language of the statutes strictly and after construing them in this manner held that the statutes were not definite and thus were void.¹⁰

However this may be as a theoretical proposition, an exhaustive research discloses that in recent years only a few state and federal decisions have invalidated a statute on the ground that the statutory standard was so vague as to be impossible to interpret. Instead, reliance

⁴ *Tozer v. United States*, (C.C. Mo. 1892) 52 F. 917; *United States v. Brewer*, 139 U.S. 278, 11 S.Ct. 538 (1891); *James v. Bowman*, 190 U.S. 127, 23 S.Ct. 678 (1903); *The Enterprise*, (C.C. N.Y. 1810) 8 Fed. Cas. 732, No. 4,499; *United States v. Reese*, 92 U.S. 214 (1875).

⁵ *State v. Partlow*, 91 N.C. 550 at 551 (1884). The statute provided "that the sale of spirituous liquors shall be prohibited within three miles of . . . Mount Zion church in Gaston County," but there were two "Mount Zion" churches in Gaston County.

⁶ *Brown v. State*, 137 Wis. 543, 119 N.W. 338 (1909). The statute prescribed that physicians must register with the "local registrar" although there was no "local registrar" in existence.

⁷ *State v. Claiborne*, 185 Iowa 170, 170 N.W. 417 (1919). Where a statute made it unlawful to operate a motor vehicle with a lighting device unless it cast a beam which "shall arise above forty-two inches from the level surface," the court held "failure of legislation" because it was clear to the court that the legislature meant "shall not."

⁸ 23 Mont. 229 at 241, 58 P. 551 (1889).

⁹ Note 1 *supra*.

¹⁰ *The Enterprise*, (C.C. N.Y. 1810) 8 Fed. Cas. 732, No. 4,499; *United States v. Sharp*, (C.C. Pa. 1815) 27 Fed. Cas. 1041, No. 16,264; *James v. Bowman*, 190 U.S. 127, 23 S.Ct. 678 (1903).

has been placed on constitutional provisions to support findings of invalidity. The reasons for this are understandable. In the first place, the individual contesting the statute usually places his objections on constitutional grounds. Not only does this assure that the issue will be properly considered, but it also allows a double-barreled attack, since the court must invariably decide whether the statute is definite enough to be interpreted. In addition, this is the only means of raising a federal question as to a state statute, enabling an appeal to the federal courts. While the courts speak of the notice given to the individual by the terms of a statute in voiding it for vagueness, this reference is not placed in a constitutional context and seems to be present when any statute is being interpreted or applied.¹¹ It is doubtful, therefore, whether it can be assumed that the courts are tacitly considering constitutional due process in these discussions. On the other hand, the constitutional test of indefiniteness is in general broad enough to include the test of judicial indefiniteness, since ordinarily a statute which is too vague to be applied or interpreted by the courts is too indefinite to give adequate notice to the persons to whom it is addressed.¹² Finally, despite the validity of the judicial definiteness approach, this common law doctrine is basically addressed to the court's discretion, and the court usually finds it more convenient to base its decision on the broader and more concrete constitutional test.

B. *The Constitutional Requirement of Adequate Notice.* The due process clauses of the Fifth and Fourteenth Amendments of the Federal Constitution and similar provisions in state constitutions¹³ are the source of the requirement that a statute must be definite enough to allow the persons to whom it is addressed to determine the standard of conduct prescribed by the statute so that they can govern their actions accordingly.¹⁴ *Connally v. General Construction Co.* laid down the

¹¹See *McBoyle v. United States*, 283 U.S. 25, 51 S.Ct. 340 (1931), where notice to the individual was discussed in refusing to apply a criminal statute because of the *ejusdem generis* construction canon. The idea of notice is implicit in every canon and aid to interpretation and application of a statute, and is necessarily involved in any consideration of them.

¹²Conceivably, there could be cases where sufficient notice is given by the terms of the statute although the statute is too indefinite for the court to apply. This would be because of the presence of some factor that would require less notice to be given to the individual. See note 56 *infra*.

¹³Only decisions of the federal courts will be considered for the remainder of the comment.

¹⁴*United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 41 S.Ct. 298 (1921) (prohibiting the exaction of "unjust or unreasonable" charges for "necessaries"); *International Harvester Co. v. Kentucky*, 234 U.S. 216, 34 S.Ct. 853 (1914) (combination for the purpose or having the effect of fixing a price greater or less than the real value of an

often cited¹⁵ standard of this requirement in holding that a statute is too indefinite if it "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. . . ."¹⁶ The real difficulty comes in determining whether this test of lack of adequate notice¹⁷ makes the statute inapplicable only as to the specific parties before the court or makes the statute completely void.¹⁸ Until very recently the United

article made unlawful); *A. B. Small Co. v. American Sugar Refining Co.*, 267 U.S. 233, 45 S.Ct. 295 (1925) (same provisions of the Lever Act as were involved in *United States v. L. Cohen Grocery Co.*); *Connally v. General Construction Co.*, 269 U.S. 385, 46 S.Ct. 126 (1926) (criminal to pay state employees "less than the current rate of per diem wages in the locality where the work is performed"); *Yu Cong Eng v. Trinidad*, 271 U.S. 500, 46 S.Ct. 619 (1926) (unlawful to keep business account books in other than the English or Spanish languages); *Stromberg v. California*, 283 U.S. 359, 51 S.Ct. 532 (1931) (felonious to display red flag "as a sign, symbol or emblem of opposition to organized government or as an invitation . . . to anarchistic action"); *Champlin Refining Co. v. Corporation Commission of Oklahoma*, 286 U.S. 210, 52 S.Ct. 559 (1932) (unlawful for oil wells to be used so that there is "waste" or "conditions constituting waste"); *Herndon v. Lowry*, 301 U.S. 242, 57 S.Ct. 732 (1937) ("any attempt, by persuasion or otherwise, to induce others to join in any combined resistance to the lawful authority of the State shall constitute an attempt to incite insurrection"); *Lanzetta v. New Jersey*, 306 U.S. 451, 59 S.Ct. 618 (1939) (subjecting to punishment as "gangsters" any person "not engaged in any lawful occupation, known to be a member of any gang consisting of two or more members, who has been convicted at least three times of being a disorderly person, or who has been convicted of any crime . . ."); *Thornhill v. Alabama*, 310 U.S. 88, 60 S.Ct. 736 (1940) (unlawful to "go near to or loiter about the premises . . . of any other person . . . in business . . . for the purpose of hindering, delaying or interfering with or injuring any lawful business"); *Rutledge, J., concurring in United States v. C.I.O.*, 335 U.S. 106 at 129, 68 S.Ct. 1349 (1948) (Labor-Management Relations Act, 1947, makes unlawful expenditures by labor organizations in connection with federal elections); *Winters v. New York*, 333 U.S. 507, 68 S.Ct. 665 (1948) (ban of printed matter "devoted to . . . criminal news . . . accounts of criminal deeds . . . or . . . bloodshed, lust or crime"); *Black, J., concurring in United States v. Five Gambling Devices*, 346 U.S. 441 at 452, 74 S.Ct. 190 (1953) (requiring dealers to report "all sales and deliveries of gambling devices . . .").

¹⁵ *Winters v. New York*, 333 U.S. 507, 68 S.Ct. 665 (1948); *Lanzetta v. New Jersey*, 306 U.S. 451, 59 S.Ct. 618 (1939); *Jordan v. De George*, 341 U.S. 223, 71 S.Ct. 703 (1951). But this does not mean that a statute cannot place a burden of judgment on those affected. In *Nash v. United States*, 229 U.S. 373 at 377, 33 S.Ct. 780 (1913), Justice Holmes stated 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." Cf. *Tozer v. United States*, (C.C. Mo. 1892) 52 F. 917. Moreover, the cases are in agreement that words with well-established common law meaning are definite enough regardless of whether men of "common intelligence" would differ as to their meaning. See note 54 infra. Perhaps the answer is that laymen are presumed to know the law and thus men of "common intelligence" should not differ.

¹⁶ 269 U.S. 385 at 391, 46 S.Ct. 126 (1926).

¹⁷ Although it is doubtful in many instances that a statute is consulted for guidance, the statute must be certain enough in its terms to put those affected on warning so that legal counsel may advise with reasonable certainty in the event that it is consulted.

¹⁸ As contrasted with complete invalidation of the statute when a court decides that a statute is too indefinite to apply [*United States v. Cardiff*, 344 U.S. 174, 73 S.Ct. 189 (1952)], theoretically there is merely a refusal to apply the statute when it is held too indefinite on "due process" grounds; the court decides solely on its constitutionality as to person(s) before the court. See Crawford, "Legislative Status of an Unconstitutional Statute," 49 MICH. L. REV. 645 at 647 (1951).

States Supreme Court has felt that the issue of indefiniteness¹⁹ "squarely raises the question of whether the section invoked in the indictment is void *in toto*, barring all further actions under it, in this, and every other case."²⁰ Thus, even a person who could not reasonably have any doubt of his violation of a statute's terms may use the shield of indefiniteness²¹ if the statute could possibly fail to give reasonable notice to another hypothetical person in some hypothetical situation. This seems to have been the case in *Winters v. New York*, where the majority admitted that there was "nothing of any possible value to society in these magazines,"²² but decided that the statute making criminal the sale of publications in which accounts of "bloodshed, lust or crime" were so massed as to incite to crimes of violence was "void, on its face."²³

This concept, which was subjected to severe criticism in Justice Murphy's dissent in *Screws v. United States*,²⁴ seems to have been rejected in *Williams v. United States*.²⁵ There the statute in question²⁶ was held to be definite enough to be applied to the defendant before the Court even though the Court conceded that a case might arise where the language would be too indefinite to give the requisite notice and would thus be inapplicable.²⁷ If, as this case indicates, indefiniteness is an individual matter, lack of notice and vagueness as to the persons before the court should be pleaded and proved in order to raise the constitutional objection. The issue is not settled, however, for Justice Black appears to have adhered, in his concurring opinion in *United*

¹⁹ It would seem that only the Fifth and Fourteenth Amendments would be involved in ascertaining whether a statute is sufficiently definite, but the Supreme Court has held that a statute which fails to give notice also violates the Sixth Amendment provision that the accused shall have the right "to be informed of the nature and cause of the accusation." *Yu Cong Eng v. Trinidad*, 271 U.S. 500, 46 S.Ct. 619 (1926); *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 41 S.Ct. 298 (1921). The rationale of these decisions seems to be that accusation under a vague statute is no accusation at all. It is submitted that this is an incorrect application of the Sixth Amendment. That provision is commonly thought to prevent detention without charge, not to establish any scale of definiteness for Congress.

²⁰ *United States v. Petrillo*, 332 U.S. 1 at 5-6, 67 S.Ct. 1538 (1947).

²¹ *Gorin v. United States*, 312 U.S. 19, 61 S.Ct. 429 (1941). But cf. 29 CALIF. L. REV. 548 (1941).

²² 333 U.S. 507 at 510, 68 S.Ct. 665 (1948).

²³ Cf. Justice Frankfurter's dissenting opinion. *Id.* at 520.

²⁴ 325 U.S. 91 at 134, 65 S.Ct. 1031 (1945).

²⁵ 341 U.S. 97, 71 S.Ct. 376 (1951).

²⁶ 18 U.S.C. (1952) §242, making it a crime for any person, under color of any law, to subject any inhabitant "to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States. . . ." The same statute was involved in *Screws v. United States*, 325 U.S. 91, 65 S.Ct. 1031 (1945).

²⁷ "Many criminal statutes might be extended to circumstances so extreme as to make their application unconstitutional. . . . Some day the application of §20 to less obvious methods of coercion may be presented and doubts as to the adequacy of the standard of guilt may be presented. . . ." *Williams v. United States*, 341 U.S. 97 at 101, 71 S.Ct. 576 (1951).

*States v. Five Gambling Devices*²⁸ and his dissenting opinion in *Edelman v. California*,²⁹ to the principle of total invalidation for vagueness enunciated in the *Winters* case. The basic question seems to be whether or not a person should be allowed to assert vagueness as a defense without some indication that he actually consulted the statute with a view toward compliance. Justice Clark, dissenting in *United States v. Five Gambling Devices*, has indicated that he is opposed to Justice Black's approach by stating:

"... with or without the regulations, a person honestly seeking to comply with this law would inevitably have succeeded, without undue mental strain in determining the statute's import and without uncertainty as to his chances of remaining within the bounds of the law. The certainty required by the Due Process Clause is not tested from the would-be violator's standpoint; the test is rather whether adequate guidance is given to those who would be law-abiding."³⁰

II. Factors Varying the Degree of Definiteness Required

A. *The Means by Which a Statute is Executed.* It is clear that the standards of a self-executing statute must in and of themselves give notice to the individual as to what is demanded of him. While he is expected to use various aids, both intrinsic and extrinsic, in interpreting the standards set out, and may even be charged with knowledge of a subsequent interpretation of the statute, he need look no farther than the statute itself for the words that are to be considered.³¹ On the other hand, it has been asserted that less definiteness is required of an administratively executed statute,³² the sole requisite being that the basic standards set up must be sufficiently definite and precise to enable those affected to determine whether the administrator or quasi-legislative board is exceeding his or its authority in promulgating a regulation under the statute.³³ Distinct from this problem of meeting the

²⁸ 346 U.S. 441, 74 S.Ct. 190 (1953).

²⁹ 344 U.S. 357 at 362, 73 S.Ct. 293 (1953).

³⁰ 346 U.S. 441 at 458, 74 S.Ct. 190 (1953). Chief Justice Warren and Justices Burton and Reed concurred in Justice Clark's dissenting opinion.

³¹ *Winters v. New York*, 333 U.S. 507, 68 S.Ct. 665 (1948). Cf. *Fox v. Washington*, 236 U.S. 273, 35 S.Ct. 383 (1915). See Horack, "Cooperative Action for Improved Statutory Interpretation," 3 VANDERBILT L. REV. 382 (1950).

³² *Mahler v. Eby*, 264 U.S. 32, 44 S.Ct. 283 (1924).

³³ *Yakus v. United States*, 321 U.S. 414 at 426, 64 S.Ct. 660 (1944), where the Emergency Price Control Act of 1942, 56 Stat. L. 23 (1942), was upheld against charges of legislative delegation because its standards were "sufficiently definite and precise to enable Congress, the courts, and the public to ascertain whether the Administrator in fixing the designated prices, has conformed to those standards." The statute allowed the

definiteness requirements of the due process clause is the problem of satisfying the demands of the constitutional separation of powers concept. In legislative delegation this requires statutory specification of the basic policies and rules of conduct of the quasi-legislative body.³⁴ The quasi-legislative body may be given policy and rule-making powers only within the limits established by the legislature. The regulations so established by a quasi-legislative body are typically prospective in effect and are subject to the same due process definiteness requirements as self-executing statutes.³⁵

If statutes creating administrative agencies performing quasi-judicial functions are treated as subject only to the same test as statutes creating quasi-legislative agencies,³⁶ then there is no definiteness requirement as such, and the only requisite is a standard by which the agency can guide its actions.³⁷ There is a serious question whether such statutes should not be subject to the same requirements of definiteness demanded of self-executing statutes,³⁸ since they are in effect self-executing statutes with boards rather than courts sitting as the enforce-

Administrator to set "fair and equitable" prices. Compare *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 41 S.Ct. 298 (1921), where the self-executing Lever Act, 40 Stat. L. 277 (1917), as amended by 41 Stat. L. 298 (1919), which prohibited "unjust or unreasonable rate of charge," was held unconstitutional.

³⁴ *Champlin Refining Co. v. Corporation Commission of Oklahoma*, 286 U.S. 210, 52 S.Ct. 559 (1932); *Yakus v. United States*, 321 U.S. 414, 64 S.Ct. 660 (1944); *United States v. Shreveport Grain & Elevator Co.*, 287 U.S. 77, 53 S.Ct. 42 (1932); *Opp Cotton Mills, Inc. v. Administrator*, 312 U.S. 126, 61 S.Ct. 524 (1941); *Norwegian Nitrogen v. United States*, 288 U.S. 294, 53 S.Ct. 350 (1933); *United States v. Grimaud*, 220 U.S. 506, 31 S.Ct. 480 (1911); *Federal Radio Commission v. Nelson Bros. Co.*, 289 U.S. 266, 53 S.Ct. 627 (1933). Cf. *Panama Refining Co. v. Ryan*, 293 U.S. 388, 55 S.Ct. 241 (1935); *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 55 S.Ct. 837 (1935).

³⁵ A search of the federal courts of appeals and United States Supreme Court cases fails to reveal any instance in which a federal administrative regulation of a quasi-legislative board itself was held unconstitutional for indefiniteness. Perhaps the regulations are clarified if they are contested on vagueness grounds and thus few, if any, reach the lower courts. Note the "clarifying" Treasury Regulations of the Treasury Department which are a binding construction of the Internal Revenue Code, unless in conflict with the statute.

³⁶ See Freund, "The Use of Indefinite Terms in Statutes," 30 *YALE L.J.* 437 (1921).

³⁷ *Mahler v. Eby*, 264 U.S. 32, 44 S.Ct. 283 (1924); *Sears, Roebuck & Co. v. FTC*, (7th Cir. 1919) 258 F. 307; *FTC v. A. McLean & Son*, (7th Cir. 1936) 84 F. (2d) 910; *Arkansas Wholesaler Grocers' Assn. v. FTC*, (8th Cir. 1927) 18 F. (2d) 866; *FTC v. Balme*, (2d Cir. 1928) 23 F. (2d) 615; *National Broadcasting Co. v. United States*, 319 U.S. 190, 63 S.Ct. 997 (1943).

³⁸ In *FTC v. R. F. Keppel & Bro.*, 291 U.S. 304 at 312, 54 S.Ct. 423 (1934), it was stated: "Congress, in defining the powers of the Commission, thus advisedly adopted a phrase ['unfair methods of competition'] which, as this Court has said, does not 'admit of precise definition but the meaning and application of which must be arrived at by what this Court elsewhere has called the "gradual process of judicial inclusion and exclusion."'" Perhaps this idea of continuing "inclusion and exclusion" is valid as to constitutional provisions and provisions of statutes creating quasi-legislative boards, but as to statutes which are self-executing or create quasi-judicial boards, it seems to be a process of continuing legislation, being applied retroactively. However, in certain circumstances general language will be definite enough even where the statute is self-executing. See part C *infra*.

ment agencies.³⁹ Quasi-judicial administrators pass judgments which, though rarely penal, often have severe economic and political consequences and concern precedent acts for which no precise guidance was given by the statute.⁴⁰ The courts seemingly fail to see the difference between a sanction imposed for precedent conduct, even though it operates prospectively,⁴¹ and a regulation prohibiting certain prescribed future conduct.⁴² In the former there may be loss of freedom or property as a result of the administrator's decision; in the latter the action of the administrator, while it may operate to curtail activities, is similar to the passage of a statute rather than the judgment of a court.

B. *Enforcement Provisions of the Statute.* Many decisions imply that a higher degree of definiteness is required in criminal statutes than in civil statutes by stressing the fact that the statute being invalidated is criminal in nature.⁴³ However, the actual decisions do not appear to bear this distinction out. As was stated by the Court in *A. B. Small Co. v. American Tobacco*, in rejecting the Lever Act as a defense in a contract action after the act had been held unconstitutional in *United States v. L. Cohen Grocery Co.*⁴⁴ and *Weeds, Inc. v. United States*,⁴⁵

"The ground or principle of the decisions was not such as to be applicable only to criminal prosecutions. It was not the criminal penalty that was held invalid, but *the exaction of obedience to a rule or standard which was so vague and indefinite as really to be no rule or standard at all.*"⁴⁶

³⁹ Those affected have no more to guide them than they have where the statute is self-executing. Some courts seem to feel that the statutes are as definite as self-executing statutes. See *Sears, Roebuck & Co. v. FTC*, (7th Cir. 1919) 258 F. 307, where the statute was compared with penal statutes, and *Mahler v. Eby*, 264 U.S. 32 at 40, 44 S.Ct. 283 (1924), where it was said: "Our history has created a common understanding of the words 'undesirable residents' which gives them the quality of a recognized standard."

⁴⁰ Civil "cease and desist" orders for "unfair methods of competition" are decreed by the Federal Trade Commission. Deportation can be ordered by the Secretary of Labor for aliens if they are found to be "undesirable citizens," according to *Mahler v. Eby*, 264 U.S. 32, 44 S.Ct. 283 (1924).

⁴¹ The Supreme Court distinguishes between prospective sanctions and sanctions for acts done which subject one to loss of liberty or property, but it regards the decree of a quasi-judicial administrator as prospective as long as it does not directly affect title or liberty. The Court requires a higher degree of definiteness in a statute directly affecting liberty or property. *Champlin Refining Co. v. Corporation Commission of Oklahoma*, 286 U.S. 210, 52 S.Ct. 559 (1932).

⁴² See cases cited in notes 34 and 37 supra.

⁴³ See *Louisville & N. R. Co. v. Railroad Commission of Tennessee*, (C.C. Tenn. 1884) 19 F. 679, where a statute imposing multiple damages for violation was termed "quasi-criminal," thus allowing the court to talk in terms of the high degree of definiteness required in a criminal statute.

⁴⁴ 255 U.S. 81, 41 S.Ct. 298 (1921).

⁴⁵ 255 U.S. 109, 41 S.Ct. 306 (1921).

⁴⁶ *A. B. Small Co. v. American Sugar Refining Co.*, 267 U.S. 233 at 239, 45 S.Ct. 295 (1925). Emphasis added. See also *United States v. Alford*, 274 U.S. 264 at 267, 47

General wording has been held sufficiently definite in both criminal and civil cases, with the real emphasis placed not on the type of enforcement, but rather on incidental factors making the language more definite. The use of the distinction, if any exists, seems to be as a support for a decision already reached. No logical basis can be found for such a distinction, since notice to the persons affected may be equally as important in one case as in the other. It might even be argued that it is more important in the case of civil statutes, since such statutes are more often looked to for guidance before the act⁴⁷ than are criminal statutes.⁴⁸ Nevertheless, the courts do give lip service to the criminal-civil distinction, and although no case has been discovered where it is clear that this distinction was actually determinative, it perhaps is helpful in making the court receptive to more important factors.⁴⁹

C. *The Subject Matter*. The type of subject matter dealt with in a statute plays an important part in the degree of definiteness required. The Supreme Court indicated in *United States v. Petrillo*⁵⁰ that a statute is definite enough if it is as definite as Congress could reasonably make it with due regard to the subject matter. Yet in *Winters v. New York*⁵¹ the statute appeared to satisfy the *Petrillo* test and still it was held to be too vague. Perhaps the difference in the activity controlled by the statutes is the reconciling element. The *Petrillo* case dealt with union persuasion devices and the *Winters* case concerned publication of certain types of reading matter. With the reverence paid the right of free expression, a higher degree of definiteness has been required in statutes limiting that right.⁵² Where less important

S.Ct. 597 (1927), where Justice Holmes stated: "We regard the meaning as too plain to be shaken by the suggestion that criminal statutes are to be construed strictly. They also are to be construed with common sense."

⁴⁷ This proposition would not be true of criminal statutes governing commercial transactions, e.g., tax and price-fixing statutes.

⁴⁸ E.g., which would require greater definiteness in its standards, a "criminal" statute imposing a five dollar fine for breaches of the peace, or the federal antitrust act, a "civil" statute awarding threefold damages? See 38 Stat. L. 731 (1914), 15 U.S.C. (1952) §15.

⁴⁹ An additional factor might perhaps be the culpability of the conduct. See Hall, "Strict or Liberal Construction of Penal Statutes," 48 HARV. L. REV. 748 (1935). Cf. note 56 *infra*.

⁵⁰ 332 U.S. 1, 67 S.Ct. 1538 (1947). "Clearer and more precise language might have been framed by Congress to express what it meant by 'number of employees needed.' But none occurs to us, nor has any better language been suggested, effectively to carry out what appears to have been the Congressional purpose." *Id.* at 7. See *United States v. Alford*, 274 U.S. 264, 47 S.Ct. 597 (1927); Frankfurter, J., dissenting in *Winters v. New York*, 333 U.S. 507 at 520, 68 S.Ct. 665 (1948).

⁵¹ 333 U.S. 507, 68 S.Ct. 665 (1948).

⁵² There is some indication that there is not only a difference in the degree of definiteness required in a statute limiting the right of free discussion, but also a difference in *kind*. See 1949 WIS. L. REV. 359, in which the writer claims that there is a presumption of

rights are involved, the *Petrillo* test of reasonable definiteness may well be applicable.⁵³

D. *Incidental Factors.* Various other factors are frequently cited by the courts in support of their decisions in this area, though it is difficult to determine the precise effect, other than as makeweights, that they have independent of more significant considerations. These incidental factors may be briefly summarized:

1. Words in the statute which have a well-settled common law or technical meaning are deemed sufficiently definite.⁵⁴

2. A statute which extends or declares the common law is required to have less definiteness than a statute that contemplates a change in existing laws.⁵⁵

unconstitutionality where a statute deals with free speech. *Thornhill v. Alabama*, 310 U.S. 88 at 97-98, 60 S.Ct. 736 (1940), seems to express the philosophy of the courts when dealing with statutes in this area: "The existence of such a statute, which readily lends itself to harsh and discriminatory enforcement by local, prosecuting officials . . . results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview. . . . Where regulations of the liberty of free discussion are concerned, there are special reasons for observing the rule that it is the statute, and not the accusation or evidence under it, which prescribes the limits of permissive conduct and warns against transgression." See also *Stromberg v. California*, 283 U.S. 359, 51 S.Ct. 532 (1931); *Herndon v. Lowry*, 301 U.S. 242, 57 S.Ct. 732 (1937). Cf. *Chaplinsky v. New Hampshire*, 315 U.S. 568 at 573, 62 S.Ct. 766 (1942), where a statute prohibiting indecent language was upheld with the court emphasizing the fact that it was "narrowly drawn and limited to define and punish specific conduct. . . ." In certain cases where the public need for free speech restriction is great and the enforcement provisions are well defined, the statutes will not be subjected to this tremendous burden of definiteness which exists where the public interest is not so immediate, e.g., control of radio transmitters by the Federal Communications Commission and of public broadcasting by the so-called "loudspeaker" ordinances. See Jackson, J., dissenting in *Saia v. New York*, 334 U.S. 558 at 566, 68 S.Ct. 1148 (1948), and concurring in *Kovacs v. Cooper*, 336 U.S. 77 at 97, 69 S.Ct. 448 (1949).

⁵³ This is suggested in *Winters v. New York*, 333 U.S. 507 at 517, 68 S.Ct. 665 (1948): "This court goes far to uphold state statutes that deal with offenses, difficult to define, when they are not entwined with limitations on free expression. We have the same attitude toward federal statutes." *Communications Assn. v. Douds*, 339 U.S. 382, 70 S.Ct. 674 (1950), indicates that this attitude will not be extended into the civil rights field generally. *Feiner v. New York*, 340 U.S. 315, 71 S.Ct. 303 (1951), allowed the arrest of a street orator expressing inflammatory, "unpopular" views under a statute prohibiting incitement of breaches of the peace. But cf. *Kunz v. New York*, 340 U.S. 290, 71 S.Ct. 312 (1951), and *Niemotko v. Maryland*, 340 U.S. 268, 71 S.Ct. 325 (1951), in which convictions under licensing statutes were struck down because no appropriate standards were established for the granting of the public speaking permits.

⁵⁴ *Screws v. United States*, 325 U.S. 91, 65 S.Ct. 1031 (1945); *Winters v. New York*, 333 U.S. 507, 68 S.Ct. 665 (1948); *Hygrade Provision Co. v. Sherman*, 266 U.S. 497, 45 S.Ct. 141 (1925); *Omahevarria v. Idaho*, 246 U.S. 343, 38 S.Ct. 323 (1918). The technical meaning must be one "well settled" among the group to whom the statute is directed.

⁵⁵ Compare *Nash v. United States*, 229 U.S. 373, 33 S.Ct. 780 (1913), with *United States v. Reese*, 92 U.S. 214 (1875). The modern judicial philosophy of encouraging experimental legislation would tend to modify Chief Justice Waite's theory of restrictive interpretation, expressed in the *Reese* case. See the dissents in *Winters v. New York*, 333 U.S. 507, 68 S.Ct. 665 (1948); *Saia v. New York*, 334 U.S. 558, 68 S.Ct. 1148 (1948).

3. A statute that requires the presence of culpable intent on the part of the person affected necessitates less definiteness than a statute which prescribes or proscribes the execution of an act regardless of intent.⁵⁶

4. Language that has been amplified and elaborated by administrators' rulings,⁵⁷ legal department opinions,⁵⁸ and lower court decisions⁵⁹ need not be as definite as that considered for the first time by the court.

5. Lengthy administration of a statute with many adjudications upholding its validity seems to decrease the need for definiteness.⁶⁰

6. A statute that requires those affected to make a finding of fact based on hypothetical factors must be very definite.⁶¹

⁵⁶ *Screws v. United States*, 325 U.S. 91, 65 S.Ct. 1031 (1945); *Gorin v. United States*, 312 U.S. 19, 61 S.Ct. 429 (1941); *United States v. Ragen*, 314 U.S. 513, 62 S.Ct. 374 (1942); *Hygrade Provision Co. v. Sherman*, 266 U.S. 497, 45 S.Ct. 141 (1925); *Omaechevarria v. Idaho*, 246 U.S. 343 at 348, 38 S.Ct. 323 (1918), where it was said that "... any danger ... which might otherwise arise from indefiniteness, is removed" by the existence of a general statute requiring intent. Is intent to do an indefinite act any intent at all? Does not this holding leave the meaning of the statute up to the jury? It should be remembered in considering these cases that in every one the Court said the language was definite enough and only then discussed the fact that intent was required. There is also some feeling on the part of the courts that if one could not prevent his misconduct even though he knew of the statute, or would commit the offense regardless of knowledge, less definiteness is required in the statute dealing with the misconduct—e.g., statutes dealing with homosexuals or homicides. See *Minnesota v. Probate Court*, 309 U.S. 270, 60 S.Ct. 523 (1940); *Murphy, J.*, dissenting in *Screws v. United States*, 325 U.S. 91 at 134, 65 S.Ct. 1031 (1945).

⁵⁷ *FTC v. R. F. Keppel & Bro.*, 291 U.S. 304, 54 S.Ct. 423 (1934); *United States v. Shreveport Grain & Elevator Co.*, 287 U.S. 77, 53 S.Ct. 42 (1932). Cf. Justice Black's concurring opinion in *United States v. Five Gambling Devices*, 346 U.S. 441 at 452, 74 S.Ct. 190 (1953).

⁵⁸ *United States v. Alford*, 274 U.S. 264, 47 S.Ct. 597 (1927).

⁵⁹ *Fox v. Washington*, 236 U.S. 273, 35 S.Ct. 383 (1915); *United States v. Alford*, 274 U.S. 264, 47 S.Ct. 597 (1927); *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86, 29 S.Ct. 220 (1909).

⁶⁰ "Section 5 has so often been considered and held to be constitutional by the courts that it is not necessary now to consider these objections [one was that the statute was indefinite] to its constitutionality." *FTC v. Balme*, (2d Cir. 1928) 23 F. (2d) 615 at 621. This statement seems to ignore the fact that under the adversary system a statute is only declared unconstitutional as to the person contesting. However, perhaps the other cases involved similar persons and stare decisis came into play or perhaps the court felt that many previous decisions involving different facts clarified the statute. See note 53 supra. The dissent in *Winters v. New York*, 333 U.S. 507 at 520 et seq., 68 S.Ct. 665 (1948), suggests that lengthy administration of a statute without attack will in itself decrease the need for definiteness, but this view seems unsupported.

⁶¹ In *International Harvester Co. v. Kentucky*, 234 U.S. 216 at 223, 34 S.Ct. 853 (1914), a price-fixing statute was held too indefinite not because the language itself was indefinite but because "the elements necessary to determine the imaginary ideal are uncertain both in nature and degree of effect to the acutest commercial mind."

III. *Conclusions*

A majority of the cases, regardless of the theory used, consider (1) the notice given to the individuals affected by the terms of the statute, (2) the ability of the court to understand the statute, and (3) the ingredients in the statute and any other elements present which may vary the degree of definiteness required or which may make the statute more definite. It is after these factors are considered that the theories come into operation. If judicial definiteness is the standard applied, the second factor is emphasized; if constitutional due process definiteness is the test, primary importance is placed on the first factor.⁶² When the two theories are considered in this light, they appear to be consistent, not conflicting, with the difference being in the point on which primary stress is laid. The reason that the two theories, as applied in the cases, seem inconsistent is that a vague statute almost invariably neither gives notice to the individual nor is definite enough for a court to apply.⁶³ Confronted with exactly the same situation, therefore, different courts may strike down a statute on different grounds, without even discussing the alternative theory. But this simply means that a court is faced with a choice between two correct tests, both of which must be satisfied before the statute can be applied. Thus as a practical matter the third factor—the one varying the degree of definiteness needed or present in any particular case—becomes of primary importance. Consequently, all factors which could possibly clarify the language used in the statute should be uncovered and carefully weighed.

Robert B. Krueger, S.Ed.

⁶² Sometimes, however, the courts appear to rest their decisions on dual grounds. Compare 51 MICH. L. REV. 922 (1953), in which *United States v. Cardiff*, 344 U.S. 174, 73 S.Ct. 189 (1952), is discussed from the standpoint of constitutional due process; with 51 MICH. L. REV. 941 (1953), in which the same case is analyzed as a development in the field of statutory interpretation.

⁶³ Some writers seem to agree with the proposition that both the court and the individuals affected must be able to understand the statute's terms, but regard the requirement as one of due process as to both parties. See 62 HARV. L. REV. 77 (1948). To put a court within the protection of either the Fifth or Fourteenth Amendments involves, of course, a remarkable chain of reasoning.