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LEGISLATION-INVALIDITY OF STATUTES FRAMED IN VAGUE TERMS

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LEGISLATION—INVALIDITY OF STATUTES FRAMED IN VAGUE TERMS*—Defendant, president of a corporation which processes apples for shipment in interstate commerce, was convicted of violating §301(f) of the Food, Drug, and Cosmetic Act.[1] That section prohibits "the refusal to permit entry or inspection as authorized by section 704"; section 704[2] authorizes federal officers, "after first making request and obtaining permission of the owner, operator or custodian" of the factory "to enter" and "to inspect" the establishment "at reasonable times." Federal authorities requested permission to enter and inspect defendant's

* For a different interpretation and analysis of the *Cardiff* case, see companion note in this issue at p. 922.—Ed.

[1] 52 Stat. L. 1040 (1938), 21 U.S.C. (1946) §331(f).

[2] 52 Stat. L. 1057 (1938), 21 U.S.C. (1946) §374.

factory at reasonable hours, but permission was refused. This refusal was the basis of the conviction.[3] The Court of Appeals for the Ninth Circuit reversed.[4] Certiorari was granted; *held*, affirmed. A criminal statute is invalid if it does not give fair and effective notice of what acts are prohibited. *United States v. Cardiff*, 344 U.S. 174, 73 S.Ct. 189 (1952).

An argument frequently presented to attack legislation couched in general terms is that the language of the particular statute is so indefinite and vague as to be invalid. This type of attack calls for special scrutiny of the language by the reviewing court in the case of criminal statutes, although the principle is applicable to legislation of a civil nature as well.[5] Since hanging a "void-for-vagueness" decision on some constitutional peg has become an accepted technique, the principal case is of interest in that it does not purport expressly to rest the ruling on any constitutional grounds.[6] The statute prohibited refusal to allow inspection only if permission had previously been granted. The Court stated that it was unable to make sense out of the language; neither of two alternative constructions apprises a businessman of what conduct will be deemed criminal. If the statute means that revocation of permission once given is illegal, a flock of uncertainties arises;[7] while if it means that inspection is conditioned on permission which it is unlawful to refuse, the absurdity is more patent yet. Although the Court discussed the lack of fair notice to defendant and cited in passing two cases decided on due process grounds,[8] no constitutional issue was referred to by the court below nor mentioned in the Supreme Court's opinion. It is submitted that in this kind of case a matter to be examined even before a constitutional issue[9] is reached is whether the legislature has in fact passed a *law*—i.e., a rule prescribing certain minimum standards of conduct. Just as a string of nonsense syllables enacted by a legislature fails to warrant such a desig-

[3] United States v. Cardiff, (D.C. Wash. 1951) 95 F. Supp. 206.

[4] Cardiff v. United States, (9th Cir. 1952) 194 F. (2d) 686.

[5] See, e.g., Small C. v. American Sugar Refining Co., 267 U.S. 233, 45 S.Ct. 295 (1925), in which the Court said in referring to cases declaring the criminal provisions of the same act invalid, at 239, "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."

[6] See article by Aigler, "Legislation in Vague or General Terms," 21 MICH. L. REV. 831 (1923), in which the author urges the point that often holdings of invalidity because of indefiniteness need not be tied to any particular constitutional inhibition.

[7] "Would revocation of permission once given carry the criminal penalty no matter how long ago it was granted and no matter if it had no relation to the inspection demanded? Or must the permission granted and revoked relate to the demand for inspection on which the prosecution is based?" Douglas, J., in principal case at 176.

[8] United States v. L. Cohen Grocery Co., 255 U.S. 81, 41 S.Ct. 298 (1921); Herndon v. Lowry, 301 U.S. 242, 57 S.Ct. 732 (1937).

[9] Indefinite language in legislation has been held to violate the following types of state and federal constitutional provisions: due process clauses (5th and 14th Amendments, state constitutions); protection of right to be informed of nature of accusation (6th Amendment, state constitutions); ex post facto clauses [on theory that jury determines nature of offense after vague legislation seems to permit certain conduct; see Ex parte Jackson, 45 Ark. 158 (1885)]; unlawful delegation of legislative powers [e.g., People ex rel. Duffy v. Hurley, 402 Ill. 562 at 573, 85 N.E. (2d) 26 (1949)]; cruel and unusual punishment [Stoutenberg v. Frazier, 16 App. Cas. (D.C. 1900) 229].

nation, so should an attempted law fail *ab initio* if it does not furnish the mythical person of ordinary intelligence an understandable external rule of conduct. In such a case the language has no meaning and is simply inoperative and void.[10] Many of the early state and federal cases involving indefinite language seem to have been decided on this basis,[11] and there have been scattered federal[12] and state[13] decisions in recent years invalidating statutes for vagueness with no mention of constitutional problems in the opinions. Often the approach of the court will make little practical difference. However, situations arise when the distinction may become important. Decisions of the United States Supreme Court on state statutes must necessarily come up via the Fourteenth Amendment; in Ohio a statute may not be declared unconstitutional unless all but one of the supreme court justices so decide;[14] in North Dakota no law may be declared unconstitutional unless at least four (of the five) supreme court justices so decide;[15] in Indiana cases presenting constitutional issues are appealable directly to the supreme court, by-passing the court of appeals;[16] in Alabama a declaratory opinion by the justices of the supreme court may be requested by the governor only upon constitutional issues.[17] The argument that legislation is "uncertain, indefinite, and vague" is frequently made in the cases. Inasmuch as courts demonstrate a reluctance to label a statute unconstitutional, it is possible that the principal case will be generally interpreted and applied as modern precedent for the proposition that indefinitely-worded legislation may be avoided simply as inoperative for failure to provide an ascertainable rule of conduct,[18] without resort to constitutional inquiries.

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[10] "A prohibition so indefinite as to be unintelligible is not a prohibition by which conduct can be governed. It is not a rule at all; it is merely exhortation and entreaty." Cardozo, J., in Standard C. & M. Corp. v. Waugh C. Corp., 231 N.Y. 51 at 54, 131 N.E. 566 (1921) (decided on basis of due process precedents).

[11] The first federal case invalidating legislation for indefiniteness, The Enterprise, 1 Paine (C.C. 1810) 32, Fed. Cas. No. 4499, is sometimes cited solely for the proposition that penal statutes are to be strictly construed, 45 HARV. L. REV. 160, n. 1 (1931).

[12] United States v. 1010.8 Acres, (D.C. Del. 1944) 56 F. Supp. 120 at 140; Varney v. Warehime, (6th Cir. 1945) 147 F. (2d) 238 at 244.

[13] Wilcox v. Penn Mutual Life Ins. Co., 357 Pa. 581, 55 A. (2d) 521 (1947) (community property law invalidated); State v. Humble Oil and Refining Co., 55 N.M. 395, 234 P. (2d) 339 (1951) (severance tax law invalid as to oil and gas industry); State v. Bryant, 219 Ark. 313, 241 S.W. (2d) 473 (1951) ("small farm vehicles" too vague); State v. Morrison, 210 N.C. 117, 185 S.E. 674 (1936) (license statute void for uncertainty).

[14] OHIO CONST., art. IV, §2 (1948). See remarks by Aigler, "Legislation in Vague or General Terms," 21 MICH. L. REV. 831 (1923), on Patten v. Aluminum Castings Co., 105 Ohio 1, 136 N.E. 426 (1922), in which a bare majority of the court held a statute invalid for indefiniteness.

[15] NORTH DAKOTA CONST. §89 (1943).

[16] Ind. Stat. (Burns, 1946 replacement) §4-214.

[17] Ala. Code (1940), tit. 13, §34. In Opinion by the Justices, 249 Ala. 88, 30 S. (2d) 14 (1947), the members of the court informed the governor that while the act in question violated none of several constitutional provisions, nonetheless its vagueness rendered it inoperative and void.

[18] This may be required by statute. "Whenever it appears that a provision of the penal law is so indefinitely framed or of such doubtful construction that it cannot be understood . . . such penal law shall be regarded as wholly inoperative." Texas Penal Code (1952) art. 6.