Vagueness as Impossibility

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The void-for-vagueness doctrine dictates that unduly vague penal statutes will be considered void based on due process principles. The U.S. Supreme Court has grounded the doctrine in two rationales. First, vague penal statutes fail to inform the ordinary person of what is proscribed, thereby violating an essential aspect of due process: the requirement of fair notice. Second, vague penal statutes violate separation-of-powers and rule-of-law principles inherent in due process by delegating legislative authority to other actors in the criminal justice system: police, prosecutors, judges, and juries.

The constitutional legitimacy of the void-for-vagueness doctrine has been recently called into question by Justice Thomas, who has suggested that the doctrine has little connection to constitutional text or history and is akin to the much maligned doctrine of substantive due process. The doctrine also suffers from a number of other defects. First, the Supreme Court, in over a century of addressing vagueness challenges, has failed to provide an intelligible standard for identifying unconstitutionally vague statutes. In addition, it appears arbitrary to deem vague laws unconstitutional when nonvague statutes, including, but not limited to ambiguous ones, can also fail to provide notice for potential wrongdoers and can delegate excessive legislative power to courts and prosecutors. Furthermore, the Court's jurisprudence embraces an inherent contradiction: it permits courts and executive agencies to save otherwise vague statutes through limiting constructions, even though excessive delegation to those institutions is one of the purported evils of vague statutes. Finally, the Court has held that a scienter requirement for criminal liability can also save an otherwise vague statute, despite the fact that scienter typically refers to knowledge of facts that make one's conduct illegal, not knowledge that one's conduct falls within the law's proscription.

Both clarity and constitutional legitimacy can be infused into this area by shedding the rhetoric of vagueness and instead thinking of the problem as impossibility of compliance. Where it is difficult to ascertain what the law requires, it is sometimes, though not always, impossible to comply. And a basic element of due process recognized by Lord Edward Coke in Dr. Bonham's Case *over four centuries ago is that the law cannot compel the impossible. A close look at the statutes that the Supreme Court has declared to be vague over the past century reveals that they generally share one of two defects: they require an*

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actor to conform his conduct either to unknowable objective facts or to unascertainable normative standards. Such statutes violate Lord Coke's ancient dictum by requiring that persons perform the impossible.

This way of reframing vagueness as impossibility not only provides a firmer constitutional footing for some of the Court's precedents but also provides a guide for future cases. While close cases will still arise, recasting vagueness as impossibility in many cases will help both litigants and courts by reframing the question as whether the statute at issue essentially requires that the actor perform the impossible.

Introduction

Pursuant to longstanding precedent, penal statutes that are unduly vague violate due process.[1] This "void-for-vagueness" doctrine is based on two rationales. First, vague statutes violate a basic requirement of due process in that they do not give fair notice to the average person of what behavior will incur a penal sanction. Second, vague statutes violate separation-of-powers and rule-of-law principles by delegating too much authority to police, prosecutors, judges, and juries to make law, a core legislative function.[2] The Court has in the past few decades stated that this second rationale is the more important, but the Court continues to cite lack of notice as a constitutional defect of vague statutes.[3]

Judges and commentators have, with no shortage of irony, decried the lack of clarity of the void-for-vagueness doctrine itself. An analysis of the Court's cases in this area leaves one wondering how lower courts and litigants are to tell the difference between statutes that are sufficiently definite and those that are not. At best, one can say that vagueness is a matter of degree, with the Court placing the line between the vague and the certain based on an "I know it when I see it" standard. At worst, the cases appear to haphazardly place that line in random places.

Separately, the void-for-vagueness doctrine has come under attack recently as having no grounding in the Constitution. In two cases in the last five years, Justice Thomas has asserted that the void-for-vagueness doctrine derives wholly from early cases presenting statutory ambiguity, not vagueness.[4] While no definition can perfectly capture the distinction, vague

1. The Supreme Court has "expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe" in the civil as opposed to the criminal context. Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498–99 (1982); *see also* Mila Sohoni, *Notice and the New Deal*, 62 DUKE L.J. 1169, 1176 (2013) ("[E]nactments with civil penalties are subject to a less exacting test for precision than enactments carrying criminal penalties."). For this reason, this Article focuses on penal statutes, leaving to one side any dispute over whether and to what extent the void-for-vagueness doctrine applies to nonpenal statutes.

2. A third rationale, providing actors with breathing room to engage in constitutionally protected conduct, has typically been cited where First Amendment freedoms or reproductive rights are at stake. *See, e.g.*, City of Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416, 419 (1983) (statute limiting access to abortion); Smith v. Goguen, 415 U.S. 566, 567 (1974) (flag desecration statute); *see also* Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 75 (1960) (asserting that "the doctrine of unconstitutional indefiniteness has been used by the Supreme Court almost invariably for the creation of an insulating buffer zone of added protection at the peripheries of several of the Bill of Rights freedoms"). This Article puts such cases to one side and considers only the void-for-vagueness doctrine in contexts where constitutionally protected conduct is not at issue.

3. *See, e.g.*, Sessions v. Dimaya, 138 S. Ct. 1204, 1212 (2018) (plurality opinion) (stating that the void-for-vagueness doctrine guarantees "fair notice" and guards against "arbitrary or discriminatory law enforcement"); Johnson v. United States, 135 S. Ct. 2551, 2567 (2015) (noting that fair notice continues to be relevant to an analysis of statutory vagueness).

4. *See Dimaya*, 138 S. Ct. at 1243 (Thomas, J., dissenting) (positing that early American courts

statutes can be thought of as those with no set, discernible meaning, while ambiguous statutes are those with a finite number—often two but sometimes more—of possible meanings.[5] The difference is critical, because no one has contended that ambiguous statutes violate due process principles. The early cases, Justice Thomas has argued, present applications of the rule of lenity, that penal statutes should be strictly construed.[6] But the rule of lenity applies only to penal statutes and, more importantly, is simply a rule of construction, not of constitutional law, and can be dispensed with by legislation. According to Justice Thomas, the void-for-vagueness doctrine has as little constitutional legitimacy as the idea of "substantive due process," and implicates the same danger of unelected judges deciding on an ad hoc basis which legislative acts go too far and must be struck down.[7] Justice Gorsuch recently took up the task of defending the void-for-vagueness doctrine as good constitutional law on originalist grounds.[8] However, he erred in asserting that the due process concept of notice, historically understood as requiring clarity in charging instruments, also requires clarity in statutes.

The void-for-vagueness doctrine is also underinclusive. Take, for instance, statutes that are not vague but ambiguous. A statute that has a finite number of possible meanings, and is therefore ambiguous, creates notice problems just as vague ones do. Potential criminal actors faced with an ambiguous statute may have no idea whether a narrower or broader reading

addressed vague laws through statutory construction, not the Due Process Clause); *Johnson*, 135 S. Ct. at 2567 (Thomas, J., concurring in the judgment) (noting that vague statutes have historically been addressed through strict construction rules, not constitutional due process).

5. *See* LAWRENCE M. SOLAN, THE LANGUAGE OF STATUTES: LAWS AND THEIR INTERPRETATION 38–39 (2010) (positing that language is ambiguous when "there are a discrete number of possible meanings," while language is vague when "there are innumerable possible meanings"); Shon Hopwood, *Clarity in Criminal Law*, 54 AM. CRIM. L. REV. 695, 696 n.2 (2017) ("Statutory ambiguity occurs when terms have more than one meaning, and statutory vagueness occurs when a statute's terms create borderline cases that are 'undecidable except by arbitrary stipulation.'" (quoting Jeremy Waldron, *Vagueness in Law and Language: Some Philosophical Issues*, 82 CALIF. L. REV. 509, 512–13 (1994))); Dru Stevenson, *Toward a New Theory of Notice and Deterrence*, 26 CARDOZO L. REV. 1535, 1585 n.205 (2005) (observing that vagueness occurs when "the terms [of a statute] could describe an almost infinite range of activities (no clear lines at all), while [ambiguity] describes (typically a single term or phrase) that could have two meanings, and a court must decide which to use"); *The Supreme Court, 2007 Term—Leading Cases*, 122 HARV. L. REV. 276, 484 n.79 (2008) [hereinafter *Rule of Lenity*] (defining ambiguity as occurring when "a single phrase [has] multiple, but finite, definitions" and vagueness as occurring where "a statute . . . can apply to any of a vast number of situations"); *see also* John F. Decker, *Addressing Vagueness, Ambiguity, and Other Uncertainty in American Criminal Laws*, 80 DENV. U. L. REV. 241, 260–61 (2002) ("[W]hile a vague statute does not satisfactorily define the proscribed conduct, one that does define prohibited conduct with some precision, but is subject to two or more different interpretations, is ambiguous.").

6. *Dimaya*, 138 S. Ct. at 1243 (Thomas, J., dissenting); *Johnson*, 135 S. Ct. at 2567 (Thomas, J., concurring in the judgment).

7. *Dimaya*, 138 S. Ct. at 1244 (Thomas, J., dissenting); *Johnson*, 135 S. Ct. at 2564 (Thomas, J., concurring in the judgment).

8. *Dimaya*, 138 S. Ct. at 1224–25 (Gorsuch, J., concurring in part and concurring in the judgment).

of the statute will eventually be adopted by a court. Ambiguous statutes also result in a delegation of legislative authority to prosecutors by permitting them to apply the broadest possible meaning of ambiguous statutory terms, (at least until they are definitively construed by a court of last resort), and to courts, by permitting them to interpret those terms narrowly or broadly. But, again, no one suggests that statutory ambiguity violates due process or that the rule of lenity is constitutionally compelled.

Even beyond the problem of lack of clarity in statutes, statutes that are clear yet which criminalize broad swaths of ordinary conduct also implicate similar delegation concerns. Prosecutors can and must pick and choose among the many lawbreakers who will be the few to be prosecuted. And the web of overlapping and redundant criminal proscriptions allows prosecutors to determine not only who is to be punished but also precisely how much they should be punished. In this way, broadly worded, overlapping statutes shift authority over basic matters of criminal justice policy from legislatures to prosecutors. Thus, the delegation problem is hardly unique to statutory vagueness, and yet it is only when a statute is vague is this delegation deemed constitutionally problematic.

The void-for-vagueness doctrine also houses an essential contradiction. Again, excessive delegation of legislative power has been deemed the chief evil that the doctrine seeks to cure. Yet the Court has held that a narrowing judicial construction of a statute can save it from being declared vague.[9] The Court has also embraced the notion that clarifying regulations from executive officials can save an otherwise vague statute from unconstitutionality.[10] But if excessive delegations of lawmaking power to these institutions is what makes vague statutes unconstitutional, then permitting vagueness to be cured through judicial and executive policymaking makes the cure at least as bad as the disease.

Finally, another fix the Court has used for otherwise vague statutes has also been problematic. It has held that a scienter element in a penal statute can prevent the statute from being deemed vague.[11] However, there is a good argument that this supposed cure fixes nothing because one can satisfy a scienter requirement by knowing the nature of one's conduct and the facts that make one's conduct illegal and still not understand that one's conduct falls within the law's proscription because of indefinite statutory language.

A closer look at the void-for-vagueness doctrine reveals a sounder due process basis for the doctrine that avoids these problems: the proscription against requiring the impossible. Most of the statutes that the Court has addressed in its vagueness cases can be divided into two main categories: those that require an actor to conform his conduct to certain objective facts

9. *See* discussion *infra* section II(D)(1).

10. *See* discussion *infra* section II(D)(2).

11. *See* discussion *infra* subpart II(E).

and those that require an actor to conform his conduct to certain normative standards. Each category includes two subcategories of statutes, one set that has generally been considered vague and one that has generally been considered not vague. Statutes that require conformity with objective but unknowable facts have generally been deemed unconstitutional, while those that require conformity with known or knowable facts have generally been upheld. And statutes that require conformity with the entirely subjective impressions of others have generally been deemed unconstitutional, while those that require conformity with the standards of some community have generally been upheld.[12]

These categories of so-called vague statutes—those that require conformity with either unknowable facts or the entirely subjective impressions of third parties—do not simply make it impossible to know what the law requires. They also, as a consequence, make it impossible to comply. As such, they violate the dictum from *Dr. Bonham's Case*[13] in 1610, where Lord Coke famously wrote that "when an Act of Parliament is . . . impossible to be performed, the common law will controul it, and adjudge such Act to be void."[14] Assuming that Coke is best read as advocating judicial review as practiced today—a point on which there is a fair amount of controversy—this ancient dictum nicely dovetails with what has evolved into the void-for-vagueness doctrine. Where a legislature has compelled compliance with unknowable facts or entirely subjective impressions of third parties, it has, in effect, commanded the impossible. That is something that, in our day as in Coke's, due process will not tolerate.

This Article argues that the void-for-vagueness doctrine is best understood as an instantiation of Lord Coke's ancient dictum that a statute cannot compel that the "impossible . . . be performed."[15] This refocusing of the doctrine on impossibility rather than on vagueness helps explain much of the Supreme Court's jurisprudence in this area, places it on a firmer constitutional footing, and will aid courts in future cases to apply the doctrine. Part I discusses the void-for-vagueness doctrine and its notice and nondelegation rationales. Part II highlights the problems of the void-for-vagueness doctrine: its lack of clarity, its questionable constitutional provenance, its underinclusiveness, its inconsistent attitude toward delegations to judicial and executive actors, and its problematic reliance on a scienter requirement as a fix. Part III suggests that the void-for-vagueness doctrine be largely recast as a constraint on statutes that are impossible to comply with and then undertakes a fresh look at the Court's vagueness cases within a framework of impossibility. Part III then briefly discusses some

12. There are other categories of cases that do not fall neatly into any of these four categories but that also, on closer inspection, are not really about vagueness at all.

13. (1610) 77 Eng. Rep. 646; 8 Co. Rep. 113 b.

14. *Id.* at 652; 8 Co. Rep. at 118 a.

15. (1610) 77 Eng. Rep. 646; 8 Co. Rep. 113 b.

Supreme Court cases that do not fit this framework, including its two most recent vagueness cases, and suggests that they be reconsidered.

I. The Void-for-Vagueness Doctrine

The void-for-vagueness doctrine dictates that unduly uncertain laws, whether criminal or civil, violate due process and cannot be enforced. The doctrine has two main rationales, one based on individual rights and one based on constitutional structure, that guide its application. Unduly indefinite statutes, the Supreme Court has instructed, violate due process by failing to provide potential criminal actors fair notice of what is unlawful, and they violate nondelegation and rule-of-law constraints by, in effect, handing over lawmaking responsibility to nonlegislative actors, notably police, prosecutors, judges, and juries.

According to the Court, a statute that does not "give ordinary people fair notice of the conduct it punishes" violates an essential requirement of due process.[16] As the Court has written: "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids."[17] Because both retributivist and utilitarian rationales for punishment assume that people can ordinarily choose whether to obey the law, the Court has "insist[ed] that laws give the person of ordinary intelligence a reasonable opportunity to" do so.[18] Thus, if people "of common intelligence must necessarily guess at [a statute's] meaning," it will be deemed vague.[19]

The Court has also justified the void-for-vagueness doctrine by adding a structural rationale on top of the fair-notice justification. Just as an unduly vague statute cannot tell potential criminal actors what they cannot do, it cannot provide this information to others in the criminal justice system either.[20] To avoid a vagueness problem, then, "a legislature [must] establish minimal guidelines to govern law enforcement."[21] This structural rationale demonstrates that the void-for-vagueness doctrine operates as a type of nondelegation doctrine, bolstering the separation of powers by requiring that the lawmaking power be housed in the legislative branch.[22] A statute that falls

16. Johnson v. United States, 135 S. Ct. 2551, 2556 (2015).

17. Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939).

18. Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).

19. Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926).

20. Boyce Motor Lines, Inc. v. United States, 342 U.S. 337, 340 (1952) ("A criminal statute must be sufficiently definite to give notice of the required conduct to one who would avoid its penalties, and to guide the judge in its application . . . .").

21. Kolender v. Lawson, 461 U.S. 352, 358 (1983) (quoting Smith v. Goguen, 415 U.S. 566, 574 (1974)).

22. *See* Sessions v. Dimaya, 138 S. Ct. 1204, 1212 (2018) (plurality opinion) (characterizing the void-for-vagueness doctrine as "a corollary of the separation of powers"); United States v. L. Cohen Grocery Co., 255 U.S. 81, 92 (1921) (asserting that to uphold the statute would be to hold "that it was competent to delegate legislative power, in the very teeth of the settled significance of . . . plainly applicable provisions of the Constitution").

below some minimal level of clarity is in essence an abdication of lawmaking power. It is tantamount to a statute that says, "do not do unto others as you would not have them do unto you," requiring other actors in the criminal justice system to fill in the details.[23]

At first blush, it might seem odd to couch such a structural, nondelegation concern as a due process right. Yet, as Chapman and McConnell have argued, due process is largely about separation-of-powers concerns.[24] This is because the core, irreducible requirement of due process is that state agents follow the law. They may not simply make up the law on an ad hoc basis, for this implicates the danger of arbitrary deprivations of life, liberty, and property. Moreover, statutes vesting too much discretion in executive officials are, in Justice Douglas's evocative phrase from a different context, "pregnant with discrimination."[25] They permit law enforcers to act not just arbitrarily but also discriminatorily.[26] Vagueness doctrine thus links up with the core equality concerns of the Fourteenth Amendment. Basic questions of policy are for democratically elected legislatures to decide and cannot be left to those charged with enforcing the laws.[27]

This separation-of-powers-infused view of due process dovetails nicely with what the Supreme Court has said about vague statutes. Where a statute does not contain sufficient guidance, it "may permit 'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.'"[28] That opens the door to both arbitrary and discriminatory enforcement. Thus, in striking down a Cincinnati ordinance that made it a criminal offense for more than two people to assemble on a sidewalk and act in an "annoying" manner, the Court wrote that it "contain[ed] an obvious invitation to discriminatory enforcement against those whose association

23. *Cf.* Musser v. Utah, 333 U.S. 95, 96 (1948) (addressing vagueness challenge to statute forbidding "any act injurious to the public health, to public morals, or to trade or commerce, or for the perversion or obstruction of justice or the due administration of the laws").

24. *See generally* Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672 (2012).

25. Furman v. Georgia, 408 U.S. 238, 257 (1972) (Douglas, J., concurring).

26. Guyora Binder & Brenner Fissell, *A Political Interpretation of Vagueness Doctrine*, 2019 U. ILL. L. REV. (forthcoming 2019) (manuscript at 111) (on file with author) ("[T]he Court has tied arbitrary enforcement concerns to discrimination against minority groups."); Tammy W. Sun, *Equality by Other Means: The Substantive Foundations of the Vagueness Doctrine*, 46 HARV. C.R.-C.L. L. REV. 149, 154 (2011) ("Discrimination is a manifestation of the arbitrary exercise of power.").

27. *See* Carissa Byrne Hessick, *Vagueness Principles*, 48 ARIZ. ST. L.J. 1137, 1145 (2016) ("[I]t seems fair to conclude that the non-delegation principle underlying the vagueness doctrine is a concern that vague laws allow law enforcement and fact finders to pursue their own policy agenda.").

28. Kolender v. Lawson, 461 U.S. 352, 358 (1983) (quoting Smith v. Goguen, 415 U.S. 566, 575 (1974)).

together is 'annoying' because their ideas, their lifestyle, or their physical appearance is resented by the majority of their fellow citizens."[29]

The Court has called the structural rationale "the more important aspect of the vagueness doctrine."[30] That idea has more or less stuck. For example, in *City of Chicago v. Morales*,[31] the Court addressed a vagueness challenge to a Chicago antiloitering ordinance that contained as an element "remain[ing] in any one place with no apparent purpose."[32] By a vote of six to three, the Court held that the statute was void for vagueness based on the structural rationale.[33] It found that the ordinance vested "absolute discretion to police officers to decide what activities constitute[d] loitering."[34] This was because the "no apparent purpose" language was "inherently subjective" in that it was satisfied only if "some purpose [was] 'apparent' to the officer on the scene."[35] In this way, the ordinance "necessarily entrust[ed] lawmaking to the moment-to-moment judgment of the policeman on his beat."[36] However, only three Justices would have held it unconstitutional based on the notice rationale alone.[37] Perhaps this was because one could be guilty of violating the ordinance only if one disobeyed a police order to disperse[38] and, as the dissenters pointed out, the dispersal order itself arguably provided adequate notice that the putative offender was on the cusp of criminal activity.[39] In any event, *Morales* signifies that the nondelegation rationale has achieved predominance over the notice rationale.[40]

Early in the twentieth century, the Court often used the void-for-vagueness doctrine to strike down legislation designed to rein in business interests. Thus, it struck down statutes that forbade firms from making an

29. Coates v. City of Cincinnati, 402 U.S. 611, 616 (1971); *see also* United States v. Williams, 553 U.S. 285, 304 (2008) (stating that a vague statute is one "so standardless that it authorizes or encourages seriously discriminatory enforcement").

30. *Kolender*, 461 U.S. at 358.

31. 527 U.S. 41 (1999).

32. *Id.* at 47 (quoting GANG CONGREGATION ORDINANCE, CHICAGO MUNICIPAL CODE § 8-4-015 (1992)).

33. *Id.* at 60–64.

34. *Id.* at 61 (quoting City of Chicago v. Morales, 687 N.E.2d 53, 63 (Ill. 1997)).

35. *Id.* at 62.

36. *Id.* at 60 (quoting Kolender v. Lawson, 461 U.S. 352, 360 (1983)).

37. *Id.* at 56–57 (plurality opinion) ("It is difficult to imagine how any citizen of the city of Chicago standing in a public place with a group of people would know if he or she had an 'apparent purpose.'").

38. *Id.* at 47.

39. *Id.* at 90 (Scalia, J., dissenting) (observing that, because of the requirement of "refusal to obey a dispersal order . . . there is no doubt of adequate notice of the prohibited conduct"); *id.* at 112 (Thomas, J., dissenting) ("There is nothing 'vague' about an order to disperse."); *cf. id.* at 69 (Kennedy, J., concurring in part and concurring in the judgment) (declining to join portion of the plurality opinion on lack of notice but opining that "[t]he predicate of an order to disperse is not . . . sufficient to eliminate doubts regarding the adequacy of notice under this ordinance").

40. Andrew E. Goldsmith, *The Void-for-Vagueness Doctrine in the Supreme Court, Revisited*, 30 AM. J. CRIM. L. 279, 289 (2003) (observing that *Morales* demonstrates that the Court has "elevated" the nondelegation rationale "to greater importance than" the notice rationale).

"unjust or unreasonable rate or charge,"[41] that hinged criminal liability on whether a firm's anticompetitive conduct was motivated by a desire for "reasonable profit,"[42] that required firms to pay its workers "the current rate of per diem wages in the locality,"[43] and that prohibited "waste" in the production of petroleum.[44]

Beginning in 1939, the Court began to use the void-for-vagueness doctrine to strike down statutes aimed at ordinary criminal behavior by individuals.[45] So, in *Lanzetta v. New Jersey*,[46] the Court voided a statute that declared it a crime for a person with at least three prior criminal convictions who was "not engaged in any lawful occupation" to be a member of a "gang consisting of two or more persons."[47] The Court later struck down provisions making it a crime, as previously noted, to conduct oneself in a manner "annoying" to passersby,[48] to be in public "without [any] visible or lawful business,"[49] or to fail to provide "credible and reliable" identification upon demand by a police officer.[50]

More recently, in *Johnson v. United States*,[51] the Court struck down a sentence enhancement provision in the Armed Career Criminal Act of 1984.[52] The Act provides that certain persons convicted of federal crimes face a more severe penalty if they have previously been convicted three or more times in state or federal court of a "violent felony."[53] It defines "violent felony," in a part of the statute known as the "residual clause," as a felony that "involves conduct that presents a serious potential risk of physical injury to another."[54] The Court held that, in this context, that language was unconstitutionally vague because of the coalescence of two features of that clause.[55] First, as the Court had previously held, the sentencing judge must look only to the elements of the crime, not to the actual facts of the prior felony conviction,

41. *See, e.g.*, United States v. L. Cohen Grocery Co., 255 U.S. 81, 89 (1921) (striking down § 4 of the Food Control Act of 1917, 40 Stat. 276, *amended by* 41 Stat. 297 (1919)); Tedrow v. A.T. Lewis & Son Dry Goods Co., 255 U.S. 98, 99 (1921) (same); Oglesby Grocery Co. v. United States, 255 U.S. 108, 108–09 (1921) (same); Weeds, Inc. v. United States, 255 U.S. 109, 111 (1921) (same); Kinnane v. Detroit Creamery Co., 255 U.S. 102, 104 (1921) (same).

42. Cline v. Frink Dairy Co., 274 U.S. 445, 456–58 (1927).

43. Connally v. Gen. Constr. Co., 269 U.S. 385, 393–94 (1926).

44. Champlin Ref. Co. v. Corp. Comm'n, 286 U.S. 210, 243 (1932).

45. *See* Johnson v. United States, 135 S. Ct. 2551, 2570–71 (2015) (Thomas, J., concurring in the judgment) (observing this shift).

46. 306 U.S. 451 (1939).

47. *Id.* at 452, 458 (quoting 1934 N.J. LAWS 394).

48. Coates v. City of Cincinnati, 402 U.S. 611, 616 (1971).

49. Palmer v. City of Euclid, 402 U.S. 544, 545–46 (1971).

50. Kolender v. Lawson, 461 U.S. 352, 357–61 (1983).

51. 135 S. Ct. 2551 (2015).

52. *Id.* at 2563; *see* Armed Career Criminal Act of 1984, 18 U.S.C. § 924(e)(1) (2018).

53. 18 U.S.C. § 924(e)(1).

54. 18 U.S.C. § 924(e)(2)(B).

55. *Johnson*, 135 S. Ct. at 2557–58.

and must postulate how the crime is ordinarily committed.[56] Second, the court must then "apply [the] imprecise 'serious potential risk' standard" to this "judge-imagined abstraction."[57] The Court concluded: "By combining indeterminacy about how to measure the risk posed by a crime with indeterminacy about how much risk it takes for the crime to qualify as a violent felony, the residual clause produces more unpredictability and arbitrariness than the Due Process Clause tolerates."[58]

And in *Sessions v. Dimaya*,[59] the Court addressed a vagueness challenge to a provision of the Immigration and Nationality Act that made deportation virtually automatic for any alien convicted of an "aggravated felony," a term that included "a crime of violence."[60] That phrase, in turn, was defined in relevant part, as "a felony . . . that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."[61] Because of the similarity between this language and that in *Johnson*, the Court held the provision void for vagueness.[62]

II. Problems with the Void-for-Vagueness Doctrine

Courts and commentators have observed problems with the void-for-vagueness doctrine almost since it began showing up in Supreme Court cases early in the twentieth century. Most notably, the doctrine has been criticized for its lack of a clear distinction between vague and nonvague statutes. More recently, Justice Thomas has seriously questioned the constitutional underpinnings of the doctrine. Commentators have also noted the underinclusiveness of the void-for-vagueness doctrine in rooting out statutes that provide inadequate notice of wrongdoing and, especially, delegate too much legislative power to other branches of government. The doctrine also encompasses an essential contradiction, relying on narrowing constructions by the judicial and executive branches to save an otherwise vague statute, when excessive delegations to those branches is the main evil produced by vague statutory language. Finally, some commentators have taken issue with

56. *Id.*
57. *Id.* at 2558.
58. *Id.*
59. 138 S. Ct. 1204 (2018).
60. *Id.* at 1210–11 (quoting 18 U.S.C. § 16).
61. *Id.* (quoting 18 U.S.C. § 16(b)).
62. *Id.* at 1223. The Court last Term invalidated 18 U.S.C. § 924(c)(1)(A), which forbade "using or carrying a firearm 'during and in relation to,' or possessing a firearm 'in furtherance of,' any federal 'crime of violence,'" and which defined "crime of violence" in the same way as the relevant statute in *Dimaya*. United States v. Davis, 139 S. Ct. 2319, 2323–24 (2019). Because the language of the statute at issue in *Davis* was identical to the statutory language at issue in *Dimaya*, the bulk of the Court's opinion was dedicated to a question of statutory interpretation: whether § 924(c)(3)(B) should be read as requiring the same "ordinary case" determination as the statutes at issue in *Johnson* and *Dimaya*. *See id.* at 2326–36.

the Court's reliance on the presence of a scienter element in an otherwise vague penal statute as a way to save the statute from being deemed vague.

A. Lack of Clarity

Much has been written about the lack of clarity of the void-for-vagueness doctrine. Generations of courts and commentators have bemoaned the nebulousness of the doctrine, and consequently how difficult it is to apply.[63] As Justice Frankfurter famously put it: "'[I]ndefiniteness' is not a quantitative concept. It is not even a technical concept of definite components. It is itself an indefinite concept."[64] This problem is virtually inherent in a doctrine that must account for the need to draw statutes in sufficiently general terms to proscribe all the behavior the legislature deems injurious, yet be specific enough to provide notice for citizens and minimal guidance for police, prosecutors, courts, and juries.[65]

Take, for example, some of the Court's early cases in this area. In one line of cases, beginning in 1921, the Court struck down as vague § 4 of the Lever Act, which made it a crime "to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries."[66] The Court held that the words "unjust or unreasonable rate or charge" constituted no "ascertainable standard of guilt" and forbade "no specific or definite act."[67]

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63. The classic treatment, though nearly six decades old, is still Professor Anthony Amsterdam's student note, *Void-for-Vagueness Doctrine in the Supreme Court*, which he begins this way: "There are places in the law through which a pair of mutually oblivious doctrines run in infinitely parallel contrariety, like a pair of poolhall scoring racks on one or the other of which, seemingly at random, cases get hung up." Note, *supra* note 2, at 67; *see also* Ralph W. Aigler, *Legislation in Vague or General Terms*, 21 MICH. L. REV. 831, 836 (1923) ("[I]t is next to impossible with any degree of certainty or satisfaction to classify the cases except within the very broadest limits."); Robert Batey, *Vagueness and the Construction of Criminal Statutes—Balancing Acts*, 5 VA. J. SOC. POL'Y & L. 1, 3 (1997) (observing that the void-for-vagueness doctrine is "quite murky"); Decker, *supra* note 5, at 243 ("Vagueness is a concept that appears heavily dependent on the 'I know it when I see it' test." (footnote omitted)); Ryan McCarl, *Incoherent and Indefensible: An Interdisciplinary Critique of the Supreme Court's "Void-for-Vagueness" Doctrine*, 42 HASTINGS CONST. L.Q. 73, 73 (2014) ("The void-for-vagueness doctrine is a confusing conceptual thicket."); Note, *Indefinite Criteria of Definiteness in Statutes*, 45 HARV. L. REV. 160, 161 (1931) [hereinafter Note, *Indefinite Criteria*] ("Itself as indefinite as the statutes its [sic] condemns, the doctrine has been applied with little consistency by different courts."); Note, *Void for Vagueness: An Escape from Statutory Interpretation*, 23 IND. L.J. 272, 283 (1948) [hereinafter Note, *Escape*] ("One's foremost impression is of the capriciousness with which the doctrine of 'void for vagueness' has been . . . used by courts.").

64. Winters v. New York, 333 U.S. 507, 524 (1948) (Frankfurter, J., dissenting).

65. *See* Colten v. Kentucky, 407 U.S. 104, 110 (1972) ("The . . . vagueness doctrine . . . is not a principle designed to convert into a constitutional dilemma the practical difficulties in drawing criminal statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited.").

66. Food Control and the District of Columbia Rent (Lever) Act, ch. 80 § 2, 41 Stat. 297, 298 (1919).

67. United States v. L. Cohen Grocery Co., 255 U.S. 81, 89 (1921). The result in *L. Cohen Grocery* was reaffirmed in *Tedrow v. A.T. Lewis & Son Dry Goods Co.*, 255 U.S. 98, 99 (1921),

The result was both a complete lack of notice[68] and an improper delegation of power to judges and juries.[69] Likewise, the Court in 1927 struck down antitrust statutes that forbade restraints on trade except those formed in order to obtain "reasonable profit[s]" on goods or services that could not otherwise be profitably marketed.[70] As the Court wrote in 1925, the defect was that such rules and standards were "so vague and indefinite as really to be no rule or standard at all."[71]

Yet in another series of cases, decided around the same time, the Court upheld statutes that made guilt or innocence hinge, in essence, on whether the actor's conduct was reasonable. For example, in *Nash v. United States*,[72] decided in 1913, the Court upheld the Sherman Act,[73] which had been interpreted to forbid restraints of trade that "unduly restrict[ed] competition or unduly obstruct[ed] the course of trade."[74] The defendants claimed that this language was constitutionally indefinite because it "contains in its definition an element of degree as to which estimates may differ."[75] The Court, through Justice Holmes, rejected this challenge, famously opining 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."[76] Likewise, two years later, the Court upheld a state statute requiring hotel owners "to do all in their power" to keep their guests safe from certain hazards.[77] Echoing *Nash*, the Court wrote that "[r]ules of conduct must necessarily be expressed in general terms and depend for their application upon circumstances, and circumstances vary."[78] And the Court in 1922 rejected a vagueness challenge to a New York rent control statute that forbade "unjust and unreasonable" rent and "oppressive" rental agreements.[79]

The tension between these two lines of cases is obvious. If legislatures can generally require people to act reasonably in conduct that could harm competition, in caring for their hotel guests, or in charging rents, why can they not require people not to charge unreasonably high prices or take

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Oglesby Grocery Co. v. United States, 255 U.S. 108, 108–09 (1921), *Weeds, Inc. v. United States*, 255 U.S. 109, 111 (1921), and *Kinnane v. Detroit Creamery Co.*, 255 U.S. 102, 104 (1921).

68. *L. Cohen Grocery*, 255 U.S. at 89 (opining that "no one can foresee" the scope of the act and that "no one can foreshadow or adequately guard against" the imposition of criminal liability).

69. *Id.* (observing that criminal liability under the act was left entirely up to "the estimation of the court and jury"); *see also* Cline v. Frink Dairy Co., 274 U.S. 445, 457 (1927) ("The real issue which the [statute] would submit to the jury would be legislative, not judicial.").

70. *Frink Dairy Co.*, 274 U.S. at 456–58.

71. A.B. Small Co. v. Am. Sugar Ref. Co., 267 U.S. 233, 239 (1925).

72. 229 U.S. 373 (1913).

73. Sherman Antitrust Act of 1890, ch. 647, 26 Stat. 209 (1890).

74. *Nash*, 229 U.S. at 376.

75. *Id.*

76. *Id.* at 377.

77. Miller v. Strahl, 239 U.S. 426, 430–31, 434 (1915).

78. *Id.* at 434.

79. Edgar A. Levy Leasing Co. v. Siegel, 258 U.S. 242, 249–50 (1922).

unreasonably high profits for certain commodities?[80] The Court attempted to explain that "on an issue like negligence . . . every one may be held to observe . . . a standard of human conduct which all are reasonably charged with knowing," while the criminal law could not punish "unwise exercise of . . . economic or business knowledge involving so many factors of varying effect that [the actor cannot] safely and certainly judge the result."[81] Yet this fails to recognize that many types of human conduct that risk crossing the line into negligence can entail complex and multifarious factors.[82]

What is equally perplexing is that the Court later, in *United States v. National Dairy Products Corp.*,[83] upheld a provision of the Robinson-Patman Act that made it "a crime to sell goods at 'unreasonably low prices for the purpose of destroying competition or eliminating a competitor.'"[84] The oddity of striking down a statute that forbade charging *higher* than a "reasonable rate," as it had done in *L. Cohen Grocery*, while upholding a statute that forbade charging *lower* than a "[]reasonabl[e] . . . price[]," was not lost on the dissent in *National Dairy Products*.[85] Yet *National Dairy Products* did not overrule *L. Cohen Grocery* but attempted to distinguish that case by pointing to specific conduct alleged in the indictment that purported to provide the notice that the statute might have lacked.[86] However, a clear indictment cannot cure a vague statute for the obvious reason that notice is provided by an indictment only after the actor has engaged in the challenged conduct. The Court itself had recognized this in *Lanzetta*, when it wrote: "If on its face the challenged provision is repugnant to the due process clause, specification of details of the offense intended to be charged would not serve to validate it."[87]

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80. *See* Weeds, Inc. v. United States, 255 U.S. 109, 112 (1921) (Pitney, J., concurring) ("I regard this provision as clearly constitutional, and need only refer to [*Nash*]."); Note, *Statutory Standards of Personal Conduct: Indefiniteness and Uncertainty as Violations of Due Process*, 38 HARV. L. REV. 963, 967 (1925) (characterizing as "highly doubtful from an economic standpoint" the notion that "what was a reasonable return on a real estate investment [is] commercially more certain than what was a reasonable price of commodities").

81. Cline v. Frink Dairy Co., 274 U.S. 445, 464–65 (1927).

82. *See* Note, *Indefinite Criteria*, *supra* note 63, at 161–62 (observing that "certainty to the average man" could not be the real criterion based on these decisions, but rather "certainty to the judge trained in the common law").

83. 372 U.S. 29 (1963).

84. *Id.* at 29 (quoting Robinson-Patman Act, Pub. L. No. 74-692, 49 Stat. 1526 (1936) (codified at 15 U.S.C. § 13(a) (2012)).

85. *See id.* at 37 (Black, J., dissenting) (observing that the case ought to be governed by *L. Cohen Grocery*); *see also* Robert C. Post, *Reconceptualizing Vagueness: Legal Rules and Social Orders*, 82 CALIF. L. REV. 491, 502 & n.49 (1994) (observing tension between *National Dairy Products* and *Cline*).

86. *Nat'l Dairy Prods.*, 372 U.S. at 36 (distinguishing *L. Cohen Grocery* based on "the specificity of the violations charged in the indictment here").

87. Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939). *National Dairy Products* is also distinguishable from *Cline* based on "the additional element of predatory intent . . . required" in the statute at issue in the former. *Nat'l Dairy Prods.*, 372 U.S. at 35. Yet this reasoning has been attacked by commentators. *See infra* subpart II(E).

Coates v. City of Cincinnati[88] and *Colten v. Kentucky*[89] are also at odds with one another. As noted earlier, in *Coates*, the Court struck down a city ordinance that made it a criminal offense for "three or more persons to assemble" on a city sidewalk "and there conduct themselves in a manner annoying to persons passing by."[90] The Court noted that the word "annoying" was inherently subjective: "Conduct that annoys some people does not annoy others."[91] This inherent subjectivity of the term set an "unascertainable standard," and thus the ordinance was deemed vague.[92]

Colten upheld a Kentucky statute that made it a crime to "congregate[] . . . in a public place and refuse[] to comply with a lawful order of the police to disperse" when done "with intent to cause public inconvenience, annoyance or alarm."[93] Colten's offense was to attempt to engage in conversation with a police officer who was in the process of issuing a traffic summons to Colten's friend by the side of a public highway, and to refuse to leave when ordered.[94] The state courts had found, and the Supreme Court did not question the conclusion, that Colten had acted only "to cause inconvenience and annoyance."[95] The Court held that, as applied to Colten, the statute was not unconstitutionally vague because it should have been obvious to him that one engaging in the conduct in which he engaged would be deemed to have had the intent to cause inconvenience and annoyance.[96]

But if the word "annoy" in the Cincinnati ordinance established "no standard of conduct . . . at all,"[97] then how could Colten have been on notice that the terms "inconvenience" and "annoyance" would apply to his conduct?[98] Regrettably, the *Colten* Court did not tell us, for it failed to cite *Coates* at all, despite the fact that it had been decided only a year earlier.[99] More strangely, the dissenters did not cite *Coates* either, for Justice Douglas attacked the statute solely on First Amendment grounds[100] and Justice Marshall dissented on different grounds altogether.[101]

88. 402 U.S. 611 (1971).

89. 407 U.S. 104 (1972).

90. *Coates*, 402 U.S. at 611 (quoting CINCINNATI, OHIO, CODE OF ORDINANCES § 901-L6 (1956)).

91. *Id.* at 614.

92. *Id.*

93. *Colten*, 407 U.S. at 108 (quoting KY. REV. STAT. § 437.016(1)(f)).

94. *Id.* at 106–07.

95. *Id.* at 109 (quoting Colten v. Commonwealth, 467 S.W.2d 374, 378 (Ky. 1971)).

96. *See id.* at 108–10 (explaining that a person acting like Colten "should understand that he could be convicted under" the Kentucky statute, which requires "intent to cause public inconvenience, annoyance or alarm . . . ." (quoting KY. REV. STAT. § 437.016(1)(f))).

97. *Coates*, 402 U.S. at 614.

98. *See* Jeffrey I. Tilden, Note, Big Mama Rag*: An Inquiry Into Vagueness*, 67 VA. L. REV. 1543, 1555 n.65 (1981) (observing that *Coates* and *Colten* are "difficult to reconcile").

99. *Id.* at 1552 n.57.

100. Colten v. Kentucky, 407 U.S. 104, 120–22 (1972) (Douglas, J., dissenting).

101. *Id.* at 122–27 (Marshall, J., dissenting).

One possible distinction is that *Coates* was a facial challenge while *Colten* was an as-applied challenge. But such a distinction also makes little sense, given that the burden of succeeding on a facial challenge typically is much higher than the burden of succeeding on an as-applied challenge. Specifically, a litigant need only show that a statute is vague as to her in challenging the statute as applied, but normally must show that the statute is vague in all possible applications when making a facial challenge. Certainly, the *Coates* challengers could not really make such a showing: spitting in someone's face, for example, would certainly be deemed "annoying." It may be that all challenges to purportedly vague statutes can and should be treated as facial challenges.[102] If so, then the *Colten* Court was wrong to uphold the statute on the grounds that Colten's conduct supposedly fell within the core meaning of "annoyance" or "inconvenience." If not, then the *Coates* Court was wrong to strike down the statute completely because it failed to determine whether it was vague as to Coates. But the distinction between facial and as-applied challenges cannot make the two decisions consistent with one another.[103]

A final dyad of cases demonstrates the inconsistencies in the Court's jurisprudence. In *Champlin Refining Co. v. Corporation Commission*,[104] the Court addressed an Oklahoma statute prohibiting "the production of crude oil or petroleum . . . in such a manner and under such conditions as to constitute waste."[105] The act defined waste to "include economic waste, underground waste, surface waste, and waste incident to the production of crude oil or petroleum in excess of transportation or marketing facilities or reasonable market demands."[106] The Court held that, even as so defined, the term "waste" was uncertain because its meaning "depends upon many factors subject to frequent changes" such that no "court could . . . foresee or prescribe the scope of the inquiry that reasonably might have a bearing or be necessary in determining whether in fact there had been waste."[107] The Court voided the statute for vagueness.[108]

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102. There has been much disagreement over this view on the Supreme Court in recent years. *Compare* City of Chicago v. Morales, 527 U.S. 41, 71 (1999) (Breyer, J., concurring in part and concurring in the judgment) (opining that facial challenges can generally be brought against purportedly vague statutes because "if every application of the ordinance represents an exercise of unlimited discretion, then the ordinance is invalid in all its applications"), *with* Johnson v. United States, 135 S. Ct. 2551, 2580 (2015) (Alito, J., dissenting) ("'[V]agueness challenges to statutes which do not involve First Amendment freedoms must be examined' on an as-applied basis." (quoting United States v. Mazurie, 419 U.S. 544, 550 (1975))). This Article need not and does not take sides in this dispute.

103. In fact, there is a valid way of distinguishing the two statutes, but it was not one mentioned by the Court. *See infra* text accompanying notes 363–64.

104. 286 U.S. 210 (1932).

105. *Id.* at 223 n.1 (quoting COMP. STAT. OKLA. ANN. Ch. 68, art. 4 § 7954 (1921)).

106. *Id.* (quoting COMP. STAT. OKLA. ANN. Ch. 68, art. 4 § 7956 (1921)).

107. *Id.* at 243.

108. *Id.* ("[T]hese general words and phrases are so vague and indefinite that any penalty prescribed for their violation constitutes a denial of due process of law.").

Yet, only the year previously, the Court upheld a similar statute against a vagueness challenge. In *Bandini Petroleum Co. v. Superior Court*,[109] the Court addressed a California statute forbidding "[t]he unreasonable waste of natural gas by" anyone extracting oil or gas from the land.[110] Aside from the addition of the word "unreasonable" in the statute, the distinction between the two cases appears to be the fact that the California Supreme Court had previously opined "that there was an 'unreasonable waste' of gas where it 'has been allowed to come to the surface without its lifting power having been utilized to produce the greatest quantity of oil in proportion.'"[111] That court had determined that the legislature intended to bar production of gas "where the production thereof so greatly exceeds the market demand therefor, in quantities exceeding a reasonable proportion to the amount of oil produced."[112] With that construction, the statute was not vague.[113]

Yet that construction does nothing to make the statute any less vague in operation than the one in *Champlin*. An actor trying to comply with the California statute, or a court trying to apply it, would still need to somehow discern whether the production of gas concomitant with the extraction of oil in a particular case had "greatly exceed[ed] the market demand" for the gas, and whether the excess was "[un]reasonable [in] proportion to the amount of oil produced." Thus, the words "greatly exceeds" and "reasonable proportion" simply replicate rather than clarify the vagueness of the term "unreasonable waste." As the Court would later write in *Champlin*, such a determination "depends upon [so] many factors subject to frequent changes" that it would be impossible to "foresee or prescribe the scope of the inquiry that reasonably might have a bearing" on that question.[114] Indeed, the *Bandini* Court premised its conclusion in part on the fact that it would have been impossible for the legislature to have been more exact, and that what is reasonable waste could be determined only on a case-by-case basis.[115] Of course, the same was true in *Champlin*. Yet the Court upheld the statute in one case and voided it in the other.[116]

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109. 284 U.S. 8 (1931).

110. *Id.* at 10 n.1 (quoting Oil and Gas Conservation Act of California, 1929 Cal. Stat. 923, 927).

111. *Id.* at 17 (quoting People *ex rel.* Stevenot v. Associated Oil Co., 294 P. 717, 724 (Cal. 1930)).

112. *Id.* at 18 (quoting *Associated Oil Co.*, 294 P. at 724).

113. *Id.*

114. Champlin Ref. Co. v. Corp. Comm'n, 286 U.S. 210, 243 (1932).

115. *Bandini*, 284 U.S. at 18 ("[I]t would be impossible for the legislature to frame a measure based on ratios or percentages or definite proportions . . . and . . . what is a reasonable proportion of gas to the amount of oil produced from each well or reservoir is a matter which may be ascertained to a fair degree of certainty in each individual case." (quoting *Associated Oil Co.*, 294 P. at 724 (alteration added))).

116. One possible distinction between the two cases is that the statute in *Champlin*, 286 U.S. at 223 n.1, was penal, while the statute in *Bandini*, 284 U.S. at 10 n.1, was not. However, *Champlin* does not distinguish *Bandini* on that ground. Indeed, *Champlin* cites *Bandini* only once, and only for certain basic principles of oil and gas law. *Champlin*, 286 U.S. at 233–34.

B. Questionable Legitimacy

The Court had been voiding statutes on vagueness grounds for over a century before the legitimacy of doing so was first questioned by a sitting Justice. But Justice Thomas has twice in recent years raised such an objection. According to Justice Thomas, the void-for-vagueness doctrine is relatively new. He argues that while courts have always dealt with lack of clarity in statutes, they traditionally did so via the rule of lenity, which dictates that ambiguous statutes be interpreted narrowly, in favor of criminal defendants.[117] Vagueness challenges as we know them today became popular only after ratification of the Fourteenth Amendment, in the age of an aggressive understanding of substantive due process.[118] The first successful vagueness challenges were made by corporations fighting economic regulations in parallel to the rise of Lochnerism as a way to invalidate economic regulation on due process grounds.[119] This, Justice Thomas wrote, "does not seem like a coincidence."[120] As Lochnerism waned, the Court maintained the void-for-vagueness doctrine in service of allowing individual criminal defendants to challenge uncertain penal statutes.[121] But like Lochnerism, the void-for-vagueness doctrine appeared to Justice Thomas to be a way of "invoking the Due Process Clause to constitutionalize rules that

117. *See* Sessions v. Dimaya, 138 S. Ct. 1204, 1243 (2018) (Thomas, J., dissenting) ("[E]arly American courts, like their English predecessors, addressed vague laws through statutory construction instead of constitutional law"); Johnson v. United States, 135 S. Ct. 2551, 2567 (2015) (Thomas, J., concurring in the judgment) ("Before the end of the 19th century, courts addressed vagueness through a rule of strict construction of penal statutes, not a rule of constitutional law."); *see also* Hopwood, *supra* note 5, at 720 ("There is no indication that courts in the early nineteenth century struck down vague laws on constitutional-due-process grounds. If a court confronted a vague criminal law, a court . . . could just construe it narrowly until the statute was no longer vague."); Sohoni, *supra* note 1, at 1181 ("The years between 1914 and 1932 saw . . . the transformation of vagueness doctrine from a canon of statutory construction into a substantive doctrine for invalidating statutes."); Note, *supra* note 80, at 964 ("The requirement of definiteness may be traced to the principle of strict construction of criminal statutes.").

118. *Johnson*, 135 S. Ct. at 2569 (Thomas, J., concurring in the judgment); *see also* Note, *Escape*, *supra* note 63, at 274 ("Prior to the nineteenth century 'void for vagueness' was probably never used."); *cf.* McCarl, *supra* note 63, at 75–76 ("[T]he doctrine contains no unique element that separates it from other substantive due process principles . . . .").

119. *Johnson*, 135 S. Ct. at 2570 (Thomas, J., concurring in the judgment).

120. *Dimaya*, 138 S. Ct. at 1244 (Thomas, J., dissenting). The mere mention of the void-for-vagueness doctrine in the same breath as substantive due process was obviously designed to cast doubt on the constitutional legitimacy of the former. *See* Binder & Fissell, *supra* note 26, at 116 ("Justice Thomas could cast a negative light on vagueness merely by associating it with substantive due process."); Carissa Byrne Hessick, Johnson v. United States *and the Future of the Void-for-Vagueness Doctrine*, 10 N.Y.U. J.L. & LIBERTY 152, 162 (2016) ("Given the controversial status of substantive due process, drawing parallels between the two doctrines is obviously meant to question the legitimacy of the vagueness doctrine."); *see also* Note, *Indefinite Criteria*, *supra* note 63, at 162 ("[K]nowable criteria in 'common experience' have been found wanting in interpreting only those statutes which sought to limit the free play of economic forces.").

121. *Johnson*, 135 S. Ct. at 2571 (Thomas, J., concurring in the judgment).

were traditionally left to the democratic process," undermining its constitutional legitimacy.[122]

The Court has not undertaken any real efforts to justify the void-for-vagueness doctrine as an instantiation of due process principles.[123] However, Justice Gorsuch did take the opportunity to attempt such a justification in his separate opinion in *Sessions v. Dimaya*. Justice Gorsuch first defended the idea that the notion of due process encompasses the requirement that government afford persons the "customary procedures to which freemen were entitled by the old law of England."[124] Among "the most basic of [those] customary protections is the demand of fair notice."[125] This requirement took the form of sufficiently detailed specifications in an indictment in a criminal case or a writ in a civil suit.[126]

According to Justice Gorsuch, this "requirement of fair notice applied to statutes too."[127] He gave as an example Blackstone's reference to a statute that made "stealing sheep, or other cattle" a capital offense.[128] Because "cattle" meant far more than it does today, courts apparently refused to apply it to anything other than sheep.[129] Justice Gorsuch then claimed that this understanding, that an unduly vague statute was void, carried over to the United States, as demonstrated by a number of federal and state cases in the first century of the Republic.[130] Finally, Justice Gorsuch tied the void-for-

122. *Dimaya*, 138 S. Ct. at 1244–45 (Thomas, J., dissenting). Justice Thomas did concede two points. First, he "assume[d] that, at some point, a statute could be so devoid of content that a court tasked with interpreting it 'would simply be making up a law—that is, exercising legislative power.'" *Id.* at 1249 (quoting Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 339 (2002)). But he was skeptical that the Court's vagueness doctrine "accurately demarcates the line between legislative and judicial power." *Id.* And he allowed that the nondelegation concern was a real one, but he located the constitutional home for that concern in the Vesting Clauses, not the Due Process Clause. *Id.* at 1248.

123. *See id.* at 1224 (Gorsuch, J., concurring in part and concurring in the judgment) (noting that "the Court has yet to offer a reply" to Justice Thomas's critique).

124. *Id.* (quoting Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 28 (1991) (Scalia, J., concurring in the judgment)). This contrasts with a more limited view of due process as merely a constraint upon the government to follow the law. *See id.* (mentioning that some believe that the Clause only serves to ensure that the government respects whatever procedure it has put into place).

125. *Id.* at 1225.

126. *Id.*

127. *Id.*

128. *Id.* (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *88).

129. *Id.*; *see* 1 WILLIAM BLACKSTONE, COMMENTARIES *88 ("[T]hese general words, 'or other cattle,' being looked upon as much too loose to create a capital offence, the act was held to extend to nothing but mere sheep.").

130. *Dimaya*, 138 S. Ct. at 1225–26 (Gorsuch, J., concurring in part and concurring in the judgment) (citing The Enterprise, 8 F. Cas. 732 (C.C.D.N.Y. 1810) (No. 4,499); United States v. Sharp, 27 F. Cas. 1041 (C.C.Pa. 1815) (No. 16,264); McJunkins v. State, 10 Ind. 140, 145 (1858); Drake v. Drake, 15 N.C. 110, 115 (1833); Commonwealth v. Bank of Pa., 3 Watts & Serg. 173, 177 (1842); McConvill v. Mayor of Jersey City, 39 N.J.L. 38, 42 (1876)); *id.* at 1226 n.1 (citing State v. Mann, 2 Or. 238, 240–41 (1867); Drake v. Drake, 15 N.C. 110, 115 (1833); McConvill v. Mayor of Jersey City, 39 N.J.L. 38, 44 (1876); State v. Boon, 1 N.C. 191, 192 (1801); *Ex parte* Jackson, 45

vagueness doctrine to the Constitution by invoking the structural guarantee of separation of powers, which dovetails with the doctrine's concern that legislative power not be unduly delegated to judges, executive officials, and jurors.[131]

However, Justice Gorsuch stumbled when he attempted to make the leap from a due process right to notice *in an indictment* to a due process right to notice *in a statute*. It appears that the sources he cited did not support the existence of the latter. Begin with Blackstone. The "cattle" example that Blackstone provided fell within a section on the construction of statutes,[132] and that particular example was used by Blackstone to illustrate his third rule that "[p]enal statutes must be construed strictly."[133] Indeed, the cattle example was the second one Blackstone provided. The first involved a statute that made theft of "horses" a capital offense.[134] According to Blackstone, courts had construed it narrowly so as to apply only to theft of multiple horses and not to theft of a single horse.[135] Framed thusly, this was clearly an instance of statutory ambiguity, not vagueness, which implicates the canon of strict construction of penal statutes that Blackstone had cited. Thus, Blackstone did not distinguish between a case of ambiguity (whether "horses" meant any number of horses or only more than one horse) and a case of vagueness (the many possible meanings of the word "cattle"). Both, to him, were subject to the rule of strict construction. This rule was merely a rule of construction and not a limitation upon the power of the legislature to enact laws.

For Blackstone to have claimed that vague laws were a nullity would have made little sense given Blackstone's views on judicial review. Blackstone took the position that judges had virtually no power to nullify legislation for any reason.[136] Legislatures had the power to alter even the most fundamental requirements of the common law. Instead, Blackstone's jurisprudence revolved around what we today call the constitutional avoidance canon: when possible, in interpreting statutes, judges ought to impute to the legislature an unwillingness to contradict the common law's

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Ark. 158, 164 (1885); McJunkins v. State, 10 Ind. 140, 145 (1858); Jennings v. State, 16 Ind. 335, 336 (1861); Commonwealth v. Bank of Pa., 3 Watts & Serg. 173, 177 (1842); Cheezem v. State, 2 Ind. 149, 150 (1850)).

131. *See Dimaya*, 138 S. Ct. at 1227–28 (arguing that vague statutes effectively constitute an abdication of duty by the legislature).

132. *See* BLACKSTONE, *supra* note 129, at *87–92 (elaborating on different methods of statutory interpretation).

133. *Id.* at 88.

134. *Id.*

135. *Id.*

136. *See* Morton J. Horwitz, *A Historiography of the People Themselves and Popular Constitutionalism*, 81 CHI.-KENT L. REV. 813, 815 (2006) (distinguishing Coke, who has been read as having advocated "judicial review based on fundamental law," from Blackstone, who believed in the "uncontested constitutional principle of parliamentary supremacy").

fundamental tenets.[137] But this unwillingness was not to be deemed an incapacity, and the presumption that the legislature was adhering to the fundamental requirements of the common law was almost always a rebuttable one. In his examples involving "horses" and "cattle," Blackstone was expressing these canons of statutory construction, not a common law proscription against vague statutes.

On this side of the Atlantic, given the acceptability of judicial crime-creation through much of the nineteenth century,[138] it would be odd to think that vague statutes were proscribed by either the 1791 Due Process Clause or its 1868 counterpart. Accordingly, most of the early American cases Justice Gorsuch cited in *Dimaya* are also about ambiguity, not vagueness, and therefore seem to be applying the conventional canon of strict construction, not a special constitutional rule that vague statutes are void. The oldest, *The Enterprise*,[139] was a forfeiture case concerning the clandestine loading of a ship "without a license or permit from the collector and naval officer, and without the inspection of any officer of the revenue."[140] This was supposedly in violation of § 2 of the Embargo Act of 1807, which provided that no such ship:

> shall receive a clearance, unless the lading shall be made under the inspection of the proper revenue officers, subject to the same restrictions, regulations, penalties, and forfeitures, as are provided by law for the inspection of merchandise imported into the United States, upon which duties are imposed, any law to the contrary notwithstanding.[141]

The Government argued that the "restrictions, regulations, penalties, and forfeitures" referred to were those contained in § 50 of the Collection Act of 1799, which provided penalties, including forfeiture, for anyone who unloaded "goods brought from a foreign port . . . but in open day, between the rising and setting of the sun, except by special license from the collector and naval officer of the port, nor at any time without their permit."[142]

The Enterprise is a case about statutory ambiguity, not vagueness, and it employs the canon of strict construction of penal statutes, not any special due process authority to void vague statutes.[143] There was nothing vague

137. *See* William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1011 (1989) ("[F]or Blackstone . . . the central precepts for statutory interpretation were the narrow construction of statutes in derogation of common law and the broad construction of remedial statutes.").

138. John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 192–93 & n.10 (1985).

139. 8 F. Cas. 732 (C.C.D.N.Y. 1810) (No. 4,499).

140. *Id.* at 734.

141. *Id.* (quoting Act of Apr. 25, 1808, ch. 66, § 2, 2 Stat. 449, 449).

142. *Id.* (quoting Act of Mar. 2, 1799, ch. 22, § 50, 1 Stat. 627, 665).

143. *See* Note, *Indefinite Criteria*, *supra* note 63, at 160 n.2 (observing that the *Enterprise* case

about any of the language used in the Embargo Act. Instead, the parties posited two potential interpretations of it. The Government argued that it meant that the loading of a ship without inspection or special permission was prohibited, and that such an offense should be punished in the same manner as nighttime unloading of a ship from a foreign port, which might be done to avoid customs duties.[144] The claimant argued that, by the plain language of the act, the only consequence of a clandestine loading without proper authorization was a denial of clearance to leave the port.[145]

Justice Livingston, sitting as circuit justice, adopted the narrower reading. He reasoned first "that no words of prohibition are to be found" in the language at issue, which would be highly unusual for a penal statute.[146] Justice Livingston acknowledged the Government's argument that the "subject to . . . regulations, penalties, and forfeitures" language might transform the preceding verbiage into a prohibition.[147] But Justice Livingston found the statute ambiguous even with this language because it was unclear whether it imposed potential forfeiture if no inspection occurred or merely provided regulations and penalties for those responsible for performing a proper inspection.[148] While the latter seems like a strained reading of the statute, the court doubted whether the Act "was meant to punish the mere act of loading secretly, in any other way than by the denial of a clearance."[149] Given the harshness of the punishment otherwise prescribed, the court concluded that the better view was that the statute "contain[ed] nothing more than a direction to the custom-house officers not to grant clearances in particular cases."[150]

The Enterprise is a case of a court choosing the narrower of two potential readings of a penal statute. Indeed, much of the court's initial analysis contains a paean to the rule of strict construction of penal statutes. It began by noting: "The act . . . is highly penal, and must therefore be construed as such laws always have been and ever should be," that is, with a "strict construction."[151] It continued to write that "no person [should] be adjudged guilty of an offence unless it be created and promulgated in terms

was cited in an 1874 treatise as a case about strict construction of ambiguous penal statutes (citing SEDGWICK, STATUTORY AND CONSTITUTIONAL LAW 286 (2d ed. 1874))). *But see* Note, *Escape*, *supra* note 63, at 275 n.18 ("There seems to be some disagreement as to whether [*The Enterprise*] rests upon the doctrine of strict construction or whether it illustrates the doctrine of 'void for vagueness.'").

144. *See The Enterprise*, 8 F. Cas. at 732 (argument of counsel for the Government).

145. *See id.* at 733 (argument of counsel for the claimant).

146. *Id.* at 735.

147. *See id.* ("The word 'subject,' it is presumed, supplies this deficiency . . . .").

148. *See id.* ("Is the inspection to be made subject to certain regulations, penalties, and forfeitures, to entitle the vessel to a clearance? Or are vessel and cargo rendered liable to confiscation if these ceremonies be omitted?").

149. *Id.*

150. *Id.*

151. *Id.* at 734.

which leave no reasonable doubt of their meaning."[152] It then repeated: "[N]o man should be stripped of a very valuable property, . . . be disfranchised, and consigned to public ignominy and reproach, unless it be very clear that such high penalties have been annexed by law to the act which he has committed."[153] And then, as if to leave no doubt that the rule of strict construction was driving the case, the Court wrote that "[s]ome of these principles . . . will govern the court in deciding on the present appeal."[154]

It is true that, as Justice Gorsuch noted, Justice Livingston at one point called some of "the statutory terms . . . 'unintelligible and useless.'"[155] However, this is isolated language plucked from the court's application of the canon of strict construction to the statute at issue, after it had already made clear that that canon "govern[ed]" the outcome. More importantly, Justice Livingston was not referring to any supposedly vague statutory language but was instead specifically referring to the terms "penalties" and "forfeitures." His point was not that these terms were vague. To the contrary, his point was that if one adopted the Government's reading of the statute, the words "penalties" and "forfeitures" would become mere "surplusage," and one should choose to "pass them by as unintelligible and useless," rather "than to put on them, at great uncertainty, a very harsh signification, and one which the legislature may never have designed."[156] While this reasoning is somewhat obscure, and seems questionable, it does seem relatively certain that Justice Livingston was not positing any constitutional constraint on vague statutes. He was, it seems, nesting one canon of construction (that statutes should be interpreted to avoid surplusage) inside another (that penal statutes should be construed strictly). At the end of the day, *The Enterprise* is best read as an exercise in statutory interpretation, not statutory nullification on vagueness grounds.

A bit harder to interpret is the other early federal case cited by Justice Gorsuch, *United States v. Sharp*.[157] Yet it, too, is best read as an application of the strict construction canon. There, the defendants, four seamen, were charged with "mak[ing] a revolt" onboard a ship, made a capital crime by § 8 of the Crimes Act of 1790.[158] They argued, as the court put it, that "the offence of making a revolt[] is not sufficiently defined . . . to warrant the court in passing a sentence upon the prisoners, in case of conviction."[159] Justice Washington, sitting as circuit justice, pondered the matter this way:

152. *Id.*
153. *Id.* at 734–35.
154. *Id.* at 735.
155. Sessions v. Dimaya, 138 S. Ct. 1204, 1226 (2018) (Gorsuch, J., concurring in part and concurring in the judgment) (quoting *The Enterprise*, 8 F. Cas. at 735).
156. *The Enterprise*, 8 F. Cas. at 735.
157. 27 F. Cas. 1041 (C.C.D. Pa. 1815) (No. 16,264).
158. *Id.* at 1042–43; *see* Act of Apr. 30, 1790, ch. 9, § 8, 1 Stat. 112, 113–14.
159. *Sharp*, 27 F. Cas. at 1043.

> I confess I have always considered . . . to make a revolt, was to throw off all obedience to the master; to take possession by force of the vessel by the crew; to navigate her themselves, or to transfer the command to some other person on board. . . . But although this is still my opinion, yet I am not able to support it, by any authority to be met with, either in the common, admiralty, or civil law. If we resort to definitions given by philologists, they are so multifarious, and so different, that I cannot avoid feeling a natural repugnance, to selecting from this mass of definitions, one, which may fix a crime upon these men, and that too of a capital nature . . . .[160]

Justice Washington then used language that concededly could be interpreted as employing the rule of strict construction of an ambiguous penal statute, on the one hand, or a finding that the statute was inoperative because it was void, on the other. He wrote: "Laws which create crimes, ought to be so explicit in themselves, or by reference to some other standard, that all men, subject to their penalties, may know what acts it is their duty to avoid."[161] He concluded that he would, in essence, dismiss that count of the indictment: "For these reasons, the court will not recommend to the jury, to find the prisoners guilty of making, or endeavouring to make a revolt, however strong the evidence may be."[162]

Granted, this could be read as a determination that the statute was vague and therefore inoperative. However, a close reading of the case suggests otherwise. In a part of the opinion typically ignored, but which sheds light on the foregoing, Justice Washington reviewed the facts of the case and determined that the jury could find the defendants guilty of the lesser charge of "confin[ing] the master of any ship," punishable by up to three years in prison by § 12 of the same Act.[163] He concluded that there was sufficient evidence to find the defendants guilty of "confining the captain, by intimidation."[164] Viewing the evidence in the light most favorable to the Government, it appears that the captain was intimidated by threats of force "to resign the command [of the ship] in favour of Sharp" and to confine himself to his cabin for at least some portion of the two weeks during which he was divested of control of the ship.[165] Importantly, however, there was no allegation that any physical force was used against him either in obtaining control of the ship or in confining him.[166] Based on the definition of "making

160. *Id.*
161. *Id.*
162. *Id.*
163. Act of Apr. 30, 1790, ch. 9, § 12, 1 Stat. 112, 115; *see Sharp*, 27 F. Cas. at 1043–45.
164. *Sharp*, 27 F. Cas. at 1044.
165. *See id.* at 1043–44.
166. Only one instance of any physical force is mentioned in the opinion: after an initial angry encounter with some portion of the crew, and after the captain was advised by a friend to return to his cabin, he began to ascend to the deck "when he was seized by one or more of the crew, and with

a revolt" initially suggested by Justice Washington, then, the defendants were not guilty as a matter of law. That definition included the requirement that the crew, or some portion thereof, "take possession *by force* of the vessel."[167]

Reading a bit into what Justice Washington wrote about the indefiniteness of "making a revolt," it appears that it could essentially be defined in two ways: as being satisfied through intimidation, or as requiring actual force. But if the court were to adopt the former, broader reading, it would overlap too much with the lesser offense of confining the captain, which could be accomplished either by force or by intimidation. For it is difficult to imagine a scenario in which a crew confined a captain but did not also, at the same time, either take over the ship or transfer control over it to someone else. That is to say, if making a revolt could be accomplished through intimidation, virtually every instance of the misdemeanor of confining a captain would also be an instance of the capital felony of making a revolt. Justice Washington refused to read the capital statute so broadly that it essentially eviscerated the difference between the greater and the lesser offense. A holistic reading of the opinion suggests that Justice Washington viewed the statute as ambiguous rather than vague, and that he engaged in statutory interpretation and read the statute narrowly, rather than declaring it inoperative for vagueness.

As Justice Thomas has pointed out,[168] *Sharp* was essentially overruled by *United States v. Kelly*,[169] which involved another prosecution under § 8 of the 1790 Act.[170] This time, the Court, speaking through Justice Washington, author of *Sharp* eleven years earlier, wrote that the term "endeavouring to make a revolt," though somewhat uncertain, could be defined by the Court.[171] The Court wrote:

> We think, that the offence consists in the endeavour of the crew of a vessel, or any one or more of them, to overthrow the legitimate authority of her commander, with intent to remove him from his command, or against his will to take possession of the vessel by assuming the government and navigation of her, or by transferring their obedience from the lawful commander to some other person.[172]

The Court thus, in essence, affirmed the convictions.[173]

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great difficulty he was able to extricate himself." *Id.* at 1044. However, this was disconnected temporally from the taking control of the ship by the mutinous crew, which occurred later through a written demand. *See id.* (stating that Sharp was presented with a paper "signed by twenty-one of them, the purport of which, so far as we can ascertain it from the witnesses, was to require the captain to resign").

167. *Id.* at 1043 (emphasis added).

168. *See* Johnson v. United States, 135 S. Ct. 2551, 2568 (2015) (Thomas, J., concurring in the judgment).

169. 24 U.S. (1 Wheat.) 417 (1826).

170. *Id.* at 417–18.

171. *Id.*

172. *Id.* at 418–19.

173. *Id.* at 419.

Notice that *Kelly*'s definition of "endeavouring to make a revolt" renders the meaning of "making a revolt" broader than that suggested by Justice Washington in *Sharp*. Rather than requiring force, it required only that control of the ship be taken from its master "against his will," which could come about via threats or intimidation. However one interprets *Sharp*, Justice Washington must have changed his mind between 1815 and 1826. That is to say, either he believed the statute too vague to be given any effect in *Sharp* and believed it sufficiently clear in *Kelly*, or he interpreted the statute narrowly in the former case and broadly in the latter. But the better understanding is the second one. However phrased, the dispute in *Sharp* was not really over whether "making a revolt" is too vague to be discernible by people of common intelligence. It was, rather, whether it included a physical force element or could be satisfied through mere coercion. That is to say, like *The Enterprise*, *Sharp* was fundamentally a case about ambiguity, not vagueness.

McJunkins v. State[174] is another example of a court applying the strict construction canon, not a special rule for vague statutes. The Indiana statute at issue there criminalized "notorious lewdness, or other public indecency."[175] The charge was that the defendants, in the presence of others, had sung "indecent and vulgar songs, and us[ed] vulgar and indecent language."[176] The court began its analysis by treating this as a case of vagueness, stating that "the term *public indecency* has no fixed legal meaning—is vague and indefinite, and cannot in itself imply a definite offense."[177] But the court then turned to an attempt to discern the intent of the legislature. It posed the issue as whether it was "the intention of the law-makers to declare the use of such improper language a punishable offense."[178] That is to say, should the statute be interpreted broadly to include "improprieties of language" or narrowly to encompass only "improprieties of conduct?"[179] The court thus treated the case as one of ambiguity, not vagueness. Ultimately, based in part upon the canon of strict construction, it adopted the narrower interpretation.[180] It did not void the statute, as courts do today when they find a statute vague.

State v. Mann[181] similarly was a case about ambiguity, not vagueness. The question there was whether a poker game was a "gambling device[]" within the meaning of an Oregon penal statute.[182] The court held that a poker game could not "be considered a gambling device in the sense of the words

174. 10 Ind. 140 (Ind. 1858).
175. *Id.* at 144 (quoting 8 IND. R. 494).
176. *Id.* at 140–41 (citations omitted).
177. *Id.* at 145.
178. *Id.*
179. *Id.* at 146.
180. *Id.*
181. 2 Or. 238 (1867).
182. *Id.* at 240 (quoting OR. STAT. ch. 50 § 666 (1864)).

used in" the statute "because, to be such, it must be something *tangible* and adapted, devised or designed for the purpose of playing a game of chance for money."[183] The court explained: "The game is the result produced by the use of the device; and the prohibition of the section is evidently against the use of the device instead of the result of it."[184] The court might have stopped there and *Mann* would have been an unremarkable case about statutory construction. Unfortunately, the court muddied the waters by agreeing with the appellant "that the statute . . . is void, for uncertainty."[185] Nevertheless, this was dictum, as the court had just explained, in essence, that the statute could and should be read narrowly to exclude a poker game from the universe of "gambling devices."

State v. Partlow,[186] too, is a classic case of ambiguity. The North Carolina statute in that case forbade "the sale of spirituous liquors . . . within three miles of * * * Mount Zion church in Gaston County."[187] It turned out that there were two churches bearing that name in that county.[188] The court determined that the statute was void because it was not "capable of construction and interpretation."[189] However, the statute was ambiguous, not vague: the Mt. Zion church mentioned in the statute was either one or the other, and the court twice characterized the statute as ambiguous.[190] Indeed, *Partlow* has a more famous döppelganger from the law of contracts, *Raffles v. Wichelhaus*,[191] which famously involved a contract referring to the ship "Peerless," where each party had a different "Peerless" in mind.[192] And *Raffles* is uniformly recognized as a case about contract ambiguity, not vagueness.[193]

What distinguishes *Partlow*, and justifies the court's voiding of the statute, was that it involved a distinctive sort of ambiguity: one where no interpretation was narrower or broader. Typically, a statute is ambiguous when one possible meaning entirely encompasses the other, so that the latter is a subset of the former. Had *Partlow* been an ordinary case of statutory ambiguity, the court could have invoked the rule of lenity and interpreted it

183. *Id.* at 240–41.

184. *Id.* at 241.

185. *Id.*

186. 91 N.C. 550 (1884).

187. *Id.* at 551 (quoting Act of 1881, ch. 234, 1881 N.C. Sess. Laws 444–45) (first alteration added).

188. *Id.* at 552.

189. *Id.* at 553–54.

190. *Id.* at 552 ("It is plainly the duty of the court to so construe a statute, ambiguous in its meaning, as to give effect to the legislative intent, if this be practicable."); *id.* at 554 ("We are constrained to declare that the clause of the statute under consideration is, because of its ambiguity, inoperative and void.").

191. (1864) 159 Eng. Rep. 375; 2 H. & C. 906.

192. *Id.* at 375.

193. *See, e.g.*, United States v. Rand Motors, 305 F.3d 770, 774 (7th Cir. 2002); Charter Oil Co. v. Am. Emp'rs' Ins. Co., 69 F.3d 1160, 1167 (D.C. Cir. 1995).

in a narrow fashion. Instead, the two possible meanings were mutually exclusive; neither one was narrower.[194] To choose one or the other would have been entirely arbitrary, and so the court had little choice but to void the statute.

Another North Carolina case, *State v. Boon*,[195] similarly involved an ambiguous statute, this time with three rather than two possible meanings. What is more, though claiming to void the statute, the court in effect chose the narrowest of the three meanings, consistent with the rule of lenity. The defendant there was accused of killing a slave.[196] The pertinent statute provided "that if any person shall hereafter be guilty of wilfully and maliciously killing a slave, such offender shall, upon the first conviction thereof, be adjudged guilty of murder, and shall suffer the same punishment as if he had killed a free man."[197] The court found the statute ambiguous because three different consequences could flow from the "kill[ing] [of] a free man": it could be murder, punishable by death; it could be manslaughter, also punishable by death but with benefit of clergy (meaning that the offender would be spared and would instead serve a prison sentence); or it could be justifiable or excusable homicide, which was not punishable at all.[198] Because, according to the court, the statute could have meant any of these three, it determined that "no judgment can be pronounced."[199] However, the court did not void the statute on vagueness grounds. To the contrary, the court read the statute as narrowly as possible—that is, as prescribing the same punishment for "willfully and maliciously killing a slave" as for justifiably or excusably killing a free man, which is to say no punishment at all.[200]

194. The court could have interpreted the statute to refer to whichever Mt. Zion church Ms. Partlow was not within three miles of when she sold liquor. But imagine that another person had sold liquor within three miles of that Mt. Zion church. As to this hypothetical second person, reading the statute that way would not be a narrow interpretation.

195. 1 N.C. 191 (Tay.) (N.C. 1801).

196. *Id.* at 191.

197. *Id.* at 192 (opinion of Hall, J.) (quoting An Act to Prevent the Wilful and Malicious Killing of Slaves, 1791 ch. 4 § 3, 1791 N.C. LAWS 4). Boon consists of four separate opinions written seriatim, in the style of courts prior to the popularization of the practice of writing a single opinion of the court.

198. *Id.* at 201–02 (opinion of Macay, J.); *accord id.* at 192–93 (opinion of Hall, J.) (noting that the circumstances of aggravation or mitigation would inform whether capital punishment should be inflicted); *id.* at 198–99 (opinion of Johnston, J.) (stating that the killing of a free man is punishable in different ways and that under certain circumstances, it is not punishable at all).

199. *Id.* at 201 (opinion of Taylor, J.); *accord id.* at 194 (opinion of Hall, J.) ("I do not feel myself authorized by the act of Assembly to say that any punishment should be inflicted on the prisoner.").

200. Of course, this result is absurd. The statute obviously meant that one who killed a slave "willfully and maliciously" should suffer the same punishment as someone who "willfully and maliciously" killed a free man: as a murderer. *See id.* at 193 (opinion of Hall, J.) (positing but rejecting that interpretation); *see also id.* at 199 (opinion of Johnston, J.) (expressing "no doubt" regarding the legislative intent but choosing to read the statute as narrowly as possible). As if there were any doubt from the wording of the operative provision, the preamble of the act, in observing

Indeed, three of the four judges authoring opinions in the case explicitly cited the rule of lenity as an excuse for reading the statute as narrowly as possible.[201]

One of the cases Justice Gorsuch cited, *McConvill v. Mayor of Jersey City*,[202] did involve a court voiding a statute. But that case was an unusual one involving a combination of ambiguity and vagueness: had the statute been interpreted in the most natural way, it would have been invalid for reasons unrelated to lack of clarity; and interpreted another way, it was vague. In that case, a city ordinance provided: "[N]o person or persons shall drive, or cause to be driven, any *drove or droves* of horned cattle, (except milch cows), through any of the streets, avenues, lanes, alleys or public places in Jersey City."[203] The ordinance was challenged on the ground that it was unclear precisely how many cattle were in a "drove." The court began its analysis with the uncontroversial bromide that penal laws should be written clearly.[204] But the court immediately followed up with language that suggests that it was striking the ordinance down as void for vagueness, much as modern courts do: "[T]he ordinance in question must, as it seems to me, be pronounced bad for vagueness and uncertainty in respect to the thing prohibited."[205]

However, the root of the problem with the ordinance was not vagueness but ambiguity: did it prohibit even the driving of a single head of cattle through the streets, or must "drove" be some number greater than one? Indeed, it appears that the parties agreed that the best interpretation of the

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that it was repealing a prior statute that punished the willful and malicious killing of a slave with one year in prison, characterized the "distinction of criminality between the murder of a white person and one who is equally a human creature" as "disgraceful to humanity." *Id.* at 192 (opinion of Hall, J.). *Boon* appears to be an instance of a reactionary court seeking to maintain a system where whites were privileged to kill blacks with virtual impunity, at least as a first offense, in the face of even modest legislative reforms.

201. *See id.* at 193 (opinion of Hall, J.) (rejecting the most natural interpretation of the statute "because it is a rule that penal statutes should be construed strictly"); *id.* at 199 (opinion of Johnston, J.) (opting to ignore the legislature's intention, despite having "no doubt . . . respecting the intention of the Legislature," because of the "very strict rules in the construction of penal statutes in favor of life . . . where they are doubtful, or will admit of various constructions"); *id.* at 201 (opinion of Taylor, J.) ("[I]f it admits of two constructions, that must be adopted which is favorable to the prisoner.").

202. 39 N.J.L. 38 (1876).

203. *Id.* at 39 (citing JERSEY CITY, N.J., City Ordinance Passed Apr. 4 (1876)) (emphasis added).

204. The court wrote:

> It has been well said that a by-law ought to be expressed in such a manner as that its meaning may be unambiguous, and in such language as may be readily understood by those upon whom it is to operate. . . . [T]he remark has a special significance as applied to such as are penal in their character. * * * "It is impossible," says Mr. Dwarris, "to dissent from the doctrine of Lord Coke, that acts of parliament ought to be plainly and clearly, and not cunningly and darkly penned, especially in penal matters."

Id. at 42–43 (quoting *Dwar. on Stat.* *652) (citations omitted).

205. *Id.* at 43.

ordinance was that it entirely prohibited the driving of any cattle, for the court wrote: "The same view as to the effect of this ordinance having been taken by the counsel on both sides on the argument, it is safe to conclude that while it does not, in terms, entirely prohibit the driving, &c., it does in fact amount to that."[206] However, as so interpreted, the ordinance would be beyond the power of the city to enact, for the city charter did not give the city the power to prohibit entirely the driving of cattle through the streets.[207] The court concluded that the ordinance was void for both reasons: "[I]t is bad for vagueness and uncertainty in the thing forbidden; and . . . if the effect of it is virtually to prohibit, &c., it is void, for the additional reason that the board had by their charter, no authority to make such an ordinance."[208] Thus, *McConvill* is an unusual case where the best reading of a statute rendered it an act *ultra vires*, while the second-best reading of a statute rendered it vague. *McConvill* is therefore weak evidence of a general due process rule against vague statutes.

Two other cases cited by Justice Gorsuch are also inapposite for more straightforward reasons. *Drake v. Drake*[209] involved an indefinite private statute, and the court made clear that private acts must be treated differently from public acts.[210] *Commonwealth v. Bank of Pennsylvania*[211] addressed the interpretation of a statute dictating how many votes the State of Pennsylvania should receive based on its shares of stock of the bank.[212] The court there did void the statute based on its inability to apply it, given that it could have been interpreted in numerous ways.[213] However, the statute did not regulate the primary conduct of private parties, backed up by either a criminal or a civil sanction. Rather, it was addressed to how a corporation must conduct the election of its officers. Thus, it would be difficult to describe the decision to void the statute as dictated by due process principles.[214]

In only two cases cited by Justice Gorsuch in his separate opinion in *Dimaya* was there even arguably a legitimate issue of vagueness as a due

206. *Id.* at 44.

207. *See id.* (interpreting the power to control and regulate as excluding the power to prohibit).

208. *Id.*

209. 15 N.C. (4 Dev.) 110 (N.C. 1833).

210. *Id.* at 115 (observing that private acts are "entirely different"). The court did observe that "[w]hether 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." *Id.* But this, of course, was dictum.

211. 3 Watts & Serg. 173 (Pa. 1842).

212. *Id.* at 176–77.

213. *See id.* at 177 ("[N]o valid election . . . can be held without further legislation.").

214. Another case cited by Justice Gorsuch, *Cheezem v. State*, 2 Ind. 149 (1850), involved an instance in which the court declared that a section of the law "contains no prohibition of any kind whatever, and is a nullity." *Id.* at 150. However, this statute had nothing whatsoever to do with defendant's conviction, which was obtained under a different statute and which the court affirmed. *Id.* Accordingly, whatever the court had to say about the first statute was, at best, dicta.

process concern. In *Jennings v. State*,[215] the Indiana Supreme Court held that the same statute at issue in *McJunkins*, forbidding "public indecency,"[216] was void for being "vague and indefinite."[217] However, the case does not supply the nature of the allegations against the defendant, so we have no way of knowing whether the court was simply relying on the reasoning of *McJunkins* to interpret the statute so as not to cover verbal indiscretions or whether it was going further. Moreover, the court mistakenly relied on *McJunkins* as having concluded that the statute was vague when, as already noted, *McJunkins* actually treated the statute as ambiguous and read it narrowly, consistent with the rule of lenity.

That leaves *Ex parte Jackson*.[218] Jackson was convicted under a statute making it a crime, in pertinent part, "to 'commit any act injurious to the . . . public morals.'"[219] It was alleged that Jackson harmed the public morals "by leaving his wife and child without the means of support, and living openly and publicly with one Dolly Hare."[220] The court declared the statute "simply null" on the ground that it was so vague that no one could predict beforehand what a particular judge or jury would think violates it: "Criminality depends, under it, upon the moral idiosyncrasies of the individuals who compose the court and jury. The standard of crime would be ever varying, and the courts would constantly be appealed to as the instruments of moral reform, changing with all fluctuations of moral sentiment."[221] The court analogized the statute to an ex post facto law in the sense that criminality depended upon whatever "moral sentiment . . . might happen to prevail . . . after the act had been committed."[222] Thus, as a true vagueness case in the more modern sense of the term, *Jackson* stands virtually alone.

In sum, only one real attempt has been made to anchor in sound constitutional principles the courts' ability to void statutes as vague on due process grounds. Though he tried valiantly, Justice Gorsuch's efforts in his separate opinion in *Dimaya* fell short. Most of the sources he cited, as Justice Thomas argued, demonstrate little more than application of the rule of lenity, and others involve unusual circumstances distinguishable from true vagueness cases. At best, these sources do not provide a sturdy constitutional foundation for the void-for-vagueness doctrine. To justify the doctrine, one must look elsewhere.

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215. 16 Ind. 335 (Ind. 1861).
216. McJunkins v. State, 10 Ind. 140, 145 (Ind. 1858); *see supra* text accompanying note 175.
217. *Jennings*, 16 Ind. at 336 (quoting *McJunkins*, 10 Ind. at 140).
218. 45 Ark. 158 (Ark. 1885).
219. *Id.* at 164 (quoting Ark. Revised Statutes, chap. 44, § 7 (alteration added)).
220. *Id.* at 162 (quoting warrant).
221. *Id.* at 164.
222. *Id.*

C. Underinclusiveness

Another problem with the void-for-vagueness doctrine is its underinclusiveness. Again, the doctrine is grounded in the twin rationales of requiring fair notice for potential actors and minimizing the discretion and, therefore, the opportunity for arbitrariness and discrimination of police, prosecutors, judges, and juries. But other characteristics of statutes can implicate the same problems of lack of notice and, particularly, undue delegation as those that are vague, and yet such statutes have not been considered constitutionally problematic. Of course, constitutional doctrine need not take on all problems at once. On one view, if lack of notice or undue delegation can result in a denial of due process, better that such evils resulting from vague statutes be voided even if other constitutional doctrines have not developed to address other instances of such evils. The problem here is that if the evil is lack of notice or undue delegation, the vagueness *vel non* of a statute is almost beside the point. Because these problems can result from a variety of statutory defects, singling out those that are worded vaguely appears to be arbitrary.

Take, for instance, statutes that are ambiguous rather than vague. For example, a statute that made it a crime to knowingly "carry" a firearm is ambiguous because it might apply narrowly only to someone with a firearm on his person, or it might apply more broadly to someone who has a firearm anywhere in his immediate possession, such as in his car with him, while he is traveling.[223] But a statute that made it a crime to knowingly be anywhere "near" a firearm would arguably be vague, because "near" could mean almost anything depending on the context. If the remote for the television is inches from my spouse, I could justifiably say that it is "near" her but not "near" me, even if it is only six feet away from me. On the other hand, when speaking on a cosmic scale, we would have no difficulty saying that Mercury is near the sun, or even that the Milky Way is near Andromeda.

Again, the traditional rule, the rule of lenity, is that ambiguous penal statutes should be construed narrowly. The rationales for the rule of lenity mirror the notice and nondelegation rationales that undergird the void-for-vagueness doctrine. As the Supreme Court wrote nearly two centuries ago:

> The rule that penal laws are to be construed strictly . . . is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment.[224]

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223. *See* Muscarello v. United States, 524 U.S. 125, 126–27 (1998) (interpreting 18 U.S.C. § 924(c)(1)).

224. United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95 (1820); *see* William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 600 (1992) (observing that the rule of lenity "[r]est[s] upon such due process values as providing fair notice and constraining prosecutorial discretion").

Thus, the rule is justified partly on notice principles: given the ambiguous nature of a statute, a potential criminal actor has insufficient notice that it will be interpreted broadly, and so it should be interpreted strictly.[225] And it is partly justified on nondelegation principles: "It prevents legislatures from passing off the details of criminal lawmaking to courts."[226] Indeed, both the void-for-vagueness doctrine and the rule of lenity are instantiations of the principle of legality, which dictates that no one can be punished criminally except according to a clear rule that governed the actor's conduct at the time she acted.[227] The two "have an intimate connection" and can "be thought of as contiguous segments of the same spectrum."[228]

Accordingly, the ambiguous statute discussed above presents similar notice problems as the vague one.[229] A potential criminal actor deciding whether she can safely put her firearm in the trunk of her car for a trip would have no idea whether a statute forbidding one from "carrying" a weapon makes her planned conduct a crime. Of course, a potential criminal actor faced with such an ambiguous statute can play it safe by assuming that the broadest possible reading of the statute is the proper one. That broadest possible reading, were it to be adopted by a court, results in a clear rule: no guns in the car while you are driving it. But this does nothing to improve the notice provided by the ambiguous statute. It improves only the actor's ability

225. Sohoni, *supra* note 1, at 1203 ("[T]he principle of notice continues to be accepted as a chief reason for construing criminal statutes narrowly."); Jeffrey A. Love, Comment, *Fair Notice About Fair Notice*, 121 YALE L.J. 2395, 2395 (2012) ("The rule of lenity . . . is intended, among other things, to guarantee that no criminal defendant will be caught off guard by a broader reading of a statute than he anticipated . . . ."); Sarah Newland, Note, *The Mercy of Scalia: Statutory Construction and the Rule of Lenity*, 29 HARV. C.R.-C.L. L. REV. 197, 201 (1994) ("[T]he rule focuse[s] on the need to provide notice to the defendant."); *Rule of Lenity*, *supra* note 5, at 480 ("Lenity has played an important role in . . . preventing convictions under statutes that did not adequately provide fair notice . . . ."); Note, *The New Rule of Lenity*, 119 HARV. L. REV. 2420, 2421 (2006) [hereinafter *The New Rule of Lenity*] ("[O]ne of lenity's primary justifications [is] providing notice of the scope of criminal conduct.").

226. Zachary Price, *The Rule of Lenity as a Rule of Structure*, 72 FORDHAM L. REV. 885, 909 (2004); *see also* Livingston Hall, *Strict or Liberal Construction of Penal Statutes*, 48 HARV. L. REV. 748, 757 (1935) ("Potentially the most serious argument is that the rule is founded 'on the plain principle that the power of punishment is vested in the legislative, not in the judicial department.'" (quoting *Wiltberger*, 18 U.S. (5 Wheat.) at 95)); *The New Rule of Lenity*, *supra* note 225, at 2425 ("[T]he rule of lenity enforces [separation of powers] by ensuring that Congress does not delegate crime-defining power to the courts by passing ambiguous statutes.").

227. *See* Decker, *supra* note 5, at 244 (stating that criminal liability and punishment can only be based on a clear and precise legislative enactment); Jeffries, *supra* note 138, at 196, 200 (noting that legislative definitions of crime need to be meaningfully precise and that there is a generally perceived relation between strict construction and legality).

228. HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 93 (1968); *see also id.* at 95 (observing that the rule of lenity is "something of a junior version of the vagueness doctrine"); Sohoni, *supra* note 1, at 1179 (observing that the two are "deeply interconnected").

229. *See* SOLAN, *supra* note 5, at 122 (observing that the void-for-vagueness doctrine and the rule of lenity both fit "under the broader conceptualization of fair warning"); Jeffries, *supra* note 138, at 206 (observing that vagueness and the rule of lenity are united "in a common front against unfair surprise").

to comply with it.[230] One giving wide berth to potentially criminal activity in the face of a statute criminalizing the "carrying" of a firearm has no greater notice of the prohibited activity than one faced with a statute criminalizing being "near" a firearm. That is to say, she still has no idea whether her restrained behavior is compelled by the statute or is simply overly cautious.

Ambiguous statutes also present delegation problems. Prosecutors faced with an ambiguous statute will naturally be inclined to give it the broadest possible interpretation in order to broaden the pool of potential criminal defendants whom the prosecutor can charge.[231] Given the wide discretion of prosecutors, such broadening of the pool can effectively give prosecutors tremendous power to, in effect, decide between those deserving of criminal punishment and those not so deserving.[232] While this power does not formally include the power to "make law," the difference is almost purely semantic: the prosecutor decides which of a large group of lawbreakers will be condemned by the community and which ones will not.[233] Although the statute may eventually be construed more narrowly by an appellate court, this means only that the prosecutor's power to, in essence, make law is limited temporally.[234] Given the prevalence of guilty pleas in our systems of criminal justice, the time period during which prosecutors essentially have the power to interpret ambiguous laws can be quite lengthy.[235] And when such an authoritative judicial construction occurs, the lawmaking power has simply shifted from the executive to the judicial branch, rather than being cabined within the legislative branch. More importantly, when courts address ambiguous statutes not as presenting a binary choice but as a continuing exercise in "fact-specific, case-by-case criminalization," the law remains open-ended in case after case, and, ineluctably, "lawmaking devolves to . . .

230. This distinction is further explored, *infra* text accompanying notes 352–60.

231. Hopwood, *supra* note 5, at 705 ("[T]here is a temptation for . . . prosecutors to stretch statutes as far as their creative minds can conceive.").

232. Price, *supra* note 226, at 919 (observing that broadly worded enactments give prosecutors tremendous discretion to "vindicate their own notions of appropriate social control by criminal arrest and prosecution" (quoting Jeffries, *supra* note 138, at 226)); *Rule of Lenity*, *supra* note 5, at 483 (noting that "broad statutes" give "prosecutors broad powers"); *see also* Hopwood, *supra* note 5, at 696 (observing that ambiguity in federal criminal law "leav[es] to federal prosecutors and the courts the task of defining the contours of the criminal code").

233. *See* United States v. Kozminski, 487 U.S. 931, 949 (1988) (observing that broadly worded penal statutes can "delegate to prosecutors and juries the inherently legislative task of determining what type of coercive activities are so morally reprehensible that they should be punished as crimes"); Binder & Fissell, *supra* note 26, at 112 ("[U]nbounded discretion in enforcement outsources the decision about what is and is not a crime."); Price, *supra* note 226, at 920 (noting that some crimes may be lacking in democratic legitimacy due to the ability of prosecutors to criminalize activity without consulting with the legislature).

234. Price, *supra* note 226, at 927 ("Even if defendants prevail in the courts, prosecutors may subject them to prolonged prosecutions based on theories ultimately deemed illegal.").

235. *Cf.* Sohoni, *supra* note 1, at 1219 (observing that prosecutors based hundreds of prosecutions over several decades on the "honest services" provision of federal law before the Supreme Court narrowed it in *Skilling v. United States*, 561 U.S. 358 (2010)).

police and prosecutors."[236] This is true even if—and this point is critical—the rule of lenity is employed in case after case to absolve innocent defendant after innocent defendant.[237]

Yet no one has argued that ambiguous statutes violate due process or that the rule of lenity is constitutionally compelled. At most, Professor Nicholas Rosenkranz has suggested that lenity may be either a constitutional starting-point rule, changeable only by the legislature and only within certain constitutionally dictated parameters, or a constitutional default rule, applicable unless the legislature provides a clear statement to the contrary on a statute-by-statute basis.[238] Professor Rosenkranz allows for the possibility that a legislature might not be constitutionally permitted to implement the obverse of the rule of lenity, requiring that ambiguous criminal statutes always be interpreted in the Government's favor.[239] But he has no constitutional qualms with simple legislative abrogation of the rule of lenity.[240] Similarly, Professors William Eskridge and Philip Frickey postulate the rule of lenity as a rule of "quasi-constitutional law" that forces legislatures to be attentive to the constitutional norm of separation of powers, and its attendant constraint on delegation, because of the difficulties courts have in directly enforcing such a norm.[241] But they recognize that even canons driven by constitutional concerns, such as the rule of lenity, can be legislatively overridden.[242] And from an originalist standpoint, it would be extremely difficult to make the case that the Fourteenth Amendment compels the rule of lenity, given the number of States that had legislatively abrogated it before and immediately after that Amendment was adopted.[243]

236. Jeffries, *supra* note 138, at 223.

237. *See id.* at 221–22 (describing how fact-specific statutory interpretation undermines the need to interpret criminal statutes in a "categorical" and "impersonal" way that minimizes deference for the "personality, identity, background, or allegiance of each defendant").

238. Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2097–98 (2002).

239. *Id.* at 2097.

240. *Id.*

241. Eskridge & Frickey, *supra* note 224, at 597, 600–01; *see also The New Rule of Lenity*, *supra* note 225, at 2439 (justifying the rule of lenity as "quasi-constitutional," not itself "mandated by the Constitution but '. . . designed to promote some goal with a constitutional foundation'" (quoting Cass Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 331 (2000))).

242. Eskridge & Frickey, *supra* note 224, at 631; *see also* Hall, *supra* note 226, at 757 (rejecting as "clearly unsound" the proposition that statutes abrogating the rule of lenity are unconstitutional); Price, *supra* note 226, at 924 ("[T]he acceptability of the rule of lenity would likely suffer if it were unmoored from principles of interpretation and set adrift on the doubtful waters of substantive due process.").

243. Hall, *supra* note 226, at 753 (observing that ten states had legislatively abrogated the rule of lenity by 1880, including one as early as 1838). *But see* People v. Avery, 38 P.3d 1, 5–6 (Cal. 2002) (citing the rule of lenity's "constitutional underpinnings" in declining to give effect to its abrogation by the legislature).

Undue-delegation problems can also arise where a statute is not lacking in clarity.[244] A statute that is clear yet broad could present the same problem just discussed: enhanced prosecutorial power to determine who deserves punishment, a core legislative function.[245] This is particularly true of statutes that both punish otherwise innocent conduct and are widely violated.[246] Take, for example, the plethora of traffic offenses. Because there are so many, and because no one could possibly abide by all of them all of the time, violations are legion, and all such violations cannot possibly be prosecuted.[247] That means that police and prosecutors "must decide how to use th[eir] limited resources" in determining whom to prosecute and punish.[248] In turn, this means that basic policy matters concerning who should be punished for violations of criminal law are vested in the police and prosecutors, not in the legislature.[249]

This accretion of prosecutorial power to, in essence, make policy is exacerbated by the vast, overlapping network of criminal laws with draconian

244. *See* Binder & Fissell, *supra* note 26, at 131 ("[S]pecificity does not prevent discriminatory enforcement . . . ."); Cristina D. Lockwood, *Defining Indefiniteness: Suggested Revisions to the Void for Vagueness Doctrine*, 8 CARDOZO PUB. L., POL'Y, & ETHICS J., 255, 259 (2010) ("[M]ore specific laws do not equate with less law enforcement discretion.").

245. WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., HANDBOOK ON CRIMINAL LAW § 11, at 87 n.44 (1972) ("Some risk of arbitrary enforcement is present . . . even with the most carefully drafted statute."); Debra Livingston, *Gang Loitering, the Court, and Some Realism About Police Patrol*, 1999 SUP. CT. REV. 141, 166 (noting "the significant potential for abusive enforcement that exists pursuant to broad but clear laws"); *The New Rule of Lenity*, *supra* note 225, at 2427 ("Overcriminalization and prosecutorial abuse are caused by broad statutes—laws that encompass a wide range of conduct and therefore allow prosecutors to pick and choose among potential offenders.").

246. Livingston, *supra* note 245, at 166 ("[T]he prevalence in certain domains of numerous narrow and specific, but commonly violated, low-level statutes and ordinances . . . creates opportunities for abusive police enforcement.").

247. *See* Binder & Fissell, *supra* note 26, at 131 ("[T]raffic law is a regime of overcriminalization and under-enforcement, permitting discretionary—and notoriously discriminatory—police enforcement." (footnotes omitted)); Hessick, *supra* note 27, at 1157 ("[T]he proliferation of traffic violations, combined with the fact that most drivers will commit an infraction if observed for any appreciable amount of time, gives police at least as much discretion as they possessed in *Kolender*."); Livingston, *supra* note 245, at 173 ("Low-level traffic offenses (like most laws regulating minor misconduct) are not invariably enforced, even when the evidence of their violation is clear. Because almost everyone violates traffic rules sometimes, moreover, the police, if they are patient, can eventually pull over anyone they are interested in questioning . . . .") (quoting David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 SUP. CT. REV. 271, 298–99).

248. *See* Hessick, *supra* note 27, at 1147 (describing how sweeping—and frequently overlapping—laws criminalizing broad ranges of behavior illegalize more conduct than can be prosecuted, requiring law enforcement officials to choose for themselves whom to prosecute).

249. *See id.* at 1162 ("[P]rosecutors could be said to be creating their own code within a code—emphasizing drug, immigration, and fraud cases—and nullifying congressional penal choices in [other areas] through non-enforcement." (quoting Julie R. O'Sullivan, *The Federal Criminal "Code" Is a Disgrace: Obstruction Statutes as a Case Study*, 96 J. CRIM. L. & CRIMINOLOGY 643, 654–55 (2006)) (alterations added)); *accord* Lockwood, *supra* note 244, at 325 (noting that laws "can never be drafted to eliminate discretion" and that even specific laws "may give police more discretion, rather than reducing it").

penalties attached, which allows prosecutors, if they wish, to "stack" charge upon charge.[250] The same conduct can often be charged as a violation of multiple statutes. Thus, multiple offenders who commit the same conduct can be punished drastically differently: some charged under multiple statutes, some under only one statute, and some not at all. Again, the result is a shift of basic determinations on penal policy from the legislative to the executive branch.[251] Yet, when presented with a specific opportunity to hem in the broad prosecutorial discretion that results from overlapping statutes, the Court unanimously found "no constitutional infirmities,"[252] concluding that "the power that Congress has delegated to [prosecutors and judges] is no broader than the authority they routinely exercise in enforcing the criminal laws."[253]

Finally, some statutes that have been attacked as vague have as their only vice an expansive delegation of legislative power with no accompanying indefiniteness. The statute challenged in *Shuttlesworth v. City of Birmingham*[254] falls into this category. The statute there provided, in relevant part: "It shall . . . be unlawful for any person to stand or loiter upon any street or sidewalk . . . after having been requested by any police officer to move on." [255] Before determining that the statute had been narrowed so as to meet constitutional objections,[256] the Court remarked that "[t]he constitutional vice of so broad a provision needs no demonstration" because it means that "a person may stand on a public sidewalk in Birmingham only at the whim of any police officer."[257] But this "constitutional vice" has nothing to do with indefiniteness: each term (except perhaps "loiter," which could easily be excised) is perfectly clear.[258] Yet the Court invalidated the ordinance using

250. *See* Hessick, *supra* note 27, at 1149 ("Overlapping statutes allow prosecutors to bring multiple charges under different statutes for the same conduct."); Hopwood, *supra* note 5, at 706 ("Congress has created so many substantive criminal laws that federal prosecutors have a smorgasbord of statutes with which to charge defendants . . . ."); Sun, *supra* note 26, at 188 ("There remain significant areas of discretion, such as charging decisions . . . that cannot be easily reached by the vagueness doctrine . . . .").

251. Professor Hessick has argued that the existence of broad, overlapping criminal statutes also presents notice problems, because potential criminal actors can never know under which statutes they will be prosecuted and, therefore, what their ultimate punishment will be. *See* Hessick, *supra* note 27, at 1152. However, it seems that as long as the actor knows that her conduct is unlawful and knows the maximum exposure in terms of punishment, the requirement of notice has been satisfied.

252. United States v. Batchelder, 442 U.S. 114, 123 (1979). *Batchelder* concerned two federal statutes forbidding receipt of firearms by felons, both of which applied to the defendant, but one prescribed a five-year maximum term of imprisonment while the other provided for a maximum prison term of two years. *Id.* at 115–17.

253. *Id.* at 126.

254. 382 U.S. 87 (1965).

255. *Id.* at 88 (quoting BIRMINGHAM, ALA., GEN. CITY CODE § 1142 (1944) (alterations added)).

256. *Id.* at 91.

257. *Id.* at 90.

258. *See* Peter W. Low & Joel S. Johnson, *Changing the Vocabulary of the Vagueness Doctrine*,

reasoning that could have been plucked from any of its modern void-for-vagueness cases.[259]

One could argue that the void-for-vagueness doctrine is not itself flawed but rather that its constraints on improper delegation should be more broadly applied. Professor Carissa Hessick makes precisely this argument, contending that "[t]he vagueness doctrine is a necessary but insufficient tool for protecting the due process principles on which it stands."[260] But if improper delegation is the chief evil that the vagueness doctrine takes aim at, vague statutes are just a symptom of the disease.[261] That is, if the root problem in some statutes is improper delegation of basic legislative policy choices, courts should come up with a doctrine that addresses these flaws in all legislation.[262] Seen in this way, the void-for-vagueness doctrine does no real work. At best, it is simply a mask for a determination that a statute suffers from these larger flaws. And at worst, it is a placebo that can make the courts feel better by allowing them to strike down isolated instances of excessive statutory delegation while leaving most instances of unbridled executive policymaking entirely intact.[263]

D. The Essential Contradiction of Delegation as a Cure for Vagueness

An additional problem with the Court's void-for-vagueness doctrine is that there is an essential contradiction at the heart of the doctrine. On the one hand, the main rationale for the doctrine is that it prevents undue delegation of lawmaking power to other actors in the criminal justice system: police, prosecutors, courts, and juries. At the same time, the Court has long held that a narrowing construction by a court can save an otherwise vague statute and has similarly held that clarification by executive officials can also cure an otherwise vague statute. Yet if delegation of legislative powers to these other institutions is the evil to be avoided, curing otherwise vague statutes through those selfsame delegations seems perverse.

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101 VA. L. REV. 2051, 2076 (2015) (characterizing the ordinance in *Shuttlesworth* as "unambiguously clear").

259. *See id.* at 2078 ("Vagueness reasoning was . . . used to strike down an ordinance that was written in crystal clear language. The problem was the authority granted to the police, not the clarity with which the law was expressed." (footnote omitted)).

260. Hessick, *supra* note 27, at 1162.

261. *See* Sun, *supra* note 26, at 189 ("[T]he Court's current approach to vagueness overemphasizes textual precision to the exclusion of other considerations that matter in regulating arbitrary power.").

262. *See* Lockwood, *supra* note 244, at 327 ("Correcting the false perception that the judiciary is competent to handle this issue through the void for vagueness doctrine would allow the issue to be handled . . . through other established legal doctrines . . . ." (footnote omitted)). *See generally*, Tracey Maclin, *What Can Fourth Amendment Doctrine Learn from Vagueness Doctrine?* 3 U. PA. J. CONST. L. 398 (2001) (positing a view of Fourth Amendment doctrine centered around limiting discretion of police).

263. *See* Livingston, *supra* note 245, at 164 (criticizing *City of Chicago v. Morales* for failing "to offer even a facially plausible account of the role that the vagueness doctrine actually plays in constraining the opportunity for arbitrary and discriminatory law enforcement by local police").

1. Delegation to Courts.—In articulating the structural rationale for the void-for-vagueness doctrine, the Court has continually included courts as improper delegees of legislative power. In *Sessions v. Dimaya*, for example, the plurality wrote that "the doctrine guards against arbitrary or discriminatory law enforcement by insisting that a statute provide standards to govern the actions of police officers, prosecutors, juries, and judges."[264] Similarly, in *Johnson v. United States*, the Court held that the indeterminacy of the residual clause of the Armed Career Criminal Act "both denies fair notice to defendants and invites arbitrary enforcement by judges."[265] Both *Dimaya* and *Johnson* involved federal statutes, but the Court has said much the same about delegation to state court judges via vague state statutes. In striking down a vagrancy ordinance in *Papachristou v. City of Jacksonville*,[266] for example, the Court wrote: "Those generally implicated by the imprecise terms of the ordinance . . . may be required to comport themselves according to the lifestyle deemed appropriate by the Jacksonville police and the courts."[267] And in *Grayned v. City of Rockford*,[268] the Court justified the void-for-vagueness doctrine by writing: "A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application."[269]

One might think that these concerns relate only to ad hoc, case-by-case application by judges without articulating any clarifying standards for future cases.[270] But the Court has cast doubt even on the propriety of courts shaping formless vague statutes into useable edicts via the tried-and-true common law method. The Court has frequently recited dictum from an 1875 case, *United States v. Reese*,[271] to express the danger of transferring legislative power to the judiciary through vague statutes:

> It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be

264. Sessions v. Dimaya, 138 S. Ct. 1204, 1212 (2018) (plurality opinion).

265. Johnson v. United States, 135 S. Ct. 2551, 2557 (2015).

266. 405 U.S. 156 (1972).

267. *Id.* at 170.

268. 408 U.S. 104 (1972).

269. *Id.* at 108–09 (italicization omitted); *see also* United States v. Petrillo, 332 U.S. 1, 7 (1947) (observing that language used in the statute "mark[ed] boundaries sufficiently distinct for judges and juries fairly to administer the law").

270. *See* Jeffries, *supra* note 138, at 214 (noting the "risk . . . that judicial particularization . . . will be too 'subjective,' too closely grounded in the facts of the case at hand, [and] insufficiently abstracted from the personal characteristics of the individual defendant").

271. 92 U.S. 214 (1875).

> set at large. This would, to some extent, substitute the judicial for the legislative department of government.[272]

But it is equally well settled that a narrowing judicial construction can save an otherwise vague statute from unconstitutionality.[273] As the Court wrote in *Wainwright v. Stone*:[274] "The judgment of federal courts as to the vagueness or not of a state statute must be made in the light of prior state constructions of the statute."[275] The Court went so far as to declare that the federal courts "must take the statute as though it read precisely as the highest court of the State has interpreted it."[276] "Indeed, judicial specification will be accepted as sufficient even where it amounts to a wholesale rewriting of the

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272. *Id.* at 221. For cases quoting this dictum from *Reese*, see, for example, *Sessions v. Dimaya*, 138 S. Ct. 1204, 1212 (2018) (plurality opinion); *Kolender v. Lawson*, 461 U.S. 352, 358 n.7 (1983); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 165 (1972). *Reese* is a downright peculiar source for this persistent dictum. First, *Reese* is not a case about vagueness at all but one about ambiguity. The question in *Reese* was whether a federal act criminalizing interference with an eligible voter's right to vote was properly construed as reaching all such interference, and thus beyond Congress's power to enact, or only impediments to voting based on the voter's race, color, or previous condition of servitude, and thus within Congress's authority under § 2 of the Fifteenth Amendment. *See Reese*, 92 U.S. at 221 ("We are . . . called upon to decide whether a penal statute enacted by Congress, with its limited powers, which is in general language broad enough to cover wrongful acts without as well as within the constitutional jurisdiction, can be limited by judicial construction so as to make it operate only on that which Congress may rightfully prohibit and punish."). Those were the only two possible meanings of the statute, rendering it, if uncertain at all, ambiguous, not vague. *See id.* at 218 ("The third section does not in express terms limit the offence of an inspector of elections, for which the punishment is provided, to a wrongful discrimination on account of race, &c . . . but it is urged, that when this section is construed with those which precede it, and to which, as is claimed, it refers, it is so limited.").

Second, interpreting the statute to reach all interference with voting required straining the statute beyond the breaking point; it fairly obviously reached only interference based on the categories protected by the Fifteenth Amendment. Third, even if the statute had been ambiguous, the Court should have chosen the narrower construction, based both on the rule of lenity and the constitutional avoidance canon, enunciated decades earlier in *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 448–49 (1830) (Story, J.) ("No court ought, unless the terms of an act rendered it unavoidable, to give a construction to it which should involve a violation, however unintentional, of the constitution."). Instead, the Court chose the broader construction and held the statute unconstitutional on that basis. *See* Ellen D. Katz, *Reinforcing Representation: Congressional Power to Enforce the Fourteenth and Fifteenth Amendments in the Rehnquist and Waite Courts*, 101 MICH. L. REV. 2341, 2352 (2003) ("*Reese* . . . set free defendants who the Court recognized violated the Constitution [and] did so based on a strained reading of the statute that forced the Court unnecessarily to confront a constitutional question."). *Reese* has justifiably been savaged by many critics as the effort of a reactionary Court to do whatever it could to trim the civil rights statutes enacted by a progressive Congress. *See id.* at 2350–51, 2350 n.54. Finally, the *Reese* dictum did not appear in a vagueness case until it was resurrected in *Papachristou* nearly a century later. Nevertheless, the *Reese* dictum has taken on a life of its own as a justification for the void-for-vagueness doctrine. *See, e.g.*, United States v. Davis, 139 S. Ct. 2319, 2325 (2019) (citing *Reese* in support of the void-for-vagueness doctrine).

273. Decker, *supra* note 5, at 247; Goldsmith, *supra* note 40, at 295; Cristina D. Lockwood, *Creating Ambiguity in the Void for Vagueness Doctrine by Avoiding a Vagueness Determination in Review of Federal Laws*, 65 SYRACUSE L. REV. 395, 426 (2015).

274. 414 U.S. 21 (1973).

275. *Id.* at 22.

276. *Id.* at 22–23 (quoting Minnesota *ex rel.* Pearson v. Probate Ct., 309 U.S. 270, 273 (1940)).

statutory text."[277] The Court has put this precept into practice in cases such as *Grayned v. City of Rockford*, where the Court addressed a vagueness challenge to an anti-noise ordinance that forbade the willful making of noise that "tends to disturb the peace or good order of [a] school session."[278] The Court conceded that the words of the statute were uncertain enough to leave the Court "troubled."[279] But the Illinois Supreme Court had interpreted a similar statute in such a way that the Court was satisfied that the state courts applied the anti-noise ordinance only to "actual or imminent interference with the 'peace or good order' of the school."[280] As so construed, the ordinance was not vague.[281]

The Court has applied this principal to the federal courts as well and has itself engaged in narrowly construing otherwise vague statutes in order to preserve their constitutionality. For example, in *Skilling v. United States*,[282] the Court held that the term "intangible right of honest services" for purposes of federal wire and mail fraud statutes was likely vague unless the Court were to construe it more narrowly.[283] It did so, construing it to encompass only bribery and kickback schemes, and determined that, so construed, it was not vague.[284] In a separate opinion, Justice Scalia sharply disagreed with this practice, citing *Reese*: "A statute that is unconstitutionally vague cannot be saved by . . . judicial construction that writes in specific criteria that its text does not contain."[285] He ended his dissent with the passage from *Reese* reproduced above.[286]

Thus, the Court has said that the void-for-vagueness doctrine prevents excessive delegation of legislative power to courts while at the same time—and sometimes in the same case, as in *Grayned*—saying that judicial

277. Jeffries, *supra* note 138, at 207.

278. Grayned v. City of Rockford, 408 U.S. 104, 107–08 (1972) (quoting ROCKFORD, ILL. CODE OF ORDINANCES ch. 28 § 19.2(a)).

279. *Id.* at 111.

280. *Id.* at 111–12.

281. *Id.* at 112–14; *see also* Shuttlesworth v. City of Birmingham, 382 U.S. 87, 90–91 (1965) (state court narrowing construction of statute rendered it not vague, where on its face the statute criminalized remaining on a public sidewalk after having been instructed by a police officer to move on); Fox v. Washington, 236 U.S. 273, 277 (1915) (state court construction of incitement "statute as confined to encouraging an actual breach of law" rendered it sufficiently definite); *cf.* Kolender v. Lawson, 461 U.S. 352, 355–58, 361 (1983) (state court construction of loitering statute as requiring "individual [to] provide 'credible and reliable' identification when requested by a police officer who has reasonable suspicion of criminal activity" held insufficient to save statute from vagueness (quoting People v. Solomon, 33 Cal. App. 3d 429, 108 Cal. Rptr. 867 (1973)).

282. 561 U.S. 358 (2010).

283. *Id.* at 405 ("Skilling's vagueness challenge has force . . . .").

284. *Id.* at 412 ("Interpreted to encompass only bribery and kickback schemes, § 1346 is not unconstitutionally vague."); *see also* Robert Batey, *The Vagueness Doctrine in the Roberts Court: Constitutional Orphan*, 80 UMKC L. REV. 113, 129 (2011) (providing other examples); Lockwood, *supra* note 273, at 426 (discussing *Skilling*).

285. *Skilling*, 561 U.S. at 415–16 (Scalia, J., concurring in part and concurring in the judgment) (citing United States v. Reese, 92 U.S. 214, 219–21 (1874)).

286. *Id.* at 425.

construction can save an otherwise vague statute. There is an obvious inconsistency here. Either vague statutes are unconstitutional because they excessively delegate lawmaking powers to courts, or a court can exercise that lawmaking power to narrow an otherwise vague statute, thereby saving it from unconstitutionality.[287] Only one of these propositions can be correct.

2. Delegation to Executive Officials.—Even more peculiar, given the core concern of the nondelegation rationale, is the fact that the Court has held that guidelines issued by an administrative or enforcement agency that clarify otherwise vague statutory language can save a statute from being held unconstitutionally vague.[288] The Court made this suggestion early on in its void-for-vagueness jurisprudence. In *Champlin Refining Co. v. Corporation Commission*, the Court addressed a statute prohibiting "the production of crude oil or petroleum . . . in such manner and under such conditions as to constitute waste."[289] The act defined waste to "include economic waste, underground waste, surface waste, and waste incident to the production of crude oil or petroleum in excess of transportation or marketing facilities or reasonable market demands."[290] The statute empowered the state corporation commission "to make rules and regulations for the prevention of such wastes."[291] On the way to voiding the statute for vagueness, the Court suggested that sufficiently detailed regulations from the commission might render the statutory scheme sufficiently certain. It rejected the State's contention that the statute was not self-executing but forbade only violations of the commission's implementing regulations.[292] Rather, "[t]he validity of [the statutory] provisions must be tested on the basis of the terms employed."[293] The clear implication from this dictum is that, had the commission issued clarifying regulations and had the statute forbidden only violations of those regulations, then the statutory language would have to be considered in light of those regulations and would be much better positioned to withstand a vagueness challenge.[294]

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287. *See* Note, *supra* note 2, at 74 (observing that the Court's practice of viewing a state statute as it has been clarified by the highest state court is not "quite compatible with" the Court's insistence that one "foundation for the vagueness doctrine" is that it prevents undue delegation from legislatures to courts); *see also* Goldsmith, *supra* note 40, at 296 (noting the inconsistency of the Court's doctrines).

288. Goldsmith, *supra* note 40, at 300–01.

289. Champlin Ref. Co. v. Corp. Comm'n, 286 U.S. 210, 223 n.1 (1932) (quoting COMP. STAT. OKLA. ANN. ch. 68, art. 4 § 7954 (1921)).

290. *Id.* (quoting COMP. STAT. OKLA. ANN. ch. 68, art. 4 § 7956 (1921)).

291. *Id.* (quoting COMP. STAT. OKLA. ANN. ch. 68, art. 4 § 7956 (1921)).

292. *Id.* at 242 ("There is nothing to support defendants' suggestion that the regulatory provisions of the Act do not become operative until the commission has defined permissible production.").

293. *Id.*

294. *See* Note, *Due Process Requirements of Definiteness in Statutes*, 62 HARV. L. REV. 77, 84 (1948) (observing that the Court has indicated that where "the legislature . . . empower[s] an

The Court operationalized this dictum and elevated it to a holding in *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*[295] There, the Court addressed a vagueness challenge to a local ordinance requiring a special business license to sell items "designed or marketed for use with illegal cannabis or drugs."[296] In addressing the challenge, the Court took into account "[a] series of licensing guidelines prepared by the Village Attorney," which provided a list of items that were comprehended by the ordinance if displayed in various ways.[297] The Court justified this approach by analogizing such administrative guidelines to judicial construction: "In evaluating a facial challenge to a state law, a federal court must, of course, consider any limiting construction that a state court *or enforcement agency* has proffered."[298] And in justifying more deferential treatment of "economic regulation" vis-à-vis penal statutes, the Court observed that "administrative regulation will often suffice to clarify a standard with an otherwise uncertain scope."[299] The Court proceeded to rely heavily upon those administrative guidelines in upholding the ordinance.[300]

But if the primary rationale of the void-for-vagueness doctrine is to prevent undue delegation of lawmaking power from legislatures to executive

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administrative agency to make interpretative regulations," a statute could withstand a vagueness challenge); *see also* Robert B. Krueger, Comment, *Legislation—Requirement of Definiteness in Statutory Standards*, 53 MICH. L. REV. 264, 270 (1954) ("[I]t has been asserted that less definiteness is required of an administratively executed statute . . . ."); Note, *Indefinite Criteria*, *supra* note 63, at 164 ("[U]nless the prohibition against the delegation of powers should be an obstacle, in many instances a satisfactory solution might be found by the establishment of administrative agencies whose duty it would be to warn malefactors of the danger of prosecution.").

295. 455 U.S. 489 (1982).

296. *Id.* at 491 (quoting Village of Hoffman Estates Ordinance No. 969-1978).

297. *Id.* at 492 & n.3 (providing guidelines for "paper," "roach clips," "pipes," and "paraphernalia").

298. *Id.* at 494 n.5 (emphasis added). For this proposition, the Court cited only *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972). However, in *Grayned*, the Court wrote that it was "'relegated . . . to the words of the ordinance itself,' to the interpretations the court below has given to analogous statutes, and, *perhaps to some degree*, to the interpretation of the statute given by those charged with enforcing it." *Id.* (quoting Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971) (alteration in original) (emphasis added) (footnotes omitted)). Thus, in ten years, the Court went from "perhaps to some degree" to "of course."

299. *Hoffman Estates*, 455 U.S. at 504; *see also id.* at 498 (noting that regulated industries "may have the ability to clarify the meaning of the regulation . . . by resort to an administrative process"); Joseph E. Seagram & Sons, Inc. v. Hostetter, 384 U.S. 35, 49 (1966) (rejecting vagueness challenge to a state alcohol beverage control law in part because regulated firms would "have access to the [State Liquor] Authority for a ruling to clarify the issue").

300. *Hoffman Estates*, 455 U.S. at 500–01 ("The guidelines refer to 'paper of colorful design' and to other specific items as conclusively 'designed' or not 'designed' for illegal use."); *id.* at 501 n.18 ("The guidelines explicitly provide that 'white paper . . . may be displayed,' and that 'Roach Clips' are 'designed for use with illegal cannabis or drugs . . . .'") (alteration in original); *id.* at 502 ("The ordinance, through the guidelines, explicitly regulates 'roach clips.'"); *id.* ("The guidelines refer to the display of paraphernalia, and to the proximity of covered items to otherwise uncovered items."); *see also* Parker v. Levy, 417 U.S. 733, 752 (1974) (addressing a vagueness challenge to military provisions in light of narrow constructions given them "by the United States Court of Military Appeals [and] by other military authorities").

officials, this methodology is passing strange. The village attorney in the *Hoffman Estates* case presumably was part of the executive apparatus of the village, with the authority and the obligation to bring charges against those violating the ordinance, or at least to advise those with that authority. For such an executive official to have the power, through the issuance of guidelines, to give form to a shapeless ordinance and save it from vagueness is precisely the type of delegation of legislative power from lawmakers to executives that the void-for-vagueness doctrine is designed to prevent.[301] Indeed, the nondelegation rationale for the void-for-vagueness doctrine makes no sense at all in a case such as *Boyce Motor Lines, Inc. v. United States*,[302] where the challenge was not to a statute but to an administrative regulation issued by the Interstate Commerce Commission.[303] While the power to promulgate guidelines is perhaps not as threatening as would be the power to interpret an ordinance on a case-by-case, ad hoc basis,[304] it still involves a wholesale shift of basic policymaking authority from the legislature to the executive.[305]

In a parallel context, the Court has made exactly this observation. In *Whitman v. American Trucking Ass'ns, Inc.*,[306] the Court addressed whether a provision of the Clean Air Act[307] improperly delegated legislative authority to the Administrator of the Environmental Protection Agency.[308] Although the Court ultimately rejected the nondelegation challenge to the statute,[309] it flatly rejected the notion that the agency's own narrowing construction of the statute could by itself save the statute from such a challenge:

> We have never suggested that an agency can cure an unlawful delegation of legislative power by adopting in its discretion a limiting construction of the statute. . . . The idea that an agency can cure an unconstitutionally standardless delegation of power by declining to exercise some of that power seems to us internally contradictory. The very choice of which portion of the power to exercise—that is to say,

301. *See* Goldsmith, *supra* note 40, at 301 ("Complete reliance on policies that . . . executive agencies could revoke at any time would undermine the arbitrary enforcement prong of vagueness analysis.").

302. 342 U.S. 337 (1952).

303. *Id.* at 338–40; *see* Binder & Fissell, *supra* note 26, at 151 ("If vagueness doctrine prohibits the delegation of criminalization decisions to law enforcement, and if agencies are creatures of the executive branch, how can administrative crimes and vagueness doctrine coexist?").

304. *See* Livingston, *supra* note 245, at 187–90 (arguing that administrative guidelines issued by police go a long way in ameliorating excessive police discretion to enforce unclear laws).

305. *See* Binder & Fissell, *supra* note 26, at 156 ("Administrative criminalization, under [one] view, is merely a more elaborate form of a legislature punting to the police its responsibility to define what conduct is prohibited and punishable.").

306. 531 U.S. 457 (2001).

307. 42 U.S.C. § 7409(b)(1).

308. *Whitman*, 531 U.S. at 472–76.

309. *Id.* at 474 ("The scope of discretion § 109(b)(1) allows is . . . well within the outer limits of our nondelegation precedents.").

> the prescription of the standard that Congress had omitted—would *itself* be an exercise of the forbidden legislative authority.[310]

While the Court was addressing only delegations of federal, not state, legislative authority, the principle remains the same no matter the context. Allowing an administrative or enforcement agency, state or federal, to carve out the limits of its own authority from an otherwise shapeless legislative dictate is itself a problem of excessive delegation.

E. Problematic Reliance on a Scienter Requirement to Save an Otherwise Vague Statute

One final problem with the void-for-vagueness doctrine is the way in which the Court has relied on the presence of a scienter requirement in an otherwise vague statute to save it from being voided. Courts and commentators have debated whether such a requirement can supply the requisite notice to make a statute nonvague. Irrespective of the outcome of that debate, it is unclear how a scienter requirement can do anything to ameliorate the excessive delegation inherent in an otherwise vague statute.

The Court has developed "the principle that a mens rea element in a criminal statute could mitigate a lack of clarity in its language."[311] For example, in *Screws v. United States*,[312] the Court addressed a vagueness challenge to a federal civil rights statute making it a crime to "willfully" deprive anyone, "under color of . . . law . . . of any rights, privileges, or immunities secured or protected by the Constitution."[313] A plurality of the Court observed that the vagueness challenge was a substantial one, given that the Court itself had been neither clear nor consistent as to what rights were protected by the Due Process Clause of the Fourteenth Amendment.[314] But the Court ultimately rejected the challenge, relying on the requirement that any violation be "willful" in order to be deemed criminal, meaning that the statute required that the prosecution prove the defendant's "specific intent . . . to deprive a person of a right which has been made specific" by the constitutional text or the courts' decisions.[315]

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310. *Id.* at 472–73.

311. Sohoni, *supra* note 1, at 1193; *see also* LAFAVE & SCOTT, *supra* note 245, at § 11, at 86 ("Not infrequently the Supreme Court, in passing upon a statute claimed to be unconstitutional for vagueness, has concluded that the statute gives fair warning because scienter is an element of the offense."); Binder & Fissell, *supra* note 26, at 148 (noting that vagueness can be avoided "[b]y tethering liability to a culpable mental state with respect to the causation of harm"); Decker, *supra* note 5, at 286 ("Sometimes a statute, which may otherwise be void-for-vagueness, may survive a vagueness challenge because of the statute's inclusion of a *mens rea* element."); McCarl, *supra* note 63, at 80 ("[T]he Court has said that a *scienter* (criminal intent) requirement may mitigate a law's vagueness . . . .").

312. 325 U.S. 91 (1945).

313. *Id.* at 93 (plurality opinion) (quoting 18 U.S.C. § 20).

314. *Id.* at 95–96.

315. *Id.* at 104.

This reasoning makes some sense where a statute requires a willful violation, given that "willfully," at least in some contexts, means that the actor must know his conduct is unlawful.[316] Yet the Court has extended this principle to statutes requiring culpable intent short of willfulness. In *Boyce Motor Lines, Inc. v. United States*, the Court addressed a vagueness challenge to a regulation requiring drivers of hazardous substances to "avoid, so far as practicable, and, where feasible . . . driving into or through congested thoroughfares, places where crowds are assembled," and similar places.[317] In rejecting the challenge, the Court relied heavily on the fact that the statute making violation of the regulation a crime "punishes only those who knowingly violate the Regulation."[318] It concluded that "[t]his requirement of the presence of culpable intent as a necessary element of the offense" went a long way in rebutting any notion that the regulation failed to provide fair notice.[319] Likewise, the Court in *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.* upheld an ordinance regarding paraphernalia "designed or marketed for use with illegal cannabis or drugs."[320] This was in part because the "marketed for" language implied that scienter was necessary for conviction of a retailer, reaching only those who "deliberately display[] [their] wares in a manner that appeals to or encourages illegal drug use."[321]

Many have criticized this line of reasoning, beginning with the dissents in *Screws* and *Boyce Motor Lines*. Justice Roberts in *Screws* complained: "If a statute does not satisfy the due-process requirement of giving decent advance notice of what it is which, if happening, will be visited with punishment . . . then 'willfully' bringing to pass such an undefined and too uncertain event cannot make it sufficiently definite and ascertainable."[322] Justice Jackson in *Boyce Motor Lines* pointed out that knowledge of the relevant facts, which is typically sufficient to satisfy a statutory *mens rea* requirement, is very different from knowledge of the law, and ascertainment of the meaning of a statute or regulation is a question of knowledge of the law.[323] Typical of the criticism of this principle off the Court is that by Professors Wayne LaFave and Austin Scott, who argued that "scienter—at

316. *See, e.g.*, Ratzlaf v. United States, 510 U.S. 135, 136–37 (1994) ("To establish that a defendant 'willfully violat[ed]' the antistructuring law, the Government must prove that the defendant acted with knowledge that his conduct was unlawful." (alteration in original)); Cheek v. United States, 498 U.S. 192, 201 (1991) ("[T]he standard for the statutory willfulness requirement is the 'voluntary, intentional violation of a known legal duty.'" (quoting United States v. Bishop, 129 U.S. 346, 360 (1973))).

317. Boyce Motor Lines, Inc. v. United States, 342 U.S. 337, 338–39 (1952) (quoting 49 C.F.R. § 197.1(b)).

318. *Id.* at 342.

319. *Id.*

320. 455 U.S. 489, 491 (1982) (quoting Village of Hoffman Estates Ordinance No. 969-1978).

321. *Id.* at 502.

322. Screws v. United States, 325 U.S. 91, 154 (1945) (Roberts, J., dissenting).

323. Boyce Motor Lines, Inc. v. United States, 342 U.S. 337, 345 (1952) (Jackson, J., dissenting).

least as it has been traditionally defined—cannot cure vagueness."[324] This is because, they asserted, scienter requires only "knowledge of the consequences of one's actions," as opposed to "knowledge of the existence or meaning of the criminal law."[325]

On the other hand, Professor Meir Dan-Cohen contended that this criticism "rests on the view that mens rea calls for knowledge only of facts" rather than "the legal categories under which they fall."[326] This view, according to Dan-Cohen, relies too heavily on the "distinction between knowledge of facts and knowledge of law."[327] He concluded that a *mens rea* requirement in an otherwise vague statute "can in fact serve the interest in fair warning by securing a correspondence between the defendant's own cognitions and the description of the proscribed conduct."[328]

But whatever side one takes in this debate, it is difficult to conclude that a scienter requirement does anything to ameliorate "the more important"[329] flaw of vague statutes: that they unduly delegate legislative authority. Those who defend the use of a scienter requirement to avoid a finding of vagueness, such as Dan-Cohen, uniformly do so on the ground that such a requirement cures the lack-of-notice problem. No one contends that such a requirement also addresses the delegation concern.[330] Nor could such an argument be made with any significant force. Neither a police officer deciding whom to arrest nor a prosecutor deciding whom to charge is constrained in any real way by a scienter requirement. After all, both of these decisions can be made based only on the objectively observable conduct of the defendant, which will be the same with or without a statutory scienter element.[331] The same

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324. LAFAVE & SCOTT, *supra* note 245, at § 11, at 86.

325. *Id.*; *see also* Lockwood, *supra* note 273, at 410 ("The inclusion of a scienter requirement in the law . . . does not equate with the law being written to provide clear notice of the law's parameters."); Sohoni, *supra* note 1, at 1194 ("The presence of a mens rea requirement in a criminal statute cannot make otherwise unclear statutory language clear as to what it prohibits."); Note, *supra* note 2, at 87 n.98 ("Such scienter would clarify nothing; a clarificatory 'scienter' must envisage not only a knowing what is done but a knowing that what is done is unlawful or, at least, so 'wrong' that it is probably unlawful.").

326. Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 662 (1984).

327. *Id.*

328. *Id.* at 663.

329. Kolender v. Lawson, 461 U.S. 352, 358 (1983).

330. *See* LAFAVE & SCOTT, *supra* note 245, at § 11, at 87 n.37 ("The Supreme Court decisions on this point might also be criticized in terms of the risk of arbitrary and discriminatory enforcement, as even if it is required that the defendant know what he is doing, it is nonetheless possible that the police, prosecutor, court, and jury will be arbitrary in determining whether his conduct is within the statute."); Livingston, *supra* note 245, at 168 ("The specific intent element has traditionally been said to address the vagueness doctrine's mandate that penal laws provide adequate notice to the public about the nature of prohibited conduct—not its concern that police might misuse an overly ambiguous law.").

331. *See* Livingston, *supra* note 245, at 169 (stating that "an officer would rely on the very same observable conduct to make judgments about the [actor's] internal mental state" where the statute

conduct used to determine that the actor has performed the *actus reus* of the crime will also be used by police and prosecutors to determine that she also has the requisite *mens rea*. Whatever work a scienter requirement can do in providing notice, if any, is not matched in any appreciable way when it comes to heading off excessive delegation.

F. Summary

One can draw some general conclusions that connect the individual flaws observed about the void-for-vagueness doctrine. First, from the last three flaws in the vagueness doctrine—its underinclusiveness (at least with regard to improper delegations), its contradictory approach to delegations as potential cures for vagueness, and its failure to appreciate that a scienter requirement does little, if anything, to head off excessive delegations—one could argue that reliance on the nondelegation rationale is misplaced.[332] Although the Court has propounded this as the dominant rationale for the doctrine, this makes little sense in light of these flaws in the doctrine. If a multitude of defects can result in improper delegations of legislative authority, then perhaps the delegation rationale is not really adding anything to the void-for-vagueness doctrine. And that the Court speaks out of both sides of its mouth, simultaneously condemning delegations of legislative authority while providing that such delegations can actually save an otherwise vague statute, is a clue that nondelegation is not really what the doctrine is about.

That leaves the notice rationale. But, again, there is little support from the older cases that notice of what a statute means, as opposed to notice of which statute has been violated, has historically been considered an essential element of due process. The notice rationale comes close but it does not fully capture why uncertain statutes violate due process principles. It is not just that potential criminal actors cannot discern what the law is. Again, this is true of insolubly ambiguous statutes as well as vague ones, but no one maintains that ambiguous statutes violate due process or that the rule of lenity is constitutionally compelled. This comparison with ambiguous statutes shows that vagueness is not just about ability to discern the law but also the ability to follow it. It is only when a statute leaves potential criminal actors with no way to act in obedience of the law—when compliance with the law is impossible—that due process has been denied.

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contains a scienter requirement "that he would have used to determine whether" the actor was guilty of violating a statute without such a requirement); *see also* Reynolds v. Tennessee, 414 U.S. 1163, 1167 (1974) (Douglas, J., dissenting from denial of certiorari) ("The addition of 'willful' to the statutory prohibition on disturbing [a] meeting adds no greater precision, since this element of intent is not proved separately but was inferred from the conduct constituting the violation.").

332. *Cf.* Lockwood, *supra* note 244, at 317–27 (making this argument, though for very different reasons).

III. Reframing Vagueness as Impossibility

There is something intuitively unjust about even a democratically enacted statute whose language is so impenetrable that reasonable people must act at their peril and face years in prison if they guess incorrectly. It turns out that there is a justification for a due process constraint on such statutes, but it focuses on the impossibility of performing, not the impossibility of discerning, what the statute requires. Framing the doctrine this way, as a problem of impossibility rather than one of vagueness, helps us justify a constitutional constraint on some indefinite statutes but not ambiguous ones, and also helps to interpret what the Court has said in this area and to apply the constraint in future cases.

A. The Legitimacy of a Constitutional Constraint on Requiring the Impossible

Unlike the questionable legitimacy of a due process constraint on statutes that provide insufficient notice, the prohibition on requiring the impossible has a pedigree going back over four centuries. In *Dr. Bonham's Case*, Lord Edward Coke famously wrote that

> in many cases, the common law will controul Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, *or impossible to be performed*, the common law will controul it, and adjudge such Act to be void.[333]

Of course, the constraint on requiring the impossible is dictum, for that case concerned a different common-law constraint: that on a person being the judge in his own case. However, it can scarcely be disputed that a court would have to void as a nullity a statute that required the impossible. As Chief Justice Vaughan put it in a case later that century: "[A] law which a man cannot obey, nor act according to it, is void[] and no law . . . ."[334]

Even Blackstone agreed. Generally, Blackstone rejected the Cokean idea that courts had broad power to reject "unreasonable" legislation. Yet he embraced Coke's narrower point that statutes that require the impossible are void. He did this in his section on rules of statutory construction, three pages after the portion cited by Justice Gorsuch in his separate opinion in *Dimaya* on strict construction of penal statutes. Blackstone's last rule on statutory construction begins this way:

> *[A]cts of parliament that are impossible to be performed are of no validity*: and if there arise out of them collaterally any absurd consequences, manifestly contradictory to common reason, they are, with regard to those collateral consequences, void. I lay down the rule

333. (1610) 77 Eng. Rep. 646, 652; 8 Co. Rep. 113b, 118a (emphasis added).
334. Thomas v. Sorrell (1673) 124 Eng. Rep. 1098, 1102; Vaughan 330, 337.

> with these restrictions; though I know it is generally laid down more largely, that acts of parliament contrary to reason are void. But if the parliament will positively enact a thing to be done which is unreasonable, I know of no power in the ordinary forms of the constitution, that is vested with authority to control it: and the examples usually alleged in support of this sense of the rule do none of them prove, that, where the main object of a statute is unreasonable, the judges are at liberty to reject it; for that were to set the judicial power above that of the legislature, which would be subversive of all government. But where some collateral matter arises out of the general words, and happens to be unreasonable; there the judges are in decency to conclude that this consequence was not foreseen by the parliament, and therefore they are at liberty to expound the statute by equity, and only *quoad hoc* disregard it.[335]

This passage has proven puzzling to generations of legal scholars.[336] This is because Blackstone seems to contradict himself,[337] first declaring that certain "collateral consequences" of some statutes can "void" the statute, while later contending that such "unreasonable" "collateral matters" provide a basis for judges to interpret the statute narrowly but not to void it wholesale.

But irrespective of how one tries to resolve that seeming contradiction, the first sentence of Blackstone's rule is clear and uncontroversial:[338] "[A]cts of parliament that are impossible to be performed are of no validity." The passage generally demonstrates Blackstone's far more limited view than Coke's on the power of courts to void statutes that are against common reason. Coke had laid down the broader rule referred to by Blackstone, "that acts of parliament contrary to reason are void." Blackstone's rule was far more restrictive. But one thing upon which Coke and Blackstone agreed was that statutes requiring the impossible "are of no validity."

This notion forged by our British forebears found its way into American case law. Courts have voided statutes not only on vagueness grounds but also on "impossibility of performance of the act prescribed."[339] For example, in *Brown v. State*,[340] the defendant had been convicted under a statute that required physicians to register with their local health registrar on or before October 1, 1907, and also simultaneously created the office of local registrar,

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335. BLACKSTONE, *supra* note 129, at *91 (emphasis added).

336. *See* James Q. Whitman, *Why Did the Revolutionary Lawyers Confuse Custom and Reason?*, 58 U. CHI. L. REV. 1321, 1364 n.165 (1991) (asserting that this passage has "puzzled many historians of parliamentary supremacy").

337. *See id.* (observing that the passage is "facially self-contradictory").

338. *See* John V. Orth, *Did Sir Edward Coke Mean What He Said?*, 16 CONST. COMMENT. 33, 35 (1999) (observing that this precept is "hardly controversial"); *see also* LON L. FULLER, THE MORALITY OF LAW 36–37 (1964) (positing possibility of compliance as one of the requirements for law).

339. Krueger, *supra* note 294, at 266.

340. 119 N.W. 338 (Wis. 1909).

with an effective date "from and after October 1, 1907."[341] The court read this as creating local registrars as of October 2—one day after the deadline for physicians to register with them.[342] Accordingly, the court held the statute void on grounds of impossibility: "[C]ompliance with the only command of the statute with reference to registration was impossible."[343] Interestingly, the court used language similar to that used in vagueness cases: "It is a most fundamental canon of criminal legislation that a law which takes away a man's property or liberty as a penalty for an offense must so clearly define the acts upon which the penalty is denounced that no ordinary person can fail to understand his duty . . . ."[344] But this was not the problem with the statute; "thou shalt register with the local registrar by October 1" is a perfectly clear command. The defendant could not have "fail[ed] to understand his duty"; he simply could not possibly have performed it.

While the statute in *Brown* was clear, other cases and commentators expressly tied together vagueness and impossibility. One early twentieth-century treatise declared in a section heading: "Vague Statute Incapable of Being Executed Will Be Declared Inoperative and Void."[345] One passage repeated dozens of times by state courts in the late-nineteenth and early-twentieth centuries also weds the problems of vagueness and impossibility of compliance: "If an act of the Legislature is so vague and uncertain in its terms as to convey no meaning, *or if it is so conflicting and inconsistent in its provisions that it cannot be executed*, it is incumbent upon the courts to declare it inoperative and void."[346] There is even support for the notion that indefiniteness would not void a statute unless it were so profound as to render the statute impossible to be performed. The Supreme Court of Ohio wrote in 1848: "The imperfection of a law will not render it void, unless it is so imperfect as to render it utterly impossible to execute it."[347]

Granted, this language often referred to the inability of courts[348] or government officials[349] to execute statutes, as opposed to the inability of private persons to perform under them at the risk of a criminal conviction. Nevertheless, the invalidation of penal statutes imposing impossible obligations on private citizens would follow *a fortiori* from such treatment of

341. *Id.* at 338–39 (quoting Act of July 1, 1907, ch. 409, § 1022—19, 1907 WIS. LAWS 262).

342. *Id.* at 339 ("There was . . . not until October 2d any 'local registrar' in existence . . . .").

343. *Id.*

344. *Id.*

345. PAGE & POWELL, 4 SUPPLEMENT TO RULING CASE LAW § 62 (William M. McKinney & Burdett A. Rich eds., 1919).

346. *See, e.g.*, People *ex rel.* Hoyne v. Sweitzer, 107 N.E. 902, 906 (Ill. 1915) (emphasis added).

347. Lessee of Cochran's Heirs v. Loring, 17 Ohio 409, 427 (1848); *accord Ex parte* Anderson, 242 P. 587, 589 (Nev. 1926) (noting that an imperfection in the details of a law does not necessarily render it void, provided that it is not impossible to execute the law).

348. *See Loring*, 17 Ohio at 427–28 (concluding that statute directing procedure for attachment of property was not void).

349. *See Sweitzer*, 107 N.E. at 906 (noting that the inconsistencies and repugnancies of the provisions rendered it impossible for the county clerk to comply).

statutes imposing impossible obligations on government actors: if courts were bound by common-law principles to void the latter, they would certainly be required to void the former.

Seen in this light, a statute such as the one in *Miller v. Strahl*,[350] requiring hotel owners "to do all in their power" to keep their guests safe from certain hazards, is clearly valid, as the Court so held.[351] While the language is certainly indefinite, the statute, by its very terms, does not require the actor to do the impossible. It requires her to do all that is possible but nothing more. But where statutory language makes it difficult to know what the law requires, it often, but not always, also makes it impossible to comply. The difference is subtle but important, and it helps explain why ambiguous statutes raise no constitutional difficulties.

B. Vagueness vs. Ambiguity

Viewing vagueness as a problem of impossibility also helps solve one of the mysteries of the law: why are vague statutes unconstitutional but ambiguous ones are not? After all, the rule of lenity is not constitutionally compelled.[352] Yet that canon is persistently defended on grounds that overlap almost completely with the rationales undergirding the void-for-vagueness doctrine.[353] The answer is that ambiguous statutes are capable of being followed, even if the actor must give a wide berth to the statute by avoiding possibly legal activity. It is only when a statute leaves an actor essentially unable to potentially avoid being branded a criminal that a statute violates due process principles.

Truly ambiguous statutes are never impossible to perform. Take, for example, the statute discussed earlier that makes it a crime to knowingly "carry" a firearm, which might narrowly forbid one from having a firearm on his person, or might broadly forbid someone from having a firearm anywhere in his immediate possession while traveling.[354] The potential criminal actor faced with this statute can give it a wide berth by not having a firearm anywhere in her possession while traveling. Note that ambiguous statutes are sometimes inefficient because they sometimes deter behavior that is perfectly innocent and perhaps even socially beneficial, and that may not have been intended to be encompassed by the statute. But that is not of constitutional concern. Policymakers can decide whether the costs of an unclear rule that over-deters are outweighed by some benefit.

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350. 239 U.S. 426 (1915).

351. *Id.* at 430–31, 434 (quoting NEB. REV. STAT. § 3104 (1913)); *see supra* text accompanying note 77.

352. *See supra* text accompanying notes 238–43.

353. *See supra* text accompanying notes 224–28.

354. *See* Muscarello v. United States, 524 U.S. 125, 126 (1998) (interpreting 18 U.S.C. § 924(c)(1)).

Even some statutes that suffer from some quantum of indefiniteness and are arguably vague can be performed as well. Again, imagine a statute that made it a crime to knowingly be "near" a firearm. It is possible to comply with the statute by simply divesting oneself of all firearms. In this instance, the actor must give the statute an even wider berth than in the previous example.[355] The danger of over-deterrence, vis-à-vis the actor forgoing behavior that is both intended to be legal and perhaps socially useful, is even more striking. Yet, again, this is a policy concern, not one of constitutional magnitude.[356]

This helps explain decisions such as *United States v. Alford*,[357] where the Court confronted a vagueness challenge to a statute that forbade building a fire "near any forest, timber, or other inflammable material upon the public domain."[358] Speaking for the Court, Justice Holmes dismissed the challenge with characteristic terseness: "The word 'near' is not too indefinite. Taken in connection with the danger to be prevented it lays down a plain enough rule of conduct for anyone who seeks to obey the law."[359] Yet this result is, on its face, questionable. Proximity is a nebulous concept. Granted, as the Court wrote, the point of the statute was to prevent forest fires,[360] and in that context the actor could take into account such knowable facts as current wind conditions and previous amounts of rainfall. Still, at the end of the day, the actor must make an educated guess about how "near" is too "near." Yet he is not prevented from complying merely because of unclear language. As with the ambiguous statute, the actor can give the vague statute a wide berth by vastly overestimating how far he must be from "forest, timber, or other inflammable materials" before building his fire. And to be perfectly safe, he can refrain from building any fire at all.[361]

Now consider a statute that made it a crime to knowingly be "near," not a firearm, but any "dangerous instrument." Without any statutory definition

355. *See* Hessick, *supra* note 120, at 165 ("[I]n order to avoid conviction under vague statutes, citizens may choose to avoid large swaths of conduct that might be prohibited by the vague statute.").

356. This assumes that the behavior forgone is merely useful and not constitutionally protected. In this example, the actor could be chilled from exercising a Second Amendment right by a statute that, in effect, requires that she get rid of her firearms. *See* Dist. of Columbia v. Heller, 554 U.S. 570, 595 (2008) (recognizing that "the Second Amendment confer[s] an individual right to keep and bear arms"); *see also* McDonald v. City of Chicago, 561 U.S. 742, 750 (2010) (holding that this right is incorporated into the Fourteenth Amendment). But assuming the actor is, say, a former felon, there is probably no constitutional right to be chilled. *See Heller*, 554 U.S. at 626 ("[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons . . . .").

357. 274 U.S. 264 (1927).

358. *Id.* at 266 (quoting Act of June 25, 1910, ch. 431, § 6, 36 Stat. 855, 857).

359. *Id.* at 267.

360. *Id.*

361. *Cf.* Decker, *supra* note 5, at 336 (observing that one indicia of unconstitutional vagueness is "whether there existed a more circumspect alternative available to the defendant beyond engaging in questionable conduct" (emphasis omitted)).

or common-law understanding of what a "dangerous instrument" is, the actor is left wholly in the dark by that term, as she is with respect to the word "near." The difference is that, while one can assure oneself of not being knowingly "near" a firearm by not owning a firearm, one can never assure oneself that one is not in knowing proximity to a "dangerous instrument." Many items necessary for everyday life—knives, cleansers, electrical outlets, automobiles—are "dangerous" if used improperly or maliciously. Even if one were to be rid of such extravagances as ordinary kitchen knives, any heavy, blunt instrument could be "dangerous" as well. To comply with such a law would truly be impossible.

C. Scienter as a Way of Making the Impossible Possible

Viewing the problem as one of impossibility as opposed to indefiniteness helps explain and justify the principle that a scienter requirement can save an otherwise vague statute from being voided. As discussed above,[362] it is a controversial proposition that a *mens rea* requirement can do anything to cure vagueness, given that *mens rea* refers to knowledge of facts whereas vagueness refers to an inability to ascertain the meaning of the law. Moreover, the saving grace of a scienter requirement is difficult to defend when one focuses on the excessive-delegation problem of indefinite statutes.

But when one views the issue as one of impossibility, a scienter fix makes sense. Imagine a statute, not unlike the one in *Coates v. City of Cincinnati*, that has as the touchstone of criminal conduct acting in public "in a manner annoying to persons passing by."[363] Because I do not know what others will consider annoying, my only safe bet is to avoid being out in public at all, quite an impossible task. But now imagine that the statute criminalizes annoying behavior only when undertaken with the intent to annoy. Now, I can go out in public all I want, and engage in any conduct while there, so long as I do not have the intent to annoy others. Having the intent to annoy is entirely within my control. As long as I avoid having that intent, I can avoid being branded a criminal. This is one explanation for the different results in *Coates* and *Colten*, which, as noted above,[364] upheld a Kentucky statute that made it a crime to "congregate[] . . . in a public place and refuse[] to comply with a lawful order of the police to disperse" when done "with intent to cause public inconvenience, annoyance or alarm."[365]

362. *See supra* subpart II(E).

363. 402 U.S. 611, 611 (1971).

364. *See supra* text accompanying notes 93–96.

365. Colten v. Kentucky, 407 U.S. 104, 108 (1972) (quoting KY. REV. STAT. § 437.016(1)(f) (Supp. 1968)); *see* Decker, *supra* note 5, at 276 ("[W]hile not explicitly discussed in the opinion, an additional problem with th[e] ordinance [in Coates] was that a conviction could be predicated on the conduct of the group without regard to any *mens rea*." (emphasis omitted)).

Indeed, this also explains why statutes imposing attempt liability are not irretrievably vague.[366] Statutes and common-law standards setting forth the *actus reus* of attempt are notoriously imprecise, from the common law's requirement of "dangerous proximity" to the prohibited result, to the Model Penal Code's less onerous requirement of a "substantial step" toward that result.[367] Standing alone, these nebulous standards would be highly vulnerable to a vagueness challenge.[368] But, of course, they do not stand alone. It is black letter law that one cannot be guilty of an attempt crime unless one specifically intends to bring about the prohibited result.[369] Thus, one can always avoid liability for an attempt simply by not intending to commit the target crime. Because avoiding attempt liability is within one's control, a due process challenge to the "dangerous proximity" or "substantial step" test must fail.

D. Viewing the Supreme Court's Vagueness Cases Through the Lens of Impossibility

Focusing on the impossibility of compliance, rather than the lack of notice, that can result from indefinite statutory language helps explain a good number—though concededly not all—of the Court's cases in this area. They generally fall into two categories. Statutes that require actors to conform their conduct to objective facts will be deemed sufficiently definite if those facts are knowable, but unconstitutionally vague if they are unknowable. And statutes requiring actors to conform their conduct to normative standards will be deemed sufficiently definite if those standards are derivable from industry or community norms, but unconstitutionally vague if they hinge on the subjective perceptions of others.

1. Statutes Requiring Actors to Conform Their Conduct to Objective Facts.—A number of the Court's cases, especially its earlier ones, have involved statutes that require conformance of one's conduct to certain objective facts. Whether a statute has been deemed vague has largely depended upon whether those facts were knowable, in which case the statute

366. Low & Johnson, *supra* note 258, at 2094 n.189.

367. *See* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 391–98 (7th ed. 2015) (listing and analyzing various different, yet widely used standards for defining the *actus reus* of attempt).

368. Low & Johnson, *supra* note 258, at 2094 n.189 ("Viewed on its own terms in the absence of the required intent to commit an object offense, the open-ended nature of the conduct component of an attempt could easily subject the offense to a vagueness attack."); *see also* Adam J. Kolber, *Smoothing Vague Laws*, *in* VAGUENESS AND LAW: PHILOSOPHICAL AND LEGAL PERSPECTIVES 275, 277 (Geert Keil & Ralf Poscher eds., 2016) ("Statutory language purporting to distinguish preparation and attempt is notoriously vague.").

369. DRESSLER, *supra* note 367, at 386–87.

was considered not vague, or unknowable, in which case the statute was considered vague.[370]

For example, *International Harvester Co. v. Kentucky*,[371] the first case in which the Court declared a statute void for vagueness, involved a set of Kentucky statutes that made it a crime for separate commercial buyers or sellers of goods to form "any combination for the purpose of controlling prices . . . for the purpose or with the effect of fixing a price that was greater or less than the real value of the article."[372] The "real value," according to the Kentucky courts construing the statutes, was "the market value under fair competition, and under normal market conditions."[373]

Justice Holmes, speaking for the Court in declaring the statutory scheme unconstitutional, cited the impossibility of knowing the "real value" of an article as so defined, because it depends on the purely hypothetical fact of "normal market conditions" if the (concededly legal) combination had never existed "and nothing else violently affecting values had occurred."[374] "Value," he wrote, "is a fact and generally is more or less easy to ascertain."[375] Had the state hinged criminal liability on too far a deviation from the value of an article, the scheme might have been sustained. But the statutes went a step further and hinged liability on the value that an article would have had "in an imaginary world."[376] Firms had "to guess at [their] peril" what the value of an article would be in a market without the combination (and therefore with greater competition), and without the "actual effect of other abnormal influences," while also taking into account any "economically beneficial" effects of the combination.[377] Such an equation was beyond "human ingenuity [to] solve."[378] This flaw, the Court wrote in a related case, rendered the statutory scheme in violation of "the fundamental principles of justice embraced in the conception of due process."[379] Or, as the Court put it in another related case, the scheme violated the Fourteenth Amendment because it "offered no standard of conduct that it is possible to know."[380] And if it was impossible to know the facts that determined how the

370. *See* Note, *supra* note 80, at 966 ("[A] statute will be held sufficiently definite if it imposes a standard of reasonableness with reference to existing facts, while it is invalid if it requires a man to disregard things as they are in the world and create for himself a suppositious set of circumstances . . . ."); *cf.* Krueger, *supra* note 294, at 275 ("A statute that requires those affected to make a finding of fact based on hypothetical factors must be very definite.").

371. 234 U.S. 216 (1914).

372. *Id.* at 221.

373. *Id.* (quoting Int'l Harvester Co. of Am. v. Commonwealth, 144 S.W. 1064, 1065 (Ky. 1912)).

374. *Id.* at 222.

375. *Id.*

376. *Id.*

377. *Id.* at 222–23.

378. *Id.* at 223.

379. Collins v. Kentucky, 234 U.S. 634, 638 (1914).

380. Am. Seeding Mach. Co. v. Kentucky, 236 U.S. 660, 661–62 (1915).

potential criminal actor should act, it was likewise impossible for him to comply with the statute.

Lanzetta v. New Jersey falls into this category as well. Again, the Court there voided a statute that declared it a crime to be a member of a "gang consisting of two or more persons," while having at least three prior criminal convictions if "not engaged in any lawful occupation."[381] The Court observed that the word "gang" was not self-defining, and that it could be used to refer to any group of two or more people, even those not suspected of doing anything unlawful.[382] Thus, it is easy to see why such a statute violates a due process constraint on compelling the impossible: without knowing what other facts made one a "gang" member, in order to ensure compliance with the statute, any unemployed person with three or more prior convictions would have to avoid associating with anyone. Even worse, known membership in a gang might refer to a person's associations with others before the statute was even enacted, rendering compliance totally impossible.

On the other hand, if indefinitely worded language referred to facts that were ascertainable by the actor, the statute was not vague because the actor could ascertain those facts and act consistently with them. Typically, those facts were deemed knowable if they were set by an industry or other community.[383] For example, in *Omaechevarria v. Idaho*,[384] the Court upheld a statute that forbade anyone causing their sheep to be "herded, grazed or pastured . . . upon any range usually occupied by any cattle grower."[385] The Court held that "range" and "usual" were not unconstitutionally uncertain because "[m]en familiar with range conditions . . . will have little difficulty in determining what is prohibited."[386] Likewise, those in the trucking industry could be required to ascertain the "shortest practicable route" between two points because of the "common usage and understanding" of those words in the industry.[387] And those in the meat processing trade could determine whether a product was "kosher," for that term had "a meaning well enough

381. Lanzetta v. New Jersey, 306 U.S. 451, 452, 458 (1939) (quoting 1934 N.J. LAWS 394, 394).

382. *Id.* at 453, 457.

383. LAFAVE & SCOTT, *supra* note 245, at § 11, at 85 ("[I]f a penal statute is addressed to those in a particular trade or business, it is sufficient if the terms used have a meaning well enough defined to enable one engaged in that trade or business to apply it correctly."); Decker, *supra* note 5, at 298 ("Sometimes, a court in attempting to determine the precise meaning of a statute will look to the way that a term or phrase is commonly understood in a discrete group, trade, profession, or geographical area."); Goldsmith, *supra* note 40, at 298 ("The Court has looked to the meaning of language in technical and professional fields to determine its specific meaning in criminal statutes."); Joseph Bounds Morris, Note, *Invalidity of Criminal Statute for Vagueness*, 26 TEXAS L. REV. 216, 218 (1947) ("The Supreme Court has recognized some special situations where men in a particular field or industry would be able to ascertain what conduct is prohibited . . . .").

384. 246 U.S. 343 (1918).

385. *Id.* at 345 n.3 (quoting Revised Codes of Idaho, 1908, § 6872).

386. *Id.* at 348; *see* Decker, *supra* note 5, at 299 (discussing *Omaechevarria*).

387. Sproles v. Binford, 286 U.S. 374, 393 (1932).

defined to enable one engaged in the trade to correctly apply it."[388] Common knowledge within a community was also key to upholding the statute in *United States v. Mazurie*,[389] where the Court determined that a statutory reference to "non-Indian communities" was "sufficiently precise" for those intimately familiar with the communities in question.[390]

All of these cases involve statutory uncertainty. But where actors could "use . . . common experience as a glossary,"[391] they were capable of understanding a statute sufficiently to comply with it. Where statutory standards of conduct were based on unknowable facts, on the other hand, compliance was impossible.

2. Statutes Requiring Actors to Conform Their Conduct to Normative Standards.—Many of the statutes that have been challenged as vague in the Supreme Court require conformity to normative standards rather than objective facts. In these cases, where the standards are those of the community, the actor is capable of ascertaining and complying with those standards, and typically the statute will be deemed not vague. It is only where a statute requires conformity with subjective standards set by and known only to other individuals that the actor is incapable of complying, and a statute will be deemed vague.

A number of cases involve statutes that compel compliance with the idiosyncratic normative standards of others. *Coates v. City of Cincinnati*, which has already been mentioned,[392] is a good example. In *Coates*, the Court struck down a city ordinance that made it a criminal offense for "three or more persons to assemble" on a city sidewalk "and there conduct themselves in a manner annoying to persons passing by."[393] Because the most sensitive among us could be "annoy[ed]" by the most trivial conduct—wearing argyle socks with sandals, for example—it would be impossible for anyone to comply with this statute other than by staying home or by meeting no more than one other individual on the sidewalk. While these are both technically possible, they are no more practicable than ridding oneself of all kitchen knives, toxic cleansers, and blunt objects. Thus, the Court correctly voided the statute.[394]

388. Hygrade Provision Co. v. Sherman, 266 U.S. 497, 502 (1925); *see also* United States v. Petrillo, 332 U.S. 1, 5–8 (1947) (stating that the "number of employees needed by" broadcasting company could be ascertained "when measured by common understanding and practices" in the industry (quoting 47 U.S.C. § 506(a)(1))).

389. 419 U.S. 544 (1975).

390. *Id.* at 553 & n.19.

391. Sproles v. Binford, 236 U.S. 374, 393 (1932).

392. *See supra* text accompanying notes 90–92.

393. Coates v. City of Cincinnati, 402 U.S. 611, 611 (1971) (quoting CINCINNATI, OHIO, CODE OF ORDINANCES § 901-L6 (1956)).

394. *Id.*

Likewise, the statute in *Kolender v. Lawson*,[395] made it a crime to fail to provide "'credible and reliable' identification when requested by a police officer who has reasonable suspicion of criminal activity."[396] The Court held the statute void for vagueness because whether an identification was "reliable" was completely subject to the judgment of the police officer.[397] Although the Court emphasized the unbridled discretion in the hands of the police officer,[398] an equally plausible explanation is that the statute violated due process because an individual cannot possibly comply with a command to provide "reliable" information when another person is the sole judge of what is deemed "reliable." And given the problems with the undue discretion/ delegation rationale of the void-for-vagueness doctrine,[399] this equally plausible approach is actually preferable.

This rationale also explains the one nineteenth-century case that Justice Gorsuch identified in his separate opinion in *Sessions v. Dimaya* that involved a true instance of a court voiding a statute on vagueness grounds: *Ex parte Jackson*.[400] Recall that the court there voided a statute making it a crime "to 'commit any act injurious to the . . . public morals,'" on the ground that it hinged "[c]riminality . . . upon the moral idiosyncrasies of the individuals who compose the court and jury." [401] Such a statute is much like the ordinance voided in *Coates* in that both leave the potential criminal actor in a state of near paralysis, virtually unable to do anything lest she commit some trivial "act injurious to the public morals."[402] Thus, although explained in terms of vagueness, *Jackson* is equally explicable as a case about impossibility.

On the other hand, as with objective facts ascertainable within particular communities or industries, normative standards may often be so ascertained. The most obvious examples of statutes requiring actors to ascertain normative standards of the community are those involved in cases such as *Nash v. United States*, upholding a prohibition on restraints of trade that "unduly restrict[ed] competition or unduly obstruct[ed] the course of trade,"[403] and *Edgar A. Levy Leasing Co. v. Siegel*,[404] validating a rent control law forbidding "unjust or unreasonable" rent and "oppressive" rental

395. 461 U.S. 352 (1983).

396. *Id.* at 356 (quoting People v. Solomon, 33 Cal. App. 3d 429 (1973)). This was not the wording of the statute but of a state court construction thereof that the Court deemed authoritative. *Id.* at 355–56 & n.4.

397. *Id.* at 358–60.

398. *Id.* at 358.

399. *See supra* subpart II(C) and section II(D)(2)

400. *See supra* text accompanying notes 218–22.

401. *Ex parte* Jackson, 45 Ark. 158, 164 (1885) (quoting Ark. Rev. Stat. chap. 44, § 7).

402. *Id.* (emphasis removed).

403. 229 U.S. 373, 376 (1913) (citing United States v. Am. Tobacco Co., 221 U.S. 106, 179 (1911)).

404. 258 U.S. 242 (1922).

agreements.[405] Indeed, given the number of instances in which the law requires people to act "reasonably," such language could not be declared unduly vague without causing havoc. As Justice Holmes put it in *Nash*, "the law is full of instances where a man's fate depends on his estimating rightly, that is, as a jury subsequently estimates it, some matter of degree."[406] And yet vague standards of reasonableness that govern our everyday activity do not paralyze us from acting at all. Because we are immersed in societal norms that we internalize, we are capable, generally speaking, of acting in conformity with those norms. It is only when those norms are created entirely by others in an ad hoc, idiosyncratic fashion that compliance with them is impossible.

E. Papachristou *and Statutes Criminalizing Status*

An implicit due process constraint against requiring the impossible also helps explain one "vagueness" case that is difficult to explain on vagueness grounds alone: *Papachristou v. City of Jacksonville*. There, the Court struck down a vagrancy ordinance that provided:

> Rogues and vagabonds, or dissolute persons who go about begging, common gamblers, persons who use juggling or unlawful games or plays, common drunkards, common night walkers, thieves, pilferers or pickpockets, traders in stolen property, lewd, wanton and lascivious persons, keepers of gambling places, common railers and brawlers, persons wandering or strolling around from place to place without any lawful purpose or object, habitual loafers, disorderly persons, persons neglecting all lawful business and habitually spending their time by frequenting houses of ill fame, gaming houses, or places where alcoholic beverages are sold or served, persons able to work but habitually living upon the earnings of their wives or minor children shall be deemed [guilty of a misdemeanor].[407]

The nine defendants in the case had been charged with violating the ordinance in different ways: four with "prowling by auto,"[408] two with being "vagabonds,"[409] two each with being "a common thief,"[410] and one with "disorderly loitering" and resisting arrest.[411]

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405. *Id.* at 249–50 (quoting 1920 N.Y. LAWS 2480). These cases are discussed *supra* text accompanying notes 72–79.

406. *Nash*, 229 U.S. at 377; *see also* Parker v. Levy, 417 U.S. 733, 738, 746–47 (1974) (military penal standards of "conduct unbecoming an officer and a gentleman" and "disorders and neglects to the prejudice of good order and discipline" held not vague where it incorporated standard of conduct established by custom of the military (quoting 10 U.S.C. §§ 933, 934)).

407. Papachristou v. City of Jacksonville, 405 U.S. 156, 156 n.1 (1972) (quoting JACKSONVILLE ORDINANCE CODE § 26-57).

408. *Id.* at 158.

409. *Id.*

410. *Id.*

411. *Id.*

Although the Court declared the ordinance void for vagueness,[412] the Court never homed in on precisely what language was indefinite. Moreover, for some of the defendants in the case, vagueness was the least of the problems with the prosecution against them. "Prowling by auto," for example, was not even an activity forbidden by the statute.[413] Moreover, some of the terms of the statute—"thieves . . . pickpockets, traders in stolen property," for example—were perfectly clear.[414]

But *Papachristou* can best be understood as the culmination of a series of cases over two decades in which Justices Black and (particularly) Douglas sought to strike down vagrancy laws on the ground that they criminalize status. In *Edelman v. California*,[415] Justice Black, joined by Justice Douglas, dissented from the nonmerits dismissal of a case challenging California's vagrancy statute, which made it a crime to be an "idle, or lewd, or dissolute person, or associate of known thieves."[416] They concluded that the statute was "too vague to meet the safeguarding standards of due process of law."[417] But their real qualm with the law was its criminalization of poverty. They complained that the trial court had instructed the jury that the "dissoluteness" provision referred to the defendant's "being a person of 'a certain status' [and] 'in a certain condition,'" and that "[h]is character . . . is the ultimate question for [them] to decide."[418]

Similarly, in *Hicks v. District of Columbia*,[419] Justice Douglas, writing only for himself, dissented from the nonmerits dismissal of a case challenging the District's vagrancy ordinance.[420] The ordinance there made it a crime to "lead[] an immoral or profligate life [and have] no lawful employment and . . . no lawful means of support."[421] As Justice Black did in *Edelman*, Justice Douglas in *Hicks* concluded that the ordinance "lack[ed] the specificity that due process of law requires."[422] Presumably, this reasoning applied only to the words "immoral" and "profligate." However, Justice Douglas then went further and denounced the ordinance as "an attempt by the Government to regulate the *status* of being a vagrant."[423] He issued a

412. *Id.* at 162 ("This ordinance is void for vagueness, both in the sense that it fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute and because it encourages arbitrary and erratic arrests and convictions." (internal quotation marks omitted) (citations omitted)).

413. *Id.* at 168 n.11; Low & Johnson, *supra* note 258, at 2083.

414. Alfred Hill, *Vagueness and Police Discretion: The Supreme Court in a Bog*, 51 RUTGERS L. REV. 1289, 1308 (1999).

415. 344 U.S. 357 (1953).

416. *Id.* at 364 (Black, J., dissenting) (quoting Cal. Penal Code § 647(5)).

417. *Id.* at 366.

418. *Id.* at 364–65.

419. 383 U.S. 252 (1966).

420. *Id.* at 253–54 (Douglas, J., dissenting).

421. *Id.* (quoting D.C. CODE § 22-3302(3) (1965)).

422. *Id.* at 254.

423. *Id.* at 254–55.

broadside against vagrancy statutes, declaring: "I do not see how economic or social status can be made a crime any more than being a drug addict can be."[424] And between *Edelman* and *Hicks*, Justice Douglas had previously outlined these arguments in a law review article.[425] In this fourteen-page polemic against vagrancy statutes, the word "vague" appears but once.[426]

The *Edelman* and *Hicks* dissents, and Justice Douglas's *Yale Law Journal* piece, set the stage for him in *Papachristou*, this time speaking for the Court, to declare vagrancy statutes unconstitutional. But the root of the problem with these statutes was not that they were vague.[427] Seen in the light shed by the dissenting opinions in *Edelman* and *Hicks*, the real problem with the vagrancy ordinance in *Papachristou* was that it criminalized status.[428]

Yet it should not surprise us that the *Papachristou* Court relied upon the ill-fitting void-for-vagueness doctrine to forbid the criminalization of status. After all, the criminalization of status violates due process for the same reason that supposedly vague statutes do: in ordering that the poverty-stricken no longer be poor or that the drug-addicted not be sick, they attempt to compel the impossible. Indeed, criminalizing status such as poverty, homelessness, unemployment, or drug addiction is the quintessence of compelling the impossible, so it is little wonder that the Supreme Court and lower courts have voided such statutes.[429] While the courts have identified the Eighth Amendment as the home for this right, that is a highly dubious proposition, given that that provision addresses the constitutionality of

424. *Id.* at 257 (citing Robinson v. California, 370 U.S. 660, 668 (1962) (Douglas, J., concurring)).

425. William O. Douglas, *Vagrancy and Arrest on Suspicion*, 70 YALE L.J. 1 (1960).

426. *Id.* at 7 ("One who thumbs through these vagrancy statutes may often wonder whether, apart from everything else, some of the provisions are too vague to satisfy constitutional tests.").

427. *See* Binder & Fissell, *supra* note 26, at 116 ("It seems that for Douglas, at least, vagueness was not his most fundamental objection to vagrancy laws."); Post, *supra* note 85, at 496 (asserting that the "characterization of the ordinance [as vague] was plainly inaccurate").

428. *See* Binder & Fissell, *supra* note 26, at 115 (observing that the convictions in *Papachristou* "might have been overturned on Eighth Amendment grounds as status offenses"); Decker, *supra* note 5, at 340–41 (characterizing *Papachristou* as a case about criminalizing status); Hill, *supra* note 414, at 1308 (observing that the fundamental constitutional infirmity with vagrancy laws is that they "criminalized status as such"); Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 601 (1997) ("[T]he majority of the provisions in Jacksonville's vagrancy ordinance could have been invalidated simply upon the authority of *Robinson v. California* . . . ."); Low & Johnson, *supra* note 258, at 2083 (observing that at least three of the eight *Papachristou* defendants were convicted of status offenses).

429. *See, e.g.*, Robinson v. California, 370 U.S. 660, 667 (1962) (holding unconstitutional a law criminalizing drug addiction); Martin v. City of Boise, 920 F.3d 584, 615 (9th Cir.) (holding unconstitutional a law prohibiting sleeping outside as applied to "homeless individuals with no access to alternative shelter"), *cert. denied*, 140 S. Ct. 674 (2019). It is also telling that in *Hicks*, Justice Douglas cited his concurring opinion in *Robinson*.

punishments for crimes, not whether certain things can be made criminal at all.[430] The better answer lies in Coke's ancient dictum.

F. The Supreme Court's Wrong Turns

Viewing the Supreme Court's void-for-vagueness jurisprudence through the lens of a due process constraint on compelling the impossible explains some but, unfortunately, not all of the Court's cases. Without pretense of exhausting all of the cases in which the Court has made wrong turns, two areas warrant particular attention.

First, as noted above,[431] the Court in the 1920s struck down a number of statutes in the realm of economic regulation that made it a crime to charge an "unjust or unreasonable rate" for certain commodities,[432] or, similarly, to obtain other than "reasonable profit[s]" on some goods or services via a restraint on trade.[433] These statutes, while indefinite, rely on standards set by particular industries. For a firm to comply with them, it need not shut down production completely. It need only give the statutes a wide berth by charging only those rates or taking only those profits that are in line with industry standards (or, in the latter case, by not engaging in any restraint on trade). Viewed as cases on impossibility, they were wrongly decided, as were many from the *Lochner* era that struck down economic regulation on various grounds.[434] Happily, these early cases are generally viewed today as "effectively defunct."[435]

But some of the Court's more recent cases are also questionable on an impossibility-based view. *City of Chicago v. Morales* appears to have been incorrectly decided on this view, given that one could be guilty of violating the ordinance there only if one disobeyed a police order to disperse.[436] True, a simple proscription against "remain[ing] in one place with no apparent

430. *See* Michael J. Zydney Mannheimer, *When the Federal Death Penalty Is "Cruel and Unusual*,*"* 74 U. CIN. L. REV. 819, 836 n.89 (2006) (asserting that the right recognized in *Robinson* "sounds purely in due process"); *see also* Herbert L. Packer, Comment, *Making the Punishment Fit the Crime*, 77 HARV. L. REV. 1071, 1071 (1964) (questioning whether *Robinson* was rightly decided as an Eighth Amendment matter).

431. *See supra* text accompanying notes 66–71.

432. A.B. Small Co. v. Am. Sugar Ref. Co., 267 U.S. 233, 239 (1925); United States v. L. Cohen Grocery Co., 255 U.S. 81, 89 (1921); Weeds, Inc. v. United States, 255 U.S. 109, 111 (1921); Oglesby Grocery Co. v. United States, 255 U.S. 108, 108–09 (1921); Kinnane v. Detroit Creamery Co., 255 U.S. 102, 104 (1921); Tedrow v. A.T. Lewis & Son Dry Goods Co., 255 U.S. 98, 99 (1921).

433. Cline v. Frink Dairy Co., 274 U.S. 445, 456–58 (1927).

434. *See* Post, *supra* note 85, at 502 ("It should not be surprising . . . that the Court would be reluctant to require individuals to internalize and apply either norms of 'common social duty' or imperatives of bureaucratic social policy at precisely the moment when its constitutional theory dictated that individuals should be most freely expressing their essential autonomous personality.").

435. Sohoni, *supra* note 1, at 1207.

436. 527 U.S. 41, 47 (1999).

purpose"[437] would be inconsistent with due process because one's "apparent purpose" is, like the "credible and reliable" identification element in *Kolender v. Lawson*,[438] entirely dependent upon the subjective impressions of others. Thus, to require that someone have an "apparent purpose" is to compel the impossible. However, when coupled with the requirement of disobedience of a dispersal order, compliance with the statute becomes possible. Thus, the dissenters in *Morales* were correct, but for a subtly different reason.[439]

Also troubling are the Court's recent decisions in *Johnson v. United States* and *Sessions v. Dimaya*.[440] Again, in *Johnson*, the Court struck down a provision enhancing a federal sentence if the defendant had engaged in three or more "violent felon[ies]."[441] *Dimaya* voided a statute that hinged certain deportation consequences on an alien having committed a felony that was a "crime of violence."[442] Both of these terms were defined in similar, indefinite ways that led the Court to void them on vagueness grounds. Looked at through the lens of impossibility, these cases were wrongly decided. For an alien to avoid virtually automatic deportation, and for a federal felon to avoid being sentenced as a recidivist, he need not do the impossible. Even pursuant to these admittedly imprecisely worded statutes, he need only refrain from committing a felony or, at the least, refrain from committing a felony that could possibly be considered to engender a serious or substantial risk of force against, or injury to, another. Or, in Johnson's case, having already committed several felonies that could be characterized in those ways, he need only have refrained from committing another federal felony. Indeed, as Justice Alito pointed out in his *Johnson* dissent, a sentencing provision is an odd subject of a void-for-vagueness challenge, as "[d]ue process does not require . . . that a 'prospective criminal' be able to calculate the precise penalty that a conviction would bring."[443]

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437. *Id.* at 47 n.2 (quoting GANG CONGREGATION ORDINANCE, CHICAGO MUNICIPAL CODE § 8-4-015 (1992)).

438. 461 U.S. 352, 355–56 (1983) (quoting People v. Solomon, 33 Cal. App. 3d 429 (1973)).

439. *See Morales*, 527 U.S. at 90 (Scalia, J., dissenting) (observing that, because of the requirement of "refusal to obey a dispersal order, . . . there is no doubt of adequate notice of the prohibited conduct"); *id.* at 112 (Thomas, J., dissenting) ("There is nothing 'vague' about an order to disperse."); *cf. id.* at 69 (Kennedy, J., concurring in part and concurring in the judgment) (declining to join portion of plurality opinion on lack of notice but opining that "[t]he predicate of an order to disperse is not . . . sufficient to eliminate doubts regarding the adequacy of notice under this ordinance"). Professor (now Judge) Livingston pointed to this aspect of the Chicago ordinance as a way to blunt the excessive delegation problem. Livingston, *supra* note 245, at 184–85.

440. For a discussion of these cases, see *supra* text accompanying notes 51–62.

441. Johnson v. United States, 135 S. Ct. 2551, 2555–57 (2015).

442. Sessions v. Dimaya, 138 S. Ct. 1204, 1210–11 (2018) (quoting 18 U.S.C. § 16(b)).

443. *Johnson*, 135 S. Ct. at 2577 (Alito, J., dissenting); *cf.* Beckles v. United States, 137 S. Ct. 886, 892 (2017) (holding that sentencing guidelines that "merely guide the exercise of a court's discretion in choosing an appropriate sentence within the statutory range . . . are not subject to a vagueness challenge under the Due Process Clause"); Low & Johnson, *supra* note 258, at 2112–13

Granted, the nondelegation concerns expressed by the Court in both cases are considerable. The shift of basic policymaking power from the legislative branch to the executive that has occurred, and the adverse effects of this shift, particularly in criminal matters, are well documented. But one way to address those problems is through a robust use of the sub-constitutional rule of lenity—reading these uncertain statutes narrowly to protect the rights of potential defendants to notice, curb abusive executive action, and encourage legislatures to write statutes more precisely. Another way is to address improper delegation head-on, perhaps through a reinvigorated nondelegation norm generally applicable at the federal level,[444] and the development of a similar norm under the auspices of the Fourteenth Amendment's Due Process Clause at the state level. Pursuant to such norms, perhaps *Johnson* and *Dimaya* were correctly decided. But then the void-for-vagueness doctrine is being misused as a device to pick up the slack for a desiccated nondelegation doctrine.[445] The indefiniteness of the language used in the statutes addressed in those cases is only a symptom of a larger systemic problem that cannot be cured through palliatives like the void-for-vagueness doctrine.

Conclusion

The Supreme Court's instincts in *International Harvester Co. v. Kentucky* were correct. A statute that requires people to surmise what the price of a commodity would be under ideal market conditions, with no imperfections in the market, demands the impossible. For the state to compel the impossible violates an essential element of due process of law, as Coke and Blackstone both recognized. Unfortunately, the Supreme Court soon conflated that which is impossible to perform with that which is merely difficult to understand and began striking down statutes that required actors

(distinguishing between statutes that fix sentences and those that merely guide individual sentencing decisions).

444. The nondelegation doctrine has been essentially moribund since 1935. *See* Gundy v. United States, 139 S. Ct. 2116, 2129 (2019) (plurality opinion) ("Only twice in this country's history (and that in a single year) have we found a delegation excessive—in each case because Congress had failed to articulate *any* policy or standard to confine discretion." (internal quotation marks omitted) (citing A. L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) and Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935))). However, four Justices have recently indicated a willingness to revivify the doctrine. *See id.* at 2131 (Alito, J., concurring in the judgment) ("If a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort."); *id.* at 2133–42 (Gorsuch, J., joined by Roberts, C.J., and Thomas, J., dissenting) (urging a return to a more robust form of the doctrine). Justice Kavanaugh did not participate in the decision of the case, *see id.* at 2130, but he has recently suggested his agreement with Justice Gorsuch's dissenting opinion in *Gundy*. *See* Paul v. United States, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., respecting denial of certiorari) ("Justice Gorsuch's thoughtful *Gundy* opinion raised important points that may warrant further consideration in future cases.").

445. *Cf. Gundy*, 139 S. Ct. at 2142 (Gorsuch, J., dissenting) ("[I]t seems little coincidence that our void-for-vagueness cases became much more common soon after the Court began relaxing its approach to legislative delegations.").

merely to ascertain reasonable standards of conduct in their industries and communities. The Court began focusing on the wrong characteristics of indefinite statutes: that they provided less-than-optimal notice of what was criminal and delegated to police and prosecutors excessive discretion in determining who the lawbreakers are. The Court should have instead focused on whether the statute at issue could be complied with, even by giving it a wide berth, or whether compliance was impossible.

Fortunately, there is significant overlap between the void-for-vagueness doctrine as it has developed and what it could have been: a jurisprudence centered around impossibility of compliance. Thus, much of the Court's precedents in this area can be salvaged. But the Court should return to the roots of its jurisprudence, *International Harvester*, and recognize that what it has mislabeled "vagueness" is more accurately described as a problem of impossibility. The idea that no sovereign, even in a republic, can demand the impossible not only jibes with generally shared notions of fairness but it also has an impressive pedigree. It is likely the fact that the proposition is so obvious, not that it is controversial, that explains why it has been overlooked in explaining and justifying what has become the void-for-vagueness doctrine.