[***102] *13 L. Ed. 2d 471, 85 S. Ct. 453 (1965)* (rejecting vagueness challenge to the dispersal-order prong of a breach-of-the-peace statute and describing that prong as "narrow and specific").

> 9 I call it a "suggestion" because the plurality says only that the terms of the dispersal order "compound the inadequacy of the notice," and acknowledges that they "might not render the ordinance unconstitutionally vague if the definition of the forbidden conduct were clear." *Ante*, at 15, 16. This notion that a prescription ("Disperse!") which is itself not unconstitutionally vague can somehow contribute to the unconstitutional vagueness of the entire scheme is full of mystery -- suspending, as it does, the metaphysical principle that nothing can confer what it does not possess (*nemo dat qui non habet*).

For its determination of unconstitutional vagueness, the Court relies secondarily -- and JUSTICE O'CONNOR's and JUSTICE BREYER's concurrences exclusively -- upon the second aspect of that doctrine, which requires sufficient specificity to prevent arbitrary and discriminatory law enforcement. See *ante*, at 16 (majority opinion); *ante*, at 2 (O'CONNOR, J., concurring in part and concurring in judgment); *ante*, at 3 (BREYER, J., concurring in part and concurring in judgment). In discussing whether Chicago's Ordinance meets that requirement, the Justices in the majority hide behind an artificial construct of judicial restraint. They point to the Supreme Court of Illinois' statement that the "apparent purpose" standard "provides absolute discretion to police officers to decide what activities constitute loitering," *177 Ill. 2d 440, 687 N.E.2d 53, 63, 227 Ill. Dec. 130 (1997)*, and protest that it would be wrong to construe the language of the Ordinance more narrowly than did the State's highest court. *Ante*, at 17, 19 [*92] (majority opinion); *ante*, at 4-5 (O'CONNOR, J., concurring in part and concurring in judgment). The "absolute discretion" statement, however, is nothing more than the Illinois Supreme Court's *characterization* of what the language achieved -- after that court refused (as I do) to read in any limitations that the words do not fairly contain. It is not a construction of the language (to which we are bound) but a legal conclusion (to which we most assuredly are not bound).

The criteria for issuance of a dispersal order under the Chicago Ordinance could hardly be clearer. First, the law requires police officers to "reasonably believe" that one of the group to which the order is issued is a "criminal street gang member." This resembles a probable-cause standard, and the Chicago Police Department's General Order 92-4 (1992) -- promulgated to govern enforcement of the Ordinance -- makes the probable cause requirement explicit. [10] Under the Order, officers must have probable cause to believe that an individual is a member of a criminal street gang, to be substantiated by the officer's "experience and knowledge of the alleged offenders" and by "specific, documented and reliable information" such as reliable witness testimony or an individual's admission of gang membership or display of distinctive colors, tattoos, signs, or other markings worn by members of particular criminal street gangs. App. to Pet. for Cert. 67a-69a, 71a-72a.

> 10 "Administrative interpretation and implementation of a regulation are . . . highly relevant to our [vagueness] analysis, for 'in evaluating a facial challenge to a state law, a federal court must . . . consider any limiting construction that a state court *or enforcement agency* has proffered.'" *Ward v. Rock Against Racism, 491 U.S. 781, 795-796, 105 L. Ed. 2d 661, 109 S. Ct. 2746 (1989)* (emphasis added) (quoting *Hoffman Estates, 455 U.S. at 494, n. 5*). See also *Hoffman Estates, 455 U.S. at 504* (administrative regulations "will often suffice to clarify a standard with an otherwise uncertain scope").

Second, the Ordinance requires that the group be "remaining in one place with no apparent purpose." JUSTICE O'CONNOR's assertion that this applies to "any person standing [*93] in a public place," *ante*, at 2, is a distortion. [***103] The Ordinance does not apply to "standing," but to "remaining" -- a term which in this context obviously means "[to] endure or persist," see American Heritage Dictionary 1525 (1992). There may be some ambiguity at the margin, but "remaining in one place" requires more than a temporary [**1877] stop, and is clear in most of its applications, including all of those represented by the facts surrounding the respondents' arrests described *supra, at 12*.

As for the phrase "with no apparent purpose": JUSTICE O'CONNOR again distorts this adjectival phrase, by separating it from the word that it modifies. "Any person standing on the street," her concurrence says, "has a general 'purpose' -- even if it is simply to stand," and thus "the ordinance permits police officers to choose which purposes are *permissible*." *Ante*, at 2. But Chicago police officers enforcing the Ordinance are not looking for people with no apparent purpose (who are regrettably in oversupply); they are looking for people who "remain in any one place with no apparent purpose" -- that is, who remain there without any apparent reason *for remaining there*. That is not difficult to perceive. [11]

> 11 JUSTICE BREYER asserts that "one always has some apparent purpose," so that the policeman must "interpret the words 'no apparent

> purpose' as meaning 'no apparent purpose except for . . . .'" *Ante*, at 1-2. It is simply not true that "one always has some apparent purpose" -- and especially not true that one always has some apparent purpose in remaining at rest, for the simple reason that one often (indeed, perhaps usually) has no *actual* purpose in remaining at rest. Remaining at rest will be a person's normal state, unless he has a purpose which causes him to move. That is why one frequently reads of a person's "wandering aimlessly" (which is worthy of note) but not of a person's "sitting aimlessly" (which is not remarkable at all). And that is why a synonym for "purpose" is "motive": that which causes one *to move*.

The Court's attempt to demonstrate the vagueness of the Ordinance produces the following peculiar statement: "The 'no apparent purpose' standard for making [the decision to [*94] issue an order to disperse] is inherently subjective because its application depends on whether some purpose is 'apparent' to the officer on the scene." *Ante*, at 18. In the Court's view, a person's lack of any purpose in staying in one location is presumably an *objective* factor, and what the Ordinance requires as a condition of an order to disperse -- the absence of any *apparent* purpose -- is a *subjective* factor. This side of the looking glass, just the opposite is true.

Elsewhere, of course, the Court acknowledges the clear, objective commands of the Ordinance, and indeed relies upon them to paint it as unfair:

"By its very terms, the ordinance encompasses a great deal of harmless behavior. In any public place in the city of Chicago, persons who stand or sit in the company of a gang member may be ordered to disperse unless their purpose is apparent. The mandatory language in the enactment directs the police to issue an order without first making any inquiry about their possible purposes. It matters not whether the reason that a gang member and his father, for example, might loiter near Wrigley Field is to rob an unsuspecting fan or just to get a glimpse of Sammy Sosa leaving the ballpark; in either event, if their purpose is not apparent to a nearby police officer, she may -- indeed, she 'shall' -- order [***104] them to disperse." *Ante*, at 16.

Quite so. And the fact that this clear instruction to the officers "encompasses a great deal of harmless behavior" would be invalidating if that harmless behavior were constitutionally protected against abridgment, such as speech or the practice of religion. Remaining in one place is *not* so protected, and so (as already discussed) it is up to the citizens of Chicago -- not us -- to decide whether the trade-off is worth it.

The Court also asserts -- in apparent contradiction to the passage just quoted -- that the "apparent purpose" test is too elastic because it presumably allows police officers to treat *de minimis* "violations" as not warranting enforcement. [12] See *ante*, at 18-19. But such discretion -- and, for that matter, the potential for ultra vires action -- is no different with regard to the enforcement of this clear ordinance than it is with regard to the enforcement of all laws in our criminal-justice system. Police officers (and prosecutors, see *Bordenkircher v. Hayes, 434 U.S. 357, 364, 54 L. Ed. 2d 604, 98 S. Ct. 663 (1978)*), have broad discretion over what laws to enforce and when. As we said in *Whren v. United States, 517 U.S. 806, 818, 135 L. Ed. 2d 89, 116 S. Ct. 1769 (1996)*, "we are aware of no principle that would allow us to decide at what point a code of law becomes so expansive and so commonly violated that infraction itself can no longer be the ordinary measure of the lawfulness of enforcement."

> 12 The Court also speculates that a police officer may exercise his discretion to *enforce* the Ordinance and *direct* dispersal when (in the Court's view) the Ordinance is inapplicable -- viz., where there *is* an apparent purpose, but it is an unlawful one. See *ante*, at 18. No one in his right mind would read the phrase "without any apparent purpose" to mean anything other than "without any apparent lawful purpose." The implication that acts referred to approvingly in statutory language are "lawful" acts is routine. The Court asserts that the Illinois Supreme Court has forced it into this interpretive inanity because, since it "has not placed any limiting construction on the language in the ordinance, we must assume that the ordinance means what it says . . . ." *Ante*, at 19. But the Illinois Supreme Court did not mention this particular interpretive issue, which has nothing to do with giving the Ordinance a "limiting" interpretation, and everything to do with giving it its ordinary legal meaning.

[*95] [**1878] JUSTICE BREYER's concurrence tries to perform the impossible feat of affirming our unquestioned rule that a criminal statute that is so vague as to give constitutionally inadequate notice to *some* violators may nonetheless be enforced against those whose conduct is clearly covered, see *ante*, at 3, citing *Parker v. Levy, 417 U.S. 733, 41 L. Ed. 2d 439, 94 S. Ct. 2547 (1974)*, while at the same time asserting that a statute which "delegates too much discretion to a police officer" is invalid in *all* its applications, even where the officer uses his discretion "wisely," *ante*, at 2. But the vagueness that causes notice to be inadequate is the very same vagueness that causes "too much discretion" to be lodged in the enforcing officer. Put another way: A law that gives the policeman clear guidance in all cases gives

the public clear guidance in all cases as well. Thus, what JUSTICE BREYER gives with one hand, he takes away with the other. In his view, vague statutes that nonetheless give adequate notice to *some* violators are not unenforceable against those violators because of inadequate notice, but *are* unenforceable against them "because [***105] the policeman enjoys too much discretion in *every* case," *ibid.* This is simply contrary to our case-law, including *Parker v. Levy, supra.* [13]

13 The opinion that JUSTICE BREYER relies on, *Coates v. Cincinnati, 402 U.S. 611, 29 L. Ed. 2d 214, 91 S. Ct. 1686 (1971)*, discussed *ante*, at 3-4, did not say that the ordinance there at issue gave adequate notice but did not provide adequate standards for the police. It invalidated that ordinance *on both inadequate-notice and inadequate-enforcement-standard grounds*, because *First Amendment* rights were implicated. It is common ground, however, that the present case does not implicate the *First Amendment*, see *ante*, at 8-9 (plurality opinion); *ante*, at 3 (BREYER, J., concurring in part and concurring in judgment).

[*96] V

The plurality points out that Chicago already has several laws that reach the intimidating and unlawful gang-related conduct the Ordinance was directed at. See *ante*, at 7-8, n. 17. The problem, of course, well recognized by Chicago's City Council, is that the gang members cease their intimidating and unlawful behavior under the watchful eye of police officers, but return to it as soon as the police drive away. The only solution, the council concluded, was to clear the streets of congregations of gangs, their drug customers, and their associates.

JUSTICE O'CONNOR's concurrence proffers the same empty solace of existing laws useless for the purpose at hand, see *ante*, at 3-4, but seeks to be helpful by suggesting some measures *similar* to this ordinance that *would* be constitutional. It says that Chicago could, for example, enact a law that "directly prohibits the presence of a large collection of obviously brazen, insistent, and lawless gang members and hangers-on on the public ways, that intimidates residents." *Ibid.* (internal quotation marks omitted). (If the majority considers the present ordinance too vague, it would be fun to see what it makes of "a large collection of obviously brazen, insistent, and lawless gang members.") This prescription of the concurrence is largely a quotation from the plurality -- which itself answers the concurrence's suggestion that such a law would be helpful by pointing out that the city already "has several laws that serve this purpose." *Ante*, at 7-8, n. 17 (plurality opinion) (citing extant laws against "intimidation," "streetgang criminal drug conspiracy," and "mob action"). The problem, again, is that the intimidation and lawlessness do not occur when the police are in sight.

[*97] JUSTICE O'CONNOR's concurrence also proffers another cure: "If the ordinance applied only to persons reasonably believed to be gang members, this requirement might [**1879] have cured the ordinance's vagueness because it would have directed the manner in which the order was issued by specifying to whom the order could be issued." *Ante*, at 3 (the Court agrees that this might be a cure, see *ante*, at 18-19). But the Ordinance already specifies to whom the order can be issued: persons remaining in one place with no apparent purpose in the company of a gang member. And if "remaining in one place with no apparent purpose" is so vague as to give the police unbridled discretion in controlling the conduct of non-gang-members, it surpasses understanding how it ceases to be so vague when applied to gang members *alone*. [***106] Surely gang members cannot be decreed to be outlaws, subject to the merest whim of the police as the rest of us are not.

* * *

The fact is that the present ordinance is entirely clear in its application, cannot be violated except with full knowledge and intent, and vests no more discretion in the police than innumerable other measures authorizing police orders to preserve the public peace and safety. As suggested by their tortured analyses, and by their suggested solutions that bear no relation to the identified constitutional problem, the majority's real quarrel with the Chicago Ordinance is simply that it permits (or indeed requires) too much harmless conduct by innocent citizens to be proscribed. As JUSTICE O'CONNOR's concurrence says with disapprobation, "the ordinance applies to hundreds of thousands of persons who are *not* gang members, standing on any sidewalk or in any park, coffee shop, bar, or other location open to the public." *Ante*, at 2-3 (internal quotation marks omitted).

But in our democratic system, how much harmless conduct to proscribe is not a judgment to be made by the courts. So long as constitutionally guaranteed rights are not affected, [*98] and so long as the proscription has a rational basis, *all sorts* of perfectly harmless activity by millions of perfectly innocent people can be forbidden -- riding a motorcycle without a safety helmet, for example, starting a campfire in a national forest, or selling a safe and effective drug not yet approved by the FDA. All of these acts are entirely innocent and harmless in themselves, but because of the *risk* of harm that they entail, the freedom to engage in them has been abridged. The citizens of Chicago have decided that depriving themselves of the freedom to "hang out" with a gang member is necessary to eliminate pervasive gang crime and inti-

midation -- and that the elimination of the one is worth the deprivation of the other. This Court has no business second-guessing either the degree of necessity or the fairness of the trade.

I dissent from the judgment of the Court.

JUSTICE THOMAS, with whom THE CHIEF JUSTICE and JUSTICE SCALIA join, dissenting.

The duly elected members of the Chicago City Council enacted the ordinance at issue as part of a larger effort to prevent gangs from establishing dominion over the public streets. By invalidating Chicago's ordinance, I fear that the Court has unnecessarily sentenced law-abiding citizens to lives of terror and misery. The ordinance is not vague. "Any fool would know that a particular category of conduct would be within [its] reach." *Kolender v. Lawson, 461 U.S. 352, 370, 75 L. Ed. 2d 903, 103 S. Ct. 1855 (1983)* (White, J., dissenting). Nor does it violate the Due Process Clause. The asserted "freedom to loiter for innocent purposes," *ante*, at 9, is in no way "'deeply rooted in this Nation's history and tradition,'" *Washington v. Glucksberg, 521 U.S. 702, 721, 138 L. Ed. 2d 772, 117 S. Ct. 2258 (1997)* (citation omitted). I dissent.

I

The human costs exacted by criminal street gangs are inestimable. In many of our Nation's cities, gangs [***107] have "virtually [*99] overtaken certain neighborhoods, contributing to the economic and social decline of [**1880] these areas and causing fear and lifestyle changes among law-abiding residents." U.S. Dept. of Justice, Office of Justice Programs, Bureau of Justice Assistance, Monograph: Urban Street Gang Enforcement 3 (1997). Gangs fill the daily lives of many of our poorest and most vulnerable citizens with a terror that the Court does not give sufficient consideration, often relegating them to the status of prisoners in their own homes. See U.S. Dept. of Justice, Attorney General's Report to the President, Coordinated Approach to the Challenge of Gang Violence: A Progress Report 1 (Apr. 1996) ("From the small business owner who is literally crippled because he refuses to pay 'protection' money to the neighborhood gang, to the families who are hostages within their homes, living in neighborhoods ruled by predatory drug trafficking gangs, the harmful impact of gang violence . . . is both physically and psychologically debilitating").

The city of Chicago has suffered the devastation wrought by this national tragedy. Last year, in an effort to curb plummeting attendance, the Chicago Public Schools hired dozens of adults to escort children to school. The youngsters had become too terrified of gang violence to leave their homes alone. Martinez, Parents Paid to Walk Line Between Gangs and School, Chicago Tribune, Jan. 21, 1998, p. 1. The children's fears were not unfounded. In 1996, the Chicago Police Department estimated that there were 132 criminal street gangs in the city. Illinois Criminal Justice Information Authority, Research Bulletin: Street Gangs and Crime 4 (Sept. 1996). Between 1987 and 1994, these gangs were involved in 63,141 criminal incidents, including 21,689 nonlethal violent crimes and 894 homicides. *Id. at 4-5.* [1] Many [*100] of these criminal incidents and homicides result from gang "turf battles," which take place on the public streets and place innocent residents in grave danger. See U.S. Dept. of Justice, Office of Justice Programs National Institute of Justice, Research in brief, C. Block & R. Block, Street Gang Crime in Chicago, 1 (Dec. 1993); U.S. Dept. of Justice, Office of Juvenile Justice and Delinquency Prevention, Juvenile Justice Journal, J. Howell, Youth Gang Drug Trafficking and Homicide: Policy and Program Implications, (Dec. 1997); see also Testimony of Steven R. Wiley, Chief, Violent Crimes and Major Offenders Section, FBI, Hearing on S. 54 before the Senate Committee on the Judiciary, 105th Cong., 1st Sess., 13 (1997) ("While street gangs may specialize in entrepreneurial activities like drug-dealing, their gang-related lethal violence is more likely to grow out of turf conflicts").

1 In 1996 alone, gangs were involved in 225 homicides, which was 28 percent of the total homicides committed in the city. Chicago Police Department, Gang and Narcotic Related Violent Crime, City of Chicago: 1993-1997 (June 1998). Nationwide, law enforcement officials estimate that as many as 31,000 street gangs, with 846,000 members, exist. U.S. Dept. of Justice, Office of Justice Programs, Highlights of the 1996 National Youth Gang Survey (OJJDP Fact Sheet, No. 86, Nov. 1998).

Before enacting its ordinance, the Chicago City Council held extensive hearings on the problems of gang loitering. Concerned citizens appeared to testify poignantly as to how gangs disrupt their daily lives. Ordinary citizens like Ms. D'Ivory Gordon explained that she struggled just to walk to work:

[***108] "When I walk out my door, these guys are out there . . . .

"They watch you . . . . They know where you live. They know what time you leave, what time you come home. I am afraid of them. I have even come to the point now that I carry a meat cleaver to work with me . . . .

". . . I don't want to hurt anyone, and I don't want to be hurt. We need to clean these corners up. Clean these communities up and take it back from them." Transcript

of Proceedings before the City Council of [*101] Chicago, Committee on Police and Fire 66-67 (May 15, 1997) (hereinafter Transcript).

Eighty-eight-year-old Susan Mary Jackson echoed her sentiments, testifying, "We used to have a nice neighborhood. We don't have it anymore . . . . I am scared to go out in the daytime . . . . you can't pass because they are standing. I am afraid to go to the store. I don't go to the store because I am afraid. At my age if they look at me real hard, I be ready to holler." *Id. at 93-95*. Another long-time resident testified:

[**1881] "I have never had the terror that I feel everyday when I walk down the streets of Chicago . . . . . I have had my windows broken out. I have had guns pulled on me. I have been threatened. I get intimidated on a daily basis, and it's come to the point where I say, well, do I go out today. Do I put my ax in my briefcase. Do I walk around dressed like a bum so I am not looking rich or got any money or anything like that." *Id. at 124-125*.

Following these hearings, the council found that "criminal street gangs establish control over identifiable areas . . . by loitering in those areas and intimidating others from entering those areas." App. to Pet. for Cert. 60a-61a. It further found that the mere presence of gang members "intimidates many law abiding citizens" and "creates a justifiable fear for the safety of persons and property in the area." *Ibid.* It is the product of this democratic process -- the council's attempt to address these social ills -- that we are asked to pass judgment upon today.

II

As part of its ongoing effort to curb the deleterious effects of criminal street gangs, the citizens of Chicago sensibly decided to return to basics. The ordinance does nothing more than confirm the well-established principle that the police [*102] have the duty and the power to maintain the public peace, and, when necessary, to disperse groups of individuals who threaten it. The plurality, however, concludes that the city's commonsense effort to combat gang loitering fails constitutional scrutiny for two separate reasons -- because it infringes upon gang members' constitutional right to "loiter for innocent purposes," *ante*, at 9, and because it is vague on its face, *ante*, at 11. A majority of the Court endorses the latter conclusion. I respectfully disagree.

A

We recently reconfirmed that "our Nation's history, legal traditions, and practices . . . provide the crucial 'guideposts for responsible decisionmaking' that direct and restrain our exposition of the Due Process Clause." *Glucksberg, 521 U.S. at 721* (quoting *Moore v. East Cleveland, 431 U.S. 494, 503, 52 L. Ed. 2d 531, 97 S. Ct. 1932 (1977)* (plurality [***109] opinion)). Only laws that infringe "those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition'" offend the Due Process Clause. *Glucksberg, supra, at 720-721*.

The plurality asserts that "the freedom to loiter for innocent purposes is part of the 'liberty' protected by the *Due Process Clause of the Fourteenth Amendment*." *Ante*, at 9. Yet it acknowledges -- as it must -- that "anti-loitering ordinances have long existed in this country." *Ante*, at 9, n. 20; see also *177 Ill. 2d 440, 450, 687 N.E.2d 53, 60, 227 Ill. Dec. 130 (1997)* (case below). ("Loitering and vagrancy statutes have been utilized throughout American history in an attempt to prevent crime by removing 'undesirable persons' from public before they have the opportunity to engage in criminal activity"). In derogation of the framework we articulated only two Terms ago in *Glucksberg*, the plurality asserts that this history fails to "persuade us that the right to engage in loitering that is entirely harmless . . . is not a part of the liberty protected by the due process clause." *Ante*, at 10, [*103] n. 20. Apparently, the plurality believes it sufficient to rest on the proposition that antiloitering laws represent an anachronistic throwback to an earlier, less sophisticated, era. For example, it expresses concern that some antivagrancy laws carried the penalty of slavery. *Ibid.* But this fact is irrelevant to our analysis of whether there is a constitutional right to loiter for innocent purposes. This case does not involve an antiloitering law carrying the penalty of slavery. The law at issue in this case criminalizes the failure to disobey a police officer's order to disperse and imposes modest penalties, such as a fine of up to $ 500 and a prison sentence of up to six months.

The plurality's sweeping conclusion that this ordinance infringes upon a liberty interest protected by the *Fourteenth Amendment's Due Process Clause* withers when exposed to the relevant history: Laws prohibiting loitering and vagrancy have been a fixture of Anglo-American law at least since the time of the Norman Conquest. See generally [**1882] C. Ribton-Turner, A History of Vagrants and Vagrancy and Beggars and Begging (reprint 1972) (discussing history of English vagrancy laws); see also *Papachristou v. Jacksonville, 405 U.S. 156, 161-162, 31 L. Ed. 2d 110, 92 S. Ct. 839 (1972)* (recounting history of vagrancy laws). The American colonists enacted laws modeled upon the English vagrancy laws, and at the time of the founding, state and local governments customarily criminalized loitering and other forms of vagrancy. [2] Vagrancy laws [*104] were common in the decades preceding the ratification of the [***110] *Fourteenth Amendment*, [3] and remained on the books long after. [4]

2 See, *e.g.*, Act for the Restraint of idle and disorderly Persons (1784) (reprinted in 2 The First Laws of the State of North Carolina 508-509 (J. Cushing comp. 1984)); Act for restraining, correcting, supressing and punishing Rogues, Vagabonds, common Beggars, and other lewd, idle, dissolute, profane and disorderly Persons; and for setting them to work (reprinted in The First Laws of the State of Connecticut 206-210 (J. Cushing comp. 1982)); Act for suppressing and punishing of Rogues, Vagabonds, common Beggars and other idle, disorderly and lewd persons (1788) (reprinted in The First Laws of the Commonwealth of Massachusetts 347-349 (J. Cushing comp. 1981)); Act for better securing the payment of levies and restraint of vagrants, and for making provisions for the poor (1776) (reprinted in The First Laws of the State of Virginia 44-45 (J. Cushing comp. 1982)); Act for the better ordering of the Police of the Town of Providence, of the Work-House in said Town (1796) (reprinted in 2 The First Laws of the State of Rhode Island 362-367 (J. Cushing comp. 1983)); Act for the Promotion of Industry, and for the Suppression of Vagrants and Other Idle and Disorderly Persons (1787) (reprinted in The First Laws of the State of South Carolina, Part 2, 431-433 (J. Cushing comp. 1981)); An act for the punishment of vagabond and other idle and disorderly persons (1764) (reprinted in The First Laws of the State of Georgia 431-433 (J. Cushing comp. 1981)); Laws of the Colony of New York 4, ch. 1021 (1756); 1 Laws of the Commonwealth of Pennsylvania, ch. DLV (1767) (An Act to prevent the mischiefs arising from the increase of vagabonds, and other idle and disorderly persons, within this province); Laws of the State of Vermont, § 10 (1797).

3 See, *e.g.*, Kan. Stat. ch. 161, § 1 (1855); Ky. Rev. Stat., ch. CIV, § 1 (1852); Pa. Laws, ch. 664 § V (1853); N. Y. Rev. Stat., ch. XX, § 1 (1859); Ill. Stat., ch. 30, § CXXXVIII (1857). During the 19th century, this Court acknowledged the States' power to criminalize vagrancy on several occasions. See *Mayor of New York* v. *Miln*, 11 Peters 102, 148 (1837); *Smith v. Turner, 48 U.S. 283, 12 L. Ed. 702, 7 How. 283, 425 (1849)* (opinion of Wayne, J.); *Prigg* v. *Pennsylvania*, 16 Peters 539, 625 (1842).

4 See generally C. Tiedeman, Limitations of Police Power in the United States 116-117 (1886) ("The vagrant has been very appropriately described as the chrysalis of every species of criminal. A wanderer through the land, without home ties, idle, and without apparent means of support, what but criminality is to be expected from such a person? If vagrancy could be successfully combated . . . the infractions of the law would be reduced to a surprisingly small number; and it is not to be wondered at that an effort is so generally made to suppress vagrancy"). See also R. I. Gen. Stat., ch. 232, § 24 (1872); Ill. Rev. Stat., ch. 38, § 270 (1874); Conn. Gen. Stat., ch. 3, § 7 (1875); N. H. Gen. Laws, ch. 269, § 17 (1878); *Cal. Penal Code § 647* (1885); Ohio Rev. Stat., Tit. 1, ch. 8, §§ 6994, 6995 (1886); Colo. Rev. Stat. ch. 36, § 1362 (1891); Del. Rev. Stat., ch. 92, Vol. 12, p. 962 (1861); Ky. Stat., ch. 132, § 4758 (1894); Ill. Rev. Stat., ch. 38, § 270 (1895); Ala. Code, ch. 199 § 5628 (1897); Ariz. Rev. Stat., Tit. 17, § 599 (1901); N. Y. Crim. Code § 887 (1902); Pa. Stat. §§ 21409, 21410 (1920); Ky. Stat. § 4758-1 (1922); Ala. Code, ch. 244, § 5571 (1923); Kan. Rev. Stat. § 21-2402 (1923); Ill. Stat. Ann., 606 (1924); Ariz. Rev. Stat., ch. 111, § 4868 (1928); Cal. Penal Code, Pt. 1, Tit. 15, ch. 2, *§ 647* (1929); Pa. Stat. Ann., Tit. 18, § 2032 (Purdon 1945); Kan. Gen. Stat. Ann. *§ 21-2409* (1949); N. Y. Crim. Code § 887 (1952); Colo. Rev. Stat. Ann. § 40-8-20 (1954); *Cal. Penal Code § 647* (1953); 1 Ill. Rev. Stat., ch. 38, § 578 (1953); *Ky. Rev. Stat. § 436.520* 1953); 5 Ala. Code, Tit. 14, § 437 (1959); Pa. Stat. Ann., Tit. 18, § 2032 (Purdon 1963); *Kan. Stat. Ann. § 21-2409* (1964).

[*105] Tellingly, the plurality cites only three cases in support of the asserted right to "loiter for innocent purposes." See *ante,* at 9-10. Of those, only one -- decided more than 100 years after the ratification of the *Fourteenth Amendment* -- actually addressed the validity of a vagrancy ordinance. That case, *Papachristou, supra*, contains some dicta that can be read to support the fundamental right that the plurality asserts. [5] [**1883] However, the Court in *Papachristou* did not undertake the now-accepted analysis applied in substantive due process cases -- it did not look to tradition to [***111] define the rights protected by the Due Process Clause. In any event, a careful reading of the opinion reveals that the Court never said anything about a constitutional right. The Court's holding was that the antiquarian language employed in the vagrancy ordinance at issue was unconstitutionally vague. See *Papachristou, supra, 405 U.S. at 162-163*. Even assuming, then, that *Papachristou* was correctly decided as an original matter -- a doubtful proposition [*106] -- it does not compel the conclusion that the Constitution protects the right to loiter for innocent purposes. The plurality's contrary assertion calls to mind the warning that "the Judiciary, including this Court, is the most vulnerable and comes nearest to illegi-

timacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or even the design of the Constitution . . . . [We] should be extremely reluctant to breathe still further substantive content into the Due Process Clause so as to strike down legislation adopted by a State or city to promote its welfare." *Moore, 431 U.S. at 544* (White, J., dissenting). When "the Judiciary does so, it unavoidably pre-empts for itself another part of the governance of the country without express constitutional authority." *Ibid.*

5 The other cases upon which the plurality relies concern the entirely distinct right to interstate and international travel. See *Williams v. Fears, 179 U.S. 270, 274-275, 45 L. Ed. 186, 21 S. Ct. 128 (1900)*; *Kent v. Dulles, 357 U.S. 116, 2 L. Ed. 2d 1204, 78 S. Ct. 1113 (1958)*. The plurality claims that dicta in those cases articulating a right of free movement, see *Williams, supra, at 274*; *Kent, supra, at 125*, also supports an individual's right to "remain in a public place of his choice." Ironically, *Williams* rejected the argument that a tax on persons engaged in the business of importing out-of-state labor impeded the freedom of transit, so the precise holding in that case does not support, but undermines, the plurality's view. Similarly, the precise holding in *Kent* did not bear on a constitutional right to travel; instead, the Court held only that Congress had not authorized the Secretary of State to deny certain passports. Furthermore, the plurality's approach distorts the principle articulated in those cases, stretching it to a level of generality that permits the Court to disregard the relevant historical evidence that should guide the analysis. *Michael H. v. Gerald D., 491 U.S. 110, 127, n. 6, 105 L. Ed. 2d 91, 109 S. Ct. 2333 (1989)* (plurality opinion).

B

The Court concludes that the ordinance is also unconstitutionally vague because it fails to provide adequate standards to guide police discretion and because, in the plurality's view, it does not give residents adequate notice of how to conform their conduct to the confines of the law. I disagree on both counts.

1

At the outset, it is important to note that the ordinance does not criminalize loitering per se. Rather, it penalizes loiterers' failure to obey a police officer's order to move along. A majority of the Court believes that this scheme vests too much discretion in police officers. Nothing could be further from the truth. Far from according officers too much discretion, the ordinance merely enables police officers to fulfill one of their traditional functions. Police officers are not, and have never been, simply enforcers of the criminal law. They wear other hats -- importantly, they have long been vested with the responsibility for preserving the public peace. See, *e.g.*, O. Allen, Duties and Liabilities of Sheriffs [*107] 59 (1845) ("As the principal conservator of the peace in his county, and as the calm but irresistible minister of the law, the duty of the Sheriff is no less important than his authority is great"); E. Freund, Police Power § 86, p. 87 (1904) ("The criminal law deals with offenses after they have been committed, the police power aims to prevent them. The activity of the police for the prevention of crime is partly such as needs no special legal authority"). Nor is the idea that the police are also *peace officers* simply a quaint anachronism. In most American jurisdictions, police officers continue to be obligated, by law, to maintain the public peace. [6]

6 See, *e.g.*, *Ark. Code Ann. § 12-8-106(b)* (Supp. 1997) ("The Department of Arkansas State Police shall be conservators of the peace"); Del. Code Ann. Tit. IX, § 1902 (1989) ("All police appointed under this section shall see that the peace and good order of the State . . . be duly kept"); Ill. Comp. Stat. Ann. ch. 65, § 5 11-1-2(a) (Supp. 1998) ("Police officers in municipalities shall be conservators of the peace"); *La. Rev. Stat. Ann. § 40:1379* ("(West) Police employees . . . shall . . . keep the peace and good order"); *Mo. Rev. Stat. § 85.561* (1998) ("Members of the police department shall be conservators of the peace, and shall be active and vigilant in the preservation of good order within the city"); *N. H. Rev. Stat. Ann. § 105:3* (1990) ("All police officers are, by virtue of their appointment, constables and conservators of the peace"); *Ore. Rev. Stat. § 181.110* (1997) ("Police to preserve the peace, to enforce the law and to prevent and detect crime"); 351 Pa. Code Art. V, ch. 2, § 5.5-200 ("The Police Department . . . shall preserve the public peace, prevent and detect crime, police the streets and highways and enforce traffic statutes, ordinances and regulations relating thereto"); Texas Code Crim. Proc. Ann., Art. § 2.13 (Vernon 1977) ("It is the duty of every peace officer to preserve the peace within his jurisdiction"); *Vt. Stat. Ann., Tit. 24, § 299* (1992) ("A sheriff shall preserve the peace, and suppress, with force and strong hand, if necessary, unlawful disorder"); *Va. Code Ann. § 15.2-1704(A)* (Supp. 1998) ("The police force . . . is responsible for the prevention and detection of crime, the apprehension of criminals, the safeguard of life and property, the preservation of peace and the enforcement of

state and local laws, regulations, and ordinances").

[**1884] In their role as peace officers, the [***112] police long have had the authority and the duty to order groups of individuals who threaten the public peace to disperse. For example, the 1887 Police Manual for the City of New York provided:

[*108] "It is hereby made the duty of the Police Force at all times of day and night, and the members of such Force are hereby thereunto empowered, to especially preserve the public peace, prevent crime, detect and arrest offenders, suppress riots, mobs and insurrections, *disperse unlawful or dangerous assemblages, and assemblages which obstruct the free passage of public streets, sidewalks, parks and places.*" Manual Containing the Rules and Regulations of the Police Department of the City of New York, Rule 414 (emphasis added).

See also J. Crocker, Duties of Sheriffs, Coroners and Constables § 48, p. 33 (2d ed. rev. 1871) ("Sheriffs are, *ex officio*, conservators of the peace within their respective counties, and it is their duty, as well as that of all constables, coroners, marshals and other peace officers, to prevent every breach of the peace, and to *suppress every unlawful assembly*, affray or riot which may happen in their presence") (emphasis added). The authority to issue dispersal orders continues to play a commonplace and crucial role in police operations, particularly in urban areas. [7] Even the ABA Standards for [*109] Criminal Justice recognize that "in day-to-day police experience there are innumerable situations in which police are called upon to order people not to block the sidewalk, not to congregate in a given [***113] place, and not to 'loiter' . . . . The police may suspect the loiterer of considering engaging in some form of undesirable conduct that can be at least temporarily frustrated by ordering him or her to 'move on.'" Standard 1-3.4(d), p. 1.88, and comments (2d ed. 1980, Supp. 1986). [8]

7 For example, the following statutes provide a criminal penalty for the failure to obey a dispersal order: *Ala. Code § 13A-11-6* (1994); *Ariz. Rev. Stat. Ann. § 13-2902(A)(2)* (1989); *Ark. Code Ann. § 5-71-207(a)(6)* (1993); *Cal. Penal Code Ann. § 727* (West 1985); *Colo. Rev. Stat. Ann. § 18-9-107(b)* (1997); *Del. Code Ann., Tit. 11, § 1321* (1995); *Ga. Code Ann. § 16-11-36* (1996); Guam Code Ann., Tit. 9, § 61.10(b) (1996); *Haw. Rev. Stat. Ann. § 711-1102* (Michie 1994); *Idaho Code § 18-6410* (1997); Ill. Comp. Stat. Ann., ch. 720 § 5/25-1(e) (West 1993); *Ky. Rev. Stat. Ann. §§ 525.060, 525.160* (Baldwin 1990); Me. Rev. Stat. Ann., Tit. 17A, § 502 (1983 *Mass. Ann., Laws, ch. 269, § 2* (1992); *Mich. Comp. Laws § 750.523* (1991); *Minn. Stat. Ann. § 609.715* (West 1987); *Miss. Code Ann. § 97-35-7(1)* (1994); *Mo. Ann. Stat. § 574.060* (Vernon 1995); *Mont. Code Ann. § 45-8-102* (1997); *Nev. Rev. Stat. Ann. § 203.020* (Michie 1997); *N. H. Rev. Stat. Ann. §§ 644:1, 644:2(II)(e)* (1996); N. J. Stat. Ann. § 2C: 33-1(b) (West 1995); *N. Y. Penal Law § 240.20(6)* (McKinney 1989); *N. C. Gen. Stat. § 14-288.5(a)* (1999); *N. D. Cent. Code § 12.1-25-04* (1997); *Ohio Rev. Code Ann. § 2917.13(A)(2)* (Baldwin 1997); *Okla. Stat. Ann. Tit. 21, § 1316* (West 1983); *Ore. Rev. Stat. § 166.025(1)(e)* (1997); *18 Pa. Cons. Stat. Ann. § 5502* (1983); R. I. Gen. Laws § 11-38-2 (1994); *S. C. Code Ann. § 16-7-10(a)* (1985); *S. D. Codified Laws § 22-10-11* (1998); *Tenn. Code Ann. § 39-17-305(2)* (1997); *Tex. Penal Code Ann. § 42.03(a)(2)* (Vernon 1994); *Utah Code Ann. § 76-9-104* (1995) *V. I. Code Ann. Tit. 5, § 4022* (1997); *Vt. Stat. Ann., Tit. 13, § 901* (1998); *Va. Code Ann. § 18.2-407* (Michie 1996); *Wash. Rev. Code Ann. § 9A.84.020* (West 1988); *W. Va. Code § 61-6-1* (1997); *Wis. Stat. Ann. § 947.06(3)* (West 1982).

8 See also *Ind. Code Ann. § 36-8-3-10(a)* (1997) ("The police department shall, within the city: (1) preserve peace; (2) prevent offenses; (3) detect and arrest criminals; (4) suppress riots, mobs, and insurrections; (5) disperse unlawful and dangerous assemblages and assemblages that obstruct the free passage of public streets, sidewalks, parks, and places . . . "); *Okla. Stat. Ann., Tit. 19, § 516* (1988) ("It shall be the duty of the sheriff . . . to keep and preserve the peace of the their respective counties, and to quiet and suppress all affrays, riots and unlawful assemblies and insurrections . . . ").

[**1885] In order to perform their peace-keeping responsibilities satisfactorily, the police inevitably must exercise discretion. Indeed, by empowering them to act as peace officers, the law assumes that the police will exercise that discretion responsibly and with sound judgment. That is not to say that the law should not provide objective guidelines for the police, but simply that it cannot rigidly constrain their every action. By directing a police officer not to issue a dispersal order unless he "observes a person whom he reasonably believes to be a criminal street gang member loitering in any public place," App. to Pet. for Cert. 61a. Chicago's ordinance strikes an appropriate balance between those two extremes. Just as we trust officers to rely on their experience and expertise in order to make spur-of-the-moment determinations about amorphous legal standards such as "probable cause" [*110] and "reasonable suspicion," so we must trust them to determine whether a group of loiterers contains individuals (in

this case members of criminal street gangs) whom the city has determined threaten the public peace. See *Ornelas v. United States, 517 U.S. 690, 695, 700, 134 L. Ed. 2d 911, 116 S. Ct. 1657 (1996)* ("Articulating precisely what 'reasonable suspicion' and 'probable cause' mean is not possible. They are commonsense, nontechnical conceptions that deal with the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act . . . . Our cases have recognized that a police officer may draw inferences based on his own experience in deciding whether probable cause exists") (citations and internal quotation marks omitted). In sum, the Court's conclusion that the ordinance is impermissibly vague because it "'necessarily entrusts lawmaking to the moment-to-moment judgment of the policeman on his beat,'" *ante,* at 15, cannot be reconciled with common sense, longstanding police practice, or this Court's *Fourth Amendment* jurisprudence.

The illogic of the Court's position becomes apparent when JUSTICE STEVENS opines that the ordinance's dispersal provision "would no doubt be sufficient if the ordinance only applied to loitering that had an apparently harmful purpose or effect, or possibly if it only applied to loitering by persons reasonably believed to be criminal gang members." *Ante,* at 18-19. See also *ante*, at 4 (O'CONNOR, J., concurring in part and concurring in judgment) (endorsing Court's proposal). With respect, if the Court believes that the ordinance is vague as written, this suggestion [***114] would not cure the vagueness problem. First, although the Court has suggested that a scienter requirement may mitigate a vagueness problem "with respect to the adequacy of notice to the complainant that his conduct is proscribed," *Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 499, 71 L. Ed. 2d 362, 102 S. Ct. 1186 (1982)* (footnote omitted), the alternative proposal does not incorporate a scienter requirement. If the statute's prohibition were limited [*111] to loitering with "an apparently harmful purpose," the criminality of the conduct would continue to depend on its external appearance, rather than the loiterer's state of mind. See Black's Law Dictionary 1345 (6th ed. 1990) (scienter "is frequently used to signify the defendant's guilty knowledge"). For this reason, the proposed alternative would neither satisfy the standard suggested in *Hoffman Estates* nor serve to channel police discretion. Indeed, an ordinance that required officers to ascertain whether a group of loiterers have "an apparently harmful purpose" would require them to exercise *more* discretion, not less. Furthermore, the ordinance in its current form -- requiring the dispersal of groups that contain at least one gang member -- actually vests less discretion in the police than would a law requiring that the police disperse groups that contain *only* gang members. Currently, an officer must reasonably suspect that one individual is a member of a gang. Under the plurality's proposed law, an officer would be required to make such a determination multiple times.

In concluding that the ordinance adequately channels police discretion, I do not suggest that a police officer enforcing the Gang Congregation Ordinance will never make a mistake. Nor do I overlook the *possibility* that a police officer, acting in bad faith, might enforce the ordinance in an arbitrary or discriminatory way. But our decisions should [**1886] not turn on the proposition that such an event will be anything but rare. Instances of arbitrary or discriminatory enforcement of the ordinance, like any other law, are best addressed when (and if) they arise, rather than prophylactically through the disfavored mechanism of a facial challenge on vagueness grounds. See *United States v. Salerno, 481 U.S. 739, 745, 95 L. Ed. 2d 697, 107 S. Ct. 2095 (1987)* ("A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid"). [*112]

2

The plurality's conclusion that the ordinance "fails to give the ordinary citizen adequate notice of what is forbidden and what is permitted," *ante,* at 16, is similarly untenable. There is nothing "vague" about an order to disperse. [9] While "we can never expect mathematical certainty from our language," *Grayned v. City of Rockford, 408 U.S. 104, 110, 33 L. Ed. 2d 222, 92 S. Ct. 2294 (1972)*, it is safe to assume that [***115] the vast majority of people who are ordered by the police to "disperse and remove themselves from the area" will have little difficulty understanding how to comply. App. to Pet. for Cert. 61a.

9 The plurality suggests, *ante*, at 15, that dispersal orders are, by their nature, vague. The plurality purports to distinguish its sweeping condemnation of dispersal orders from *Colten v. Kentucky, 407 U.S. 104, 32 L. Ed. 2d 584, 92 S. Ct. 1953 (1972)*, but I see no principled ground for doing so. The logical implication of the plurality's assertion is that the police can never issue dispersal orders. For example, in the plurality's view, it is apparently unconstitutional for a police officer to ask a group of gawkers to move along in order to secure a crime scene.

Assuming that we are also obligated to consider whether the ordinance places individuals on notice of what conduct might subject them to such an order, respondents in this facial challenge bear the weighty burden of establishing that the statute is vague in all its applications, "in the sense that no standard of conduct is specified at all." *Coates v. Cincinnati, 402 U.S. 611, 614, 29*

L. Ed. 2d 214, 91 S. Ct. 1686 (1971). I subscribe to the view of retired Justice White -- "If any fool would know that a particular category of conduct would be within the reach of the statute, if there is an unmistakable core that a reasonable person would know is forbidden by the law, the enactment is not unconstitutional on its face." *Kolender, 461 U.S. at 370-371* (dissenting opinion). This is certainly such a case. As the Illinois Supreme Court recognized, "persons of ordinary intelligence may maintain a common and accepted [*113] meaning of the word 'loiter.'" *Morales*, 177 Ill. 2d at 451, 687 N.E.2d at 61.

JUSTICE STEVENS' contrary conclusion is predicated primarily on the erroneous assumption that the ordinance proscribes large amounts of constitutionally protected and/or innocent conduct. See *ante*, at 11, 13, 16-17. As already explained, *supra, at 5-9*, the ordinance does not proscribe constitutionally protected conduct -- there is no fundamental right to loiter. It is also anomalous to characterize loitering as "innocent" conduct when it has been disfavored throughout American history. When a category of conduct has been consistently criminalized, it can hardly be considered "innocent." Similarly, when a term has long been used to describe criminal conduct, the need to subject it to the "more stringent vagueness test" suggested in *Hoffman Estates, supra, at 499*, dissipates, for there is no risk of a trap for the unwary. The term "loiter" is no different from terms such as "fraud," "bribery," and "perjury." We expect people of ordinary intelligence to grasp the meaning of such legal terms despite the fact that they are arguably imprecise. [10]

> 10 For example, a 1764 Georgia law declared that "all able bodied persons . . . who shall be found loitering . . . all other idle vagrants, or disorderly persons wandering abroad without betaking themselves to some lawful employer or honest labor, shall be deemed and adjudged vagabonds," and required the apprehension of "any such vagabond . . . found within any county in this State, wandering, strolling, loitering about." (reprinted in The First Laws of the State of Georgia, Part 1, 376-377 (J. Cushing comp. 1981)). See also, *e.g.*, Digest of the Laws of Pennsylvania 829 (F. Brightly ed., 8th ed. 1853) ("The following described persons shall be liable to the penalties imposed by law upon vagrants . . . . All persons who shall . . . be found loitering"); Ky. Rev. Stat., ch. CIV, § 1, p. 69 (1852) ("If any able bodied person be found loitering or rambling about, . . . he shall be taken and adjudged to be a vagrant, and guilty of a high misdemeanor").

[**1887] The plurality also concludes that the definition of the term loiter -- "to remain in any one place with no apparent purpose," [*114] see *177 Ill. 2d at 445, 687 N.E.2d at 58* -- fails to provide [***116] adequate notice. [11] "It is difficult to imagine," the plurality posits, "how any citizen of the city of Chicago standing in a public place . . . would know if he or she had an 'apparent purpose.'" *Ante*, at 12-13. The plurality underestimates the intellectual capacity of the citizens of Chicago. Persons of ordinary intelligence are perfectly capable of evaluating how outsiders perceive their conduct, and here "it is self-evident that there is a whole range of conduct that anyone with at least a semblance of common sense would know is [loitering] and that would be covered by the statute." See *Smith v. Goguen, 415 U.S. 566, 584, 39 L. Ed. 2d 605, 94 S. Ct. 1242 (1974)* (White, J., concurring in judgment). Members of a group standing on the corner staring blankly into space, for example, are likely well aware that passersby would conclude that they have "no apparent purpose." In any event, because this is a facial challenge, the plurality's ability to hypothesize that some individuals, in some circumstances, may be unable to ascertain how their actions appear to outsiders is irrelevant to our analysis. Here, we are asked to determine whether the ordinance is "vague in all of its applications." *Hoffman Estates, 455 U.S. at 497*. The answer is unquestionably no.

> 11 The Court asserts that we cannot second-guess the Illinois Supreme Court's conclusion that the definition "'provides absolute discretion to police officers to determine what activities constitute loitering,'" *ante,* at 17 (quoting *177 Ill. 2d 440, 457, 687 N.E.2d 53, 63, 227 Ill. Dec. 130 (1997)*. While we are bound by a state court's construction of a statute, the Illinois court "did not, strictly speaking, construe the [ordinance] in the sense of defining the meaning of a particular statutory word or phase. Rather, it merely characterized [its] 'practical effect' . . . . This assessment does not bind us." *Wisconsin v. Mitchell, 508 U.S. 476, 484, 124 L. Ed. 2d 436, 113 S. Ct. 2194 (1993)*.

* * *

Today, the Court focuses extensively on the "rights" of gang members and their companions. It can safely do so -- the people who will have to live with the consequences of [*115] today's opinion do not live in our neighborhoods. Rather, the people who will suffer from our lofty pronouncements are people like Ms. Susan Mary Jackson; people who have seen their neighborhoods literally destroyed by gangs and violence and drugs. They are good, decent people who must struggle to overcome their desperate situation, against all odds, in order to raise their families, earn a living, and remain good citizens. As one resident described, "There is only about maybe one or two percent of the people in the city

causing these problems maybe, but it's keeping 98 percent of us in our houses and off the streets and afraid to shop." Tr. 126. By focusing exclusively on the imagined "rights" of the two percent, the Court today has denied our most vulnerable citizens the very thing that JUSTICE STEVENS, *ante,* at 10, elevates above all else -- the "freedom of movement." And that is a shame. I respectfully dissent.

REFERENCES

21 Am Jur 2d, Criminal Law 17; *56 Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions 367, 368*; *77 Am Jur 2d, Vagrancy and Related Offenses 3, 7*

USCS, *Constitution, Amendment 14*

L Ed Digest, Municipal Corporations 37.7

L Ed Index, Certainty and Definiteness; Due Process; Vagrancy

Annotation References:

Supreme Court's views regarding validity of criminal disorderly conduct statutes under void-for-vagueness doctrine. *75 L Ed 2d 1049.*

Indefiniteness of language as affecting validity of criminal legislation or judicial definition of common-law crime-- Supreme Court cases. *96 L Ed 374, 16 L Ed 2d 1231.*

Validity of loitering statutes and ordinances. *25 ALR 3d 836.*

EXHIBIT "5"

LEXSEE 439 U.S. 379

COLAUTTI, SECRETARY OF WELFARE OF PENNSYLVANIA, ET AL. v. FRANKLIN ET AL.

No. 77-891

SUPREME COURT OF THE UNITED STATES

439 U.S. 379; 99 S. Ct. 675; 58 L. Ed. 2d 596; 1979 U.S. LEXIS 51

October 3, 1978, Argued
January 9, 1979, Decided

PRIOR HISTORY: APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

DISPOSITION: Affirmed.

SUMMARY:

In an action brought in the United States District Court for the Eastern District of Pennsylvania prior to the effective date of the Pennsylvania Abortion Control Act, the District Court held unconstitutional certain provisions of the Act, among others, the viability determination and standard of care provisions of 5(a) of the Act, requiring, upon pain of penal sanction for its violation, that every person performing or inducing an abortion (1) make a determination "based on his experience, judgment, or professional competence that the fetus is not viable," and (2) upon determining that a fetus "is viable or ... may be viable" to "exercise that degree of professional skill, care and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted" and to adopt that abortion technique "which would provide the best opportunity for the fetus to be aborted alive so long as a different technique would not be necessary in order to preserve the life or health of the mother" (*401 F Supp 554*). On direct appeal to the United States Supreme Court from the decision of the three-judge District Court, the Supreme Court vacated part of the District Court's judgment and remanded the case (*49 L Ed 2d 1204*). Among other things, the three-judge District Court, on remand, adhered to its original view regarding 5(a)'s unconstitutionality, and declared 5(a)'s provisions invalid on vagueness and overbreadth grounds.

On direct appeal, the United States Supreme Court affirmed. In an opinion by Blackmun, J., joined by Brennan, Stewart, Marshall, Powell, and Stevens, JJ., it was held that 5(a) of the Act was unconstitutionally vague both as to its requirement for determining viability and as to its requirement concerning standard of care.

White, J., joined by Burger, Ch. J., and Rehnquist, J., dissented on the ground that the challenged provisions of the Pennsylvania Abortion Control Act were not unconstitutionally vague.

LAWYERS' EDITION HEADNOTES:

[***LEdHN1]

ABORTION §1

STATUTES §18

vagueness -- viability determination -- standard of care for physician --

Headnote:[1A][1B][1C][1D]

A state criminal statute which requires every person performing or inducing an abortion to make a determination "based on his experience, judgment, or professional competence that the fetus is not viable," and also requires such person, if he determines that the fetus "is viable or ... may be viable" to "exercise that degree of professional skill, care and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted" and to adopt that abortion technique "which would provide the best op-

portunity for the fetus to be aborted alive so long as a different technique would not be necessary in order to preserve the life or health of the mother," is unconstitutionally vague both as to its requirement for determining viability and its requirement as to standard of care. (White, J., Burger, Ch. J., and Rehnquist, J., dissented from this holding.)

[***LEdHN2]

STATUTES §26

abortions -- penal provisions -- standing of physicians --

Headnote:[2A][2B]

Physicians who would be subject to potential criminal liability if they failed to utilize a prescribed abortion technique when a fetus was viable or when there was sufficient to believe that the fetus might be viable, as required under a state statute, have standing to challenge the constitutionality of such state statute in a federal court action, and their challenge presents a justiciable controversy.

[***LEdHN3]

ABORTION §1

state restriction -- viability of fetus -- determining state interest --

Headnote:[3]

For purposes of the rule that prior to the viability of a fetus a state may not seek to further its interest in the potential life of the fetus by directly restricting a woman's decision on terminating her pregnancy but that the state, after viability, may regulate or even prohibit abortion except where necessary, in appropriate medical judgment, to preserve the life of health of the woman carrying the fetus, "viability" is reached when, in the judgment of the physician attending the pregnant woman, there is, on the particular facts of the case before him, a reasonable likelihood of the fetus' sustained survival outside the womb, with or without artificial support; because viability may differ with each pregnancy, neither legislatures nor the courts may proclaim one of the elements entering into the ascertainment of viability--be it weeks of gestation, fetal weight, or any other single factor--as the determinant of when the state has a compelling interest in the life or health of the fetus.

[***LEdHN4]

STATUTES §18

criminal -- vagueness --

Headnote:[4]

As a matter of due process, a criminal statute which fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute, or which is so indefinite that it encourages arbitrary and erratic arrests and convictions, is void for vagueness, such being especially true where the uncertainty induced by the statute threatens to inhibit the exercise of constitutionally protected rights.

[***LEdHN5]

COURTS §757.5

Supreme Court abstention -- abortion statute -- vagueness --

Headnote:[5A][5B]

In determining the constitutionality, on vagueness grounds, of a state statute subjecting a physician who performs an abortion to potential criminal liability if he fails to utilize a statutorily prescribed technique when the fetus "is viable" or "may be viable," the United States Supreme Court will not abstain sua sponte, under the doctrine of federal court abstention, on the issue whether the phrase "may be viable" is synonomous with, or is merely intended to explicate, the meaning of the word "viable."

[***LEdHN6]

STATUTES §81

construction -- rendering part inoperative --

Headnote:[6]

A statute should be interpreted so as not to render one part inoperative.

[***LEdHN7]

STATUTES §172

interpretation -- definition declaring meaning --

Headnote:[7A][7B]

A statutory definition which declares what a term "means" excludes any meaning that is not stated.

[***LEdHN8]

ABORTION §1

state regulation -- determination of viability --

Headnote:[8]

The determination of whether a particular fetus is viable is, and must be, a matter for the judgment of the

responsible attending physician, and any state regulation that impinges upon such determination, if it is to be constitutional, must allow the attending physician the room he needs to make his best medical judgment.

[***LEdHN9]

ERROR §1262

appellees' assertions -- ground not considered below --

Headnote:[9A][9B]

Appellees, as parties prevailing in the trial court, may assert any ground in support of the trial court's judgment, whether or not that ground was relied upon or even considered by the trial court.

SYLLABUS

Section 5 (a) of the Pennsylvania Abortion Control Act requires every person who performs an abortion to make a determination, "based on his experience, judgment or professional competence," that the fetus is not viable. If such person determines that the fetus "is viable," or "if there is sufficient reason to believe that the fetus may be viable," then he must exercise the same care to preserve the fetus' life and health as would be required in the case of a fetus intended to be born alive, and must use the abortion technique providing the best opportunity for the fetus to be aborted alive, so long as a different technique is not necessary to preserve the mother's life or health. The Act, in § 5 (d), also imposes a penal sanction for a violation of § 5 (a). Appellees brought suit claiming, *inter alia*, that § 5 (a) is unconstitutionally vague, and a three-judge District Court upheld their claim. *Held*:

1. The viability-determination requirement of § 5 (a) is void for vagueness. Pp. 390-397.

(a) Though apparently the determination of whether the fetus "is viable" is to rest upon the basis of the attending physician's "experience, judgment or professional competence," it is ambiguous whether that subjective language applies to the second condition that activates the duty to the fetus, *viz.*, "sufficient reason to believe that the fetus may be viable." Pp. 391-392.

(b) The intended distinction between "is viable" and "may be viable" is elusive. Apparently those phrases refer to distinct conditions, one of which indeterminately differs from the definition of viability set forth in *Roe v. Wade, 410 U.S. 113*, and *Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52*. Pp. 392-394.

(c) The vagueness of the viability-determination requirement is compounded by the fact that § 5 (d) subjects the physician to potential criminal liability without regard to fault. Because of the absence of a scienter requirement in the provision directing the physician to determine whether the fetus is or may be viable, the Act is little more than "a trap for those who act in good faith," *United States v. Ragen, 314 U.S. 513, 524*, and the perils of strict criminal liability are particularly acute here because of the uncertainty of the viability determination itself. Pp. 394-397.

2. The standard-of-care provision is likewise impermissibly vague. It is uncertain whether the statute permits the physician to consider his duty to the patient to be paramount to his duty to the fetus, or whether it requires the physician to make a "trade-off" between the patient's health and increased chances of fetal survival. Where conflicting duties of such magnitude are involved, there must be greater statutory precision before a physician may be subjected to possible criminal sanctions. Pp. 397-401.

COUNSEL: Carol Los Mansmann, Special Assistant Attorney General of Pennsylvania, argued the cause for appellants. With her on the brief was J. Jerome Mansmann, Special Assistant Attorney General.

Roland Morris argued the cause and filed a brief for appellees.

* Burt Neuborne and Sylvia Law filed a brief for the American Public Health Assn. et al. as amici curiae urging affirmance.

Briefs of amici curiae were filed by George E. Reed and Patrick F. Geary for the United States Catholic Conference; and by Dennis J. Horan, John D. Gorby, Victor G. Rosenblum, and Dolores V. Horan for Americans United for Life, Inc.

JUDGES: BLACKMUN, J., delivered the opinion of the Court, in which BRENNAN, STEWART, MARSHALL, POWELL, and STEVENS, JJ., joined. WHITE, J., filed a dissenting opinion, in which BURGER, C. J., and REHNQUIST, J., joined, post, p. 401.

OPINION BY: BLACKMUN

OPINION

[*380] [***599] [**678] MR. JUSTICE BLACKMUN delivered the opinion of the Court.

[***LEdHR1A] [1A]At issue here is the constitutionality of subsection (a) of § 5 [1] of [***600] the Pennsylvania Abortion Control Act, 1974 Pa. Laws,

[*381] Act No. 209, Pa. Stat. Ann., Tit. 35, § 6605 (a) (Purdon 1977). This statute subjects a physician who performs an abortion to potential criminal liability if he fails to utilize a statutorily prescribed technique when the fetus "is viable" or when there is "sufficient reason to believe that the fetus may be viable." A three-judge Federal District Court [2] declared § 5 (a) unconstitutionally vague and overbroad and enjoined its enforcement. App. 239a-244a. Pursuant to *28 U. S. C. § 1253*, we noted probable jurisdiction *sub nom. Beal v. Franklin, 435 U.S. 913 (1978).*

1 Section 5 reads in pertinent part:

"(a) Every person who performs or induces an abortion shall prior thereto have made a determination based on his experience, judgment or professional competence that the fetus is not viable, and if the determination is that the fetus is viable or if there is sufficient reason to believe that the fetus may be viable, shall exercise that degree of professional skill, care and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted and the abortion technique employed shall be that which would provide the best opportunity for the fetus to be aborted alive so long as a different technique would not be necessary in order to preserve the life or health of the mother.

. . . .

"(d) Any person who fails to make the determination provided for in subsection (a) of this section, or who fails to exercise the degree of professional skill, care and diligence or to provide the abortion technique as provided for in subsection (a) of this section . . . shall be subject to such civil or criminal liability as would pertain to him had the fetus been a child who was intended to be born and not aborted."

2 The three-judge court was designated in September 1974 pursuant to *28 U. S. C. § 2281 (1970 ed.)*. This statute was repealed by Pub. L. 94-381, § 1, 90 Stat. 1119, but the repeal did not apply to any action commenced on or before August 12, 1976. § 7.

I

The Abortion Control Act was passed by the Pennsylvania Legislature, over the Governor's veto, in the year following this Court's decisions in *Roe v. Wade, 410 U.S. 113 (1973)*, and *Doe v. Bolton, 410 U.S. 179 (1973)*. It was a comprehensive statute.

Section 1 gave the Act its title. Section 2 defined, among other terms, "informed consent" and "viable." The latter was specified to mean "the capability of a fetus to live outside the [*382] mother's womb albeit with artificial aid." See *Roe v. Wade, 410 U.S., at 160.*

Section 3 (a) proscribed the performance of an abortion "upon any person in the absence of informed consent thereto by such person." Section 3 (b)(i) prohibited the performance of an abortion in the absence of the written consent of the woman's spouse, provided that the spouse could be located and notified, and the abortion was not certified by a licensed physician "to be necessary in order to preserve the life or health of the mother." Section 3 (b)(ii), applicable [**679] if the woman was unmarried and under the age of 18, forbade the performance of an abortion in the absence of the written consent of "one parent or person in loco parentis" of the woman, unless the abortion was certified by a licensed physician "as necessary in order to preserve the life of the mother." Section 3 (e) provided that whoever performed an abortion without such consent was guilty of a misdemeanor of the first degree.

Section 4 provided that whoever, intentionally and willfully, took the life of a premature infant aborted alive, was guilty of murder of the [***601] second degree. Section 5 (a), set forth in n. 1, *supra*, provided that if the fetus was determined to be viable, or if there was sufficient reason to believe that the fetus might be viable, the person performing the abortion was required to exercise the same care to preserve the life and health of the fetus as would be required in the case of a fetus intended to be born alive, and was required to adopt the abortion technique providing the best opportunity for the fetus to be aborted alive, so long as a different technique was not necessary in order to preserve the life or health of the mother. Section 5 (d), also set forth in n. 1, imposed a penal sanction for a violation of § 5 (a).

Section 6 specified abortion controls. It prohibited abortion during the stage of pregnancy subsequent to viability, except where necessary, in the judgment of a licensed physician, to preserve the life or health of the mother. No abortion [*383] was to be performed except by a licensed physician and in an approved facility. It required that appropriate records be kept, and that quarterly reports be filed with the Commonwealth's Department of Health. And it prohibited solicitation or advertising with respect to abortions. A violation of § 6 was a misdemeanor of the first or third degrees, as specified.

Section 7 prohibited the use of public funds for an abortion in the absence of a certificate of a physician stating that the abortion was necessary in order to preserve the life or health of the mother. Finally, § 8 au-

thorized the Department of Health to make rules and regulations with respect to performance of abortions and the facilities in which abortions were performed. See Pa. Stat. Ann., Tit. 35, §§ 6601-6608 (Purdon 1977).

[***LEdHR2A] [2A]Prior to the Act's effective date, October 10, 1974, the present suit was filed in the United States District Court for the Eastern District of Pennsylvania challenging, on federal constitutional grounds, nearly all of the Act's provisions. [3] [*384] The three-judge [**680] court on October 10 [***602] issued a preliminary injunction restraining the enforcement of a number of those provisions. [4] Each side sought a class-action determination; the plaintiffs', but not the defendants', motion to this effect was granted. [5]

3 The plaintiffs named in the complaint, as amended, were Planned Parenthood Association of Southeastern Pennsylvania, Inc., a nonprofit corporation; appellee John Franklin, M. D., a licensed and board-certified obstetrician and gynecologist and medical director of Planned Parenthood; Concern for Health Options: Information, Care and Education, Inc. (CHOICE), a nonprofit corporation; and Clergy Consultation Service of Northeastern Pennsylvania, a voluntary organization. Later, appellee Obstetrical Society of Philadelphia intervened as a party plaintiff. Named as original defendants were F. Emmett Fitzpatrick, Jr., District Attorney of Philadelphia County, and Helene Wohlgemuth, the then Secretary of Welfare of the Commonwealth of Pennsylvania. Subsequently, the Commonwealth's Attorney General and the Commonwealth itself intervened as parties defendant.

The District Court, in a ruling not under challenge here, eventually dismissed Planned Parenthood, CHOICE, and Clergy Consultation as plaintiffs. *Planned Parenthood Assn.* v. *Fitzpatrick, 401 F.Supp. 554, 562, 593-594 (1975).*

The present posture of the case, as a consequence, is a suit between Dr. Franklin and the Obstetrical Society, as plaintiffs-appellees, and Aldo Colautti, the present Secretary of Welfare, the Attorney General, the Commonwealth, and the District Attorney, as defendants-appellants.

[***LEdHR2B] [2B]We agree with the District Court's ruling in the cited 1975 opinion, *401 F.Supp., at 561-562, 594*, that under *Doe v. Bolton, 410 U.S. 179, 188 (1973)*, the plaintiff physicians have standing to challenge § 5 (a), and that their claims present a justiciable controversy. See *Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 62 (1976).*

4 The court preliminarily enjoined the enforcement of the spousal- and parental-consent requirements, § 3 (b); the penal provisions of § 3 (e); the requirements of §§ 5 (a) and (d); the restriction on abortions subsequent to viability, § 6 (b); the facility-approval requirement, § 6 (c); the reporting provisions, § 6 (d); most of the penal provisions of § 6 (i); the restrictions on funding of abortions, § 7; and the definitions of "viable" and "informed consent" in § 2. Record, Doc. No. 16; see *Planned Parenthood Assn.* v. *Fitzpatrick, 401 F.Supp., at 559.*

5 The court ruled that "the present action is determined to be a class action on behalf of the class of Pennsylvania physicians who perform abortions and/or counsel their female patients with regard to family planning and pregnancy including the option of abortion, and the sub-class of members of the Obstetrical Society of Philadelphia who practice in Pennsylvania." Record, Doc. No. 57.

The case went to trial in January 1975. The court received extensive testimony from expert witnesses on all aspects of abortion procedures. The resulting judgment declared the Act to be severable, upheld certain of its provisions, and held other provisions unconstitutional. *Planned Parenthood Assn.* v. *Fitzpatrick, 401 F.Supp. 554 (1975).* [6] The court sustained the definition of "informed consent" in § 2; the facility-approval requirement and certain of the reporting requirements of § 6; § 8's authorization of rules and regulations; and, by a divided vote, the informed consent requirement of § 3 (a). It overturned § 3 (b)(i)'s spousal-consent requirement [*385] and, again by a divided vote, § 3 (b)(ii)'s parental-consent requirement; § 6's reporting requirements relating to spousal and parental consent; § 6's prohibition of advertising; and § 7's restriction on abortion funding. The definition of "viable" in § 2 was declared void for vagueness and, because of the incorporation of this definition, § 6's proscription of abortions after viability, except to preserve the life or health of the woman, was struck down. Finally, in part because of the incorporation of the definition of "viable," and in part because of the perceived overbreadth of the phrase "may be viable," the court invalidated the viability-determination and standard-of-care provisions of § 5 (a). *401 F.Supp., at 594.*

6 See also *Doe v. Zimmerman, 405 F.Supp. 534 (MD Pa. 1975).*

Both sides appealed to this Court. While the appeals were pending, the Court decided *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976)*; *Planned Parenthood of*

Central Missouri v. Danforth, 428 U.S. 52 (1976); and *Singleton v. Wulff, 428 U.S. 106 (1976). Virginia State Board* shed light on the prohibition of advertising for abortion services. *Planned Parenthood* had direct bearing on the patient-, spousal-, and parental-consent issues and was instructive on the definition-of-viability issue. *Singleton* concerned the issue of standing to challenge abortion regulations. Accordingly, that portion of the three-judge court's judgment which was the subject of the plaintiffs' appeal was summarily affirmed. *Franklin v. Fitzpatrick, 428 U.S. 901 (1976)*. And that portion of the judgment which was the subject of the defendants' appeal [***603] was vacated and remanded for further consideration in the light of *Planned Parenthood, Singleton*, and *Virginia State Board. Beal v. Franklin, 428 U.S. 901 (1976)*.

On remand, the parties entered into a stipulation which disposed of all issues except the constitutionality of §§ 5 (a) and 7. Relying on this Court's supervening decisions in *Beal v. Doe, 432 U.S. 438 (1977)*, and *Maher v. Roe, 432 U.S. 464 (1977)*, the District Court found, contrary to its original view, [*386] see *401 F.Supp., at 594*, that § 7 did not violate either Tit. XIX of the Social Security Act, as added, 79 [**681] Stat. 343, and amended, *42 U. S. C. § 1396 et seq.*, or the *Equal Protection Clause of the Fourteenth Amendment*. App. 241a. The court, however, declared: "After reconsideration of section 5 (a) in light of the most recent Supreme Court decisions, we adhere to our original view and decision that section 5 (a) is unconstitutional." *Id., at 240a*-214a. Since the plaintiffs-appellees have not appealed from the ruling with respect to § 7, the only issue remaining in this protracted litigation is the validity of § 5 (a).

II

Three cases in the sensitive and earnestly contested abortion area provide essential background for the present controversy.

In *Roe v. Wade, 410 U.S. 113 (1973)*, this Court concluded that there is a right of privacy, implicit in the liberty secured by the *Fourteenth Amendment*, that "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Id., at 153*. This right, we said, although fundamental, is not absolute or unqualified, and must be considered against important state interests in the health of the pregnant woman and in the potential life of the fetus. "These interests are separate and distinct. Each grows in substantiality as the woman approaches term and, at a point during pregnancy, each becomes 'compelling.'" *Id., at 162-163*. For both logical and biological reasons, we indicated that the State's interest in the potential life of the fetus reaches the compelling point at the stage of viability. Hence, prior to viability, the State may not seek to further this interest by directly restricting a woman's decision whether or not to terminate her pregnancy. [7] But after viability, the [*387] State, if it chooses, may regulate or even prohibit abortion except where necessary, in appropriate medical judgment, to preserve the life or health of the pregnant woman. *Id., at 163-164*.

7 In *Maher v. Roe, 432 U.S. 464, 471-477 (1977)*, the Court ruled that a State may withhold funding to indigent women even though such withholding influences the abortion decision prior to viability. The Court, however, reaffirmed that a State during this period may not impose direct obstacles -- such as criminal penalties -- to further its interest in the potential life of the fetus.

We did not undertake in *Roe* to examine the various factors that may enter into the determination of viability. We simply observed that, in the medical and scientific communities, a fetus is considered viable if [***604] it is "potentially able to live outside the mother's womb, albeit with artificial aid." *Id., at 160*. We added that there must be a potentiality of "meaningful life," *id., at 163*, not merely momentary survival. And we noted that viability "is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks." *Id., at 160*. We thus left the point flexible for anticipated advancements in medical skill.

Roe stressed repeatedly the central role of the physician, both in consulting with the woman about whether or not to have an abortion, and in determining how any abortion was to be carried out. We indicated that up to the points where important state interests provide compelling justifications for intervention, "the abortion decision in all its aspects is inherently, and primarily, a medical decision," *id., at 166*, and we added that if this privilege were abused, "the usual remedies, judicial and intra-professional, are available." *Ibid.*

Roe's companion case, *Doe v. Bolton, 410 U.S. 179 (1973)*, underscored the importance of affording the physician adequate discretion in the exercise of his medical judgment. After the Court there reiterated that "a pregnant woman does not have an absolute constitutional right to an abortion on her demand," *id., at 189*, the Court discussed, in a vagueness-attack context, the Georgia statute's requirement that a physician's decision to perform an abortion must rest upon "his best clinical judgment." The Court found it critical that that [*388] judgment " [**682] may be exercised in the light of all factors -- physical, emotional, psychological, familial, and the woman's age -- relevant to the well-being of the patient." *Id., at 192*.

The third case, *Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976)*, stressed similar themes. There a Missouri statute that defined viability was challenged on the ground that it conflicted with the discussion of viability in *Roe* and that it was, in reality, an attempt to advance the point of viability to an earlier stage in gestation. The Court rejected that argument, repeated the *Roe* definition of viability, *428 U.S., at 63*, and observed again that viability is "a matter of medical judgment, skill, and technical ability, and we preserved [in *Roe*] the flexibility of the term." *Id., at 64*. The Court also rejected a contention that "a specified number of weeks in pregnancy must be fixed by statute as the point of viability." *Id., at 65*. It said:

"In any event, we agree with the District Court that it is not the proper function of the legislature or the courts to place viability, which essentially is a medical concept, at a specific point in the gestation period. The time when viability is achieved may vary with each pregnancy, and the determination of whether a particular fetus is viable is, and must be, a matter for the judgment of the responsible attending physician." [***605] *Id., at 64*.

[***LEdHR3] [3]In these three cases, then, this Court has stressed viability, has declared its determination to be a matter for medical judgment, and has recognized that differing legal consequences ensue upon the near and far sides of that point in the human gestation period. We reaffirm these principles. Viability is reached when, in the judgment of the attending physician on the particular facts of the case before him, there is a reasonable likelihood of the fetus' sustained survival outside the womb, with or without artificial support. Because this point may differ with each pregnancy, neither the legislature nor the courts may proclaim one of the elements entering [*389] into the ascertainment of viability -- be it weeks of gestation or fetal weight or any other single factor -- as the determinant of when the State has a compelling interest in the life or health of the fetus. Viability is the critical point. And we have recognized no attempt to stretch the point of viability one way or the other.

With these principles in mind, we turn to the issues presented by the instant controversy.

III

[***LEdHR1B] [1B]The attack mounted by the plaintiffs-appellees upon § 5 (a) centers on both the viability-determination requirement and the stated standard of care. The former provision, requiring the physician to observe the care standard when he determines that the fetus is viable, or when "there is sufficient reason to believe that the fetus may be viable," is asserted to be unconstitutionally vague because it fails to inform the physician when his duty to the fetus arises, and because it does not make the physician's good-faith determination of viability conclusive. This provision is also said to be unconstitutionally overbroad, because it carves out a new time period prior to the stage of viability, and could have a restrictive effect on a couple who wants to abort a fetus determined by genetic testing to be defective. [8] The standard of care, and in particular the requirement that the physician employ the abortion technique "which would provide the best opportunity for the fetus to be aborted alive so long as a different technique would not be necessary in [**683] order to preserve the life or health of the mother," is said to be void for vagueness and to be unconstitutionally restrictive in failing to afford [*390] the physician sufficient professional discretion in determining which abortion technique is appropriate.

8 The plaintiffs-appellees introduced evidence that modern medical technology makes it possible to detect whether a fetus is afflicted with such disorders as Tay-Sachs disease and Down's syndrome (mongolism). Such testing, however, often cannot be completed until after 18-20 weeks' gestation. App. 53a-56a (testimony of Hope Punnett, Ph. D.).

The defendants-appellants, in opposition, assert that the Pennsylvania statute is concerned only with post-viability abortions and with prescribing a standard of care for those abortions. They assert that the terminology "may be viable" correctly describes the statistical probability of fetal survival associated with viability; that the viability-determination requirement is otherwise sufficiently definite to be interpreted by the medical community; and that it is for the legislature, not the judiciary, [***606] to determine whether a viable but genetically defective fetus has a right to life. They contend that the standard-of-care provision preserves the flexibility required for sound medical practice, and that it simply requires that when a physician has a choice of procedures of equal risk to the woman, he must select the procedure least likely to be fatal to the fetus.

IV

[***LEdHR1C] [1C]We agree with plaintiffs-appellees that the viability-determination requirement of § 5 (a) is ambiguous, and that its uncertainty is aggravated by the absence of a scienter requirement with respect to the finding of viability. Because we conclude that this portion of the statute is void for vagueness, we find it unnecessary to consider appellees' alternative arguments based on the alleged overbreadth of § 5 (a).

A

[***LEdHR4] [4]It is settled that, as a matter of due process, a criminal statute that "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute," *United States v. Harriss, 347 U.S. 612, 617 (1954)*, or is so indefinite that "it encourages arbitrary and erratic arrests and convictions," *Papachristou v. Jacksonville, 405 U.S. 156, 162 (1972)*, is void for vagueness. See generally *Grayned v. City of Rockford, 408 U.S. 104, 108-109 (1972)*. [*391] This appears to be especially true where the uncertainty induced by the statute threatens to inhibit the exercise of constitutionally protected rights. *Id., at 109*; *Smith v. Goguen, 415 U.S. 566, 573 (1974)*; *Keyishian v. Board of Regents, 385 U.S. 589, 603-604 (1967)*.

Section 5 (a) requires every person who performs or induces an abortion to make a determination, "based on his experience, judgment or professional competence," that the fetus is not viable. If such person determines that the fetus is viable, or if "there is sufficient reason to believe that the fetus may be viable," then he must adhere to the prescribed standard of care. See n. 1, *supra*. This requirement contains a double ambiguity. First, it is unclear whether the statute imports a purely subjective standard, or whether it imposes a mixed subjective and objective standard. Second, it is uncertain whether the phrase "may be viable" simply refers to viability, as that term has been defined in *Roe* and in *Planned Parenthood*, or whether it refers to an undefined penumbral or "gray" area prior to the stage of viability.

The statute requires the physician to conform to the prescribed standard of care if one of two conditions is satisfied: if he determines that the fetus "is viable," or "if there is sufficient reason to believe that the fetus may be viable." Apparently, the determination of whether the fetus "is viable" is to be based on the attending physician's "experience, judgment or professional competence," a subjective point of reference. But it is unclear whether the same phrase applies to the second triggering condition, that is, to "sufficient reason to believe that the fetus may be viable." In other words, it is ambiguous [***607] whether there must be "sufficient reason" from the perspective of the judgment, skill, and training of the attending [**684] physician, or "sufficient reason" from the perspective of a cross section of the medical community or a panel of experts. The latter, obviously, portends not an inconsequential hazard for the typical private practitioner who may not [*392] have the skills and technology that are readily available at a teaching hospital or large medical center.

[***LEdHR5A] [5A]The intended distinction between the phrases "is viable" and "may be viable" is even more elusive. Appellants argue that no difference is intended, and that the use of the "may be viable" words "simply incorporates the acknowledged medical fact that a fetus is 'viable' if it has that statistical 'chance' of survival recognized by the medical community." Brief for Appellants 28. The statute, however, does not support the contention that "may be viable" is synonymous with, or merely intended to explicate the meaning of, "viable." [9]

9 [***LEdHR5B] [5B]Appellants do not argue that federal-court abstention is required on this issue, nor is it appropriate, given the extent of the vagueness that afflicts § 5 (a), for this Court to abstain *sua sponte*. See *Bellotti v. Baird, 428 U.S. 132, 143 n. 10 (1976)*.

[***LEdHR6] [6]Section 5 (a) requires the physician to observe the prescribed standard of care if he determines "that the fetus is viable *or* if there is sufficient reason to believe that the fetus may be viable" (emphasis supplied). The syntax clearly implies that there are two distinct conditions under which the physician must conform to the standard of care. Appellants' argument that "may be viable" is synonymous with "viable" would make either the first or the second condition redundant or largely superfluous, in violation of the elementary canon of construction that a statute should be interpreted so as not to render one part inoperative. See *United States v. Menasche, 348 U.S. 528, 538-539 (1955)*.

[***LEdHR7A] [7A]Furthermore, the suggestion that "may be viable" is an explication of the meaning of "viable" flies in the face of the fact that the statute, in § 2, already defines "viable." This, presumably, was intended to be the exclusive definition of "viable" throughout the Act. [10] In this respect, it is significant [*393] that § 6 (b) of the Act speaks only of the limited availability of abortion during the stage of a pregnancy "subsequent to viability." The concept of viability is just as important in § 6 (b) as it is in § 5 (a). Yet in § 6 (b) the legislature found it unnecessary to explain that a "viable" fetus includes one that "may be viable."

10 [***LEdHR7B] [7B]The statute says that viable "means," not "includes," the capability of a fetus "to live outside the mother's womb albeit with artificial aid." As a rule, "[a] definition which declares what a term 'means' . . . excludes any meaning that is not stated." 2A C. Sands, Statutes and Statutory Construction § 47.07 (4th ed. Supp. 1978).

Since we must reject appellants' theory that "may be viable" means "viable," a second serious ambiguity appears in the statute. On the one hand, as appellees urge and as the District Court found, see *401 F.Supp., at 572*, it may be that "may be viable" carves out a new time

period during pregnancy when there is a remote possibility of fetal survival outside the womb, but the fetus has not yet attained the reasonable likelihood [***608] of survival that physicians associate with viability. On the other hand, although appellants do not argue this, it may be that "may be viable" refers to viability as physicians understand it, and "viable" refers to some undetermined stage later in pregnancy. We need not resolve this question. The crucial point is that "viable" and "may be viable" apparently refer to distinct conditions, and that one of these conditions differs in some indeterminate way from the definition of viability as set forth in *Roe* and in *Planned Parenthood.* [11]

> 11 Since our ruling today is confined to the conclusion that the viability-determination requirement of § 5 (a) is impermissibly vague, there is no merit in the dissenting opinion's suggestion, *post*, at 406, that the Court has "tacitly [disowned]" the definition of viability as set forth in *Roe* and *Planned Parenthood.* On the contrary, as noted above, *supra, at 388*, we *reaffirm* what was said in those decisions about this critical concept.

[**685] Because of the double ambiguity in the viability-determination requirement, this portion of the Pennsylvania statute is readily distinguishable from the requirement that an abortion must be "necessary for the preservation of the mother's life or health," upheld against a vagueness challenge in *United* [*394] *States v. Vuitch, 402 U.S. 62, 69-72 (1971)*, and the requirement that a physician determine, on the basis of his "best clinical judgment," that an abortion is "necessary," upheld against a vagueness attack in *Doe v. Bolton, 410 U.S., at 191-192*. The contested provisions in those cases had been interpreted to allow the physician to make his determination in the light of all attendant circumstances -- psychological and emotional as well as physical -- that might be relevant to the well-being of the patient. The present statute does not afford broad discretion to the physician. Instead, it conditions potential criminal liability on confusing and ambiguous criteria. It therefore presents serious problems of notice, discriminatory application, and chilling effect on the exercise of constitutional rights.

B

The vagueness of the viability-determination requirement of § 5 (a) is compounded by the fact that the Act subjects the physician to potential criminal liability without regard to fault. Under § 5 (d), see n. 1, *supra*, a physician who fails to abide by the standard of care when there is sufficient reason to believe that the fetus "may be viable" is subject "to such civil or criminal liability as would pertain to him had the fetus been a child who was intended to be born and not aborted." To be sure, the Pennsylvania law of criminal homicide, made applicable to the physician by § 5 (d), conditions guilt upon a finding of scienter. See Pa. Stat. Ann., Tit. 18, §§ 2501-2504 (Purdon 1973 and Supp. 1978). The required mental state, however, is that of "intentionally, knowingly, recklessly or negligently [causing] the death of another human being." § 2501 (1973). Thus, the Pennsylvania law of criminal homicide requires scienter with respect to whether the physician's actions will result in the death of the fetus. But neither the Pennsylvania law of criminal homicide, nor the Abortion Control Act, requires that the [*395] physician be culpable in failing to find [***609] sufficient reason to believe that the fetus may be viable. [12]

> 12 Section 5 (a) does provide that the determination of viability is to be based on the physician's "experience, judgment or professional competence." A subjective standard keyed to the physician's individual skill and abilities, however, is different from a requirement that the physician be culpable or blameworthy for his performance under such a standard. Moreover, as noted above, it is ambiguous whether this subjective language applies to the second condition that activates the duty to the fetus, namely, "sufficient reason to believe that the fetus may be viable."

This Court has long recognized that the constitutionality of a vague statutory standard is closely related to whether that standard incorporates a requirement of *mens rea.* See, for example, *United States v. United States Gypsum Co., 438 U.S. 422, 434-446 (1978)*; *Papachristou v. Jacksonville, 405 U.S., at 163*; *Boyce Motor Lines v. United States, 342 U.S. 337, 342 (1952).* [13] Because of the absence of a scienter requirement in the provision directing the physician to determine whether the fetus is or may be viable, the statute is little more than "a trap for those who act in good faith." *United States v. Ragen, 314 U.S. 513, 524* [**686] *(1942).*

> 13 "[The] requirement of a specific intent to do a prohibited act may avoid those consequences to the accused which may otherwise render a vague or indefinite statute invalid. . . . The requirement that the act must be willful or purposeful may not render certain, for all purposes, a statutory definition of the crime which is in some respects uncertain. But it does relieve the statute of the objection that it punishes without warning an offense of which the accused was unaware." *Screws v. United States, 325 U.S. 91, 101-102 (1945)* (plurality opinion).

The perils of strict criminal liability are particularly acute here because of the uncertainty of the viability determination itself. As the record in this case indicates, a physician determines whether or not a fetus is viable after considering a number of variables: the gestational age of the fetus, derived from the reported menstrual history of the woman; fetal weight, based on an inexact estimate of the size and condition of the uterus; the woman's general health and nutrition; the [*396] quality of the available medical facilities; and other factors. [14] Because of the number and the imprecision of these variables, the probability of any particular fetus' obtaining meaningful life outside the womb can be determined only with difficulty. Moreover, the record indicates that even if agreement may be reached on the probability of survival, different physicians equate viability with different probabilities of survival, and some physicians refuse to equate viability with any numerical probability at all. [15] In the face of these uncertainties, it is not unlikely that experts will disagree over whether a particular fetus in the second trimester has advanced to [***610] the stage of viability. The prospect of such disagreement, in conjunction with a statute imposing strict civil and criminal liability for an erroneous determination of viability, could have a profound chilling effect on the willingness of physicians to perform abortions near the point of viability in the manner indicated by their best medical judgment.

14 See App. 5a-6a, 10a, 17a (testimony of Louis Gerstley III, M. D.); *id.*, at 77a-78a, 81a (testimony of Thomas W. Hilgers, M. D.); *id.*, at 93a-101a, 109a, 112a (testimony of William J. Keenan, M.D.).

15 See *id.*, at 8a (testimony of Dr. Gerstley) (viability means 5% chance of survival, "certainly at least two to three percent"); *id., at 104*a (testimony of Dr. Keenan) (10% chance of survival would be viable); *id., at 144*a (deposition of John Franklin, M. D.) (viability means "ten percent or better" probability of survival); *id., at 132*a (testimony of Arturo Hervada, M. D.) (it is misleading to be obsessed with a particular percentage figure).

[***LEdHR8] [8]Because we hold that the viability-determination provision of § 5 (a) is void on its face, we need not now decide whether, under a properly drafted statute, a finding of bad faith or some other type of scienter would be required before a physician could be held criminally responsible for an erroneous determination of viability. We reaffirm, however, that "the determination of whether a particular fetus is viable is, and must be, a matter for the judgment of the responsible attending physician." *Planned Parenthood of Central Missouri v.* [*397] *Danforth, 428 U.S., at 64.* State regulation that impinges upon this determination, if it is to be constitutional, must allow the attending physician "the room he needs to make his best medical judgment." *Doe v. Bolton, 410 U.S., at 192.*

V

[***LEdHR1D] [1D] [***LEdHR9A] [9A]We also conclude that the standard-of-care provision of § 5 (a) is impermissibly vague. [16] The standard-of-care provision, when it applies, requires the physician to

"exercise that degree of professional skill, care and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted and the abortion technique employed shall be that which would provide the best opportunity for the fetus to be aborted alive so [**687] long as a different technique would not be necessary in order to preserve the life or health of the mother."

Plaintiffs-appellees focus their attack on the second part of the standard, requiring the physician to employ the abortion technique offering the greatest possibility of fetal survival, provided some other technique would not be necessary in order to preserve the life or health of the mother. [17]

16

[***LEdHR9B] [9B]The dissenting opinion questions whether the alleged vagueness of the standard-of-care provision is properly before us, since it is said that this issue was not reached by the District Court. That court, however, declared § 5 (a) unconstitutional in its entirety, including both the viability-determination requirement and the standard-of-care provision. App. 243a. Appellees, as the prevailing parties, may of course assert any ground in support of that judgment, "whether or not that ground was relied upon or even considered by the trial court." *Dandridge v. Williams, 397 U.S. 471, 475 n. 6 (1970).*

17 In *Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 81-84 (1976),* the Court struck down a provision similar to the first part of the standard-of-care provision of § 5 (a), on the ground that it applied at all stages of gestation and not just to the period subsequent to viability. Except to the extent that § 5 (a) is also alleged to apply prior to the point of viability, a contention we do not reach, see *supra, at 390*, appellees do

not challenge the standard-of-care provision on overbreadth grounds.

[*398] The District Court took extensive testimony from various physicians about their understanding of this requirement. That testimony is illuminating. When asked what method of abortion they would prefer to use [***611] in the second trimester in the absence of § 5 (a), the plaintiffs' experts said that they thought saline amnio-infusion was the method of choice. [18] This was described as a method involving removal of amniotic fluid and injection of a saline or other solution into the amniotic sac. See *Planned Parenthood of Central Missouri v. Danforth, 428 U.S., at 75-79.* All physicians agreed, however, that saline amnio-infusion nearly always is fatal to the fetus, [19] and it was commonly assumed that this method would be prohibited by the statute.

18 App. 11a (testimony of Dr. Gerstley); *id.*, at 28a (testimony of Dr. Franklin).

19 See, *e. g., id.*, at 28a (testimony of Dr. Franklin); *id.*, at 36a (testimony of Fred Mecklenburg, M. D.).

When the plaintiffs' and defendants' physician-experts respectively were asked what would be the method of choice under § 5 (a), opinions differed widely. Preferences ranged from no abortion, to prostaglandin infusion, to hysterotomy, to oxytocin induction. [20] Each method, it was generally conceded, involved disadvantages from the perspective of the woman. Hysterotomy, a type of Caesarean section procedure, generally was considered to have the highest incidence of fetal survival of any of the abortifacients. Hysterotomy, however, is associated with the risks attendant upon any operative procedure involving anesthesia and incision of [*399] tissue. [21] And all physicians agreed that future children born to a woman having a hysterotomy would have to be delivered by Caesarean section because of the likelihood of rupture of the scar. [22]

20 There was testimony that dilation and curettage and dilation and suction, two of the more common methods of abortion in the first trimester, normally are not used in the second trimster. *Id.*, at 39a-40a (testimony of Dr. Mecklenburg).

21 *Id.*, at 23a (testimony of Dr. Franklin); *id.*, at 43a (testimony of Dr. Mecklenburg); *id.*, at 73a (testimony of Dr. Hilgers).

22 See, *e. g., id.*, at 13a (testimony of Dr. Gerstley); *id.*, at 28a (testimony of Dr. Franklin).

Few of the testifying physicians had had any direct experience with prostaglandins, described as drugs that stimulate uterine contractibility, inducing premature expulsion of the fetus. See *Planned Parenthood of Central Missouri v. Danforth, 428 U.S., at 77-78.* It was generally agreed that the incidence of fetal survival with prostaglandins would be significantly greater than with saline amnio-infusion. [23] Several physicians testified, however, that prostaglandins have undesirable side effects, such as nausea, vomiting, headache, and diarrhea, and indicated that they are unsafe with patients having a history of asthma, glaucoma, hypertension, cardiovascular disease, or epilepsy. [24] See [**688] *Wynn v. Scott, 449 F.Supp. 1302, 1326 (ND Ill. 1978).* One physician recommended oxytocin induction. He doubted, however, whether the procedure would be fully effective in all cases, and he indicated that the procedure was prolonged and expensive. [25]

23 See, *e. g., id.*, at 11a-12a (testimony of Dr. Gerstley); *id.*, at 28a (testimony of Dr. Franklin).

24 See *id.*, at 11a (testimony of Dr. Gerstley); *id.*, at 37a-38a (testimony of Dr. Mecklenburg); *id.*, at 72a (testimony of Dr. Hilgers).

25 *Id.*, at 12a (testimony of Dr. Gerstley).

The parties acknowledge that [***612] there is disagreement among medical authorities about the relative merits and the safety of different abortion procedures that may be used during the second trimester. See Brief for Appellants 24. The appellants submit, however, that the only legally relevant considerations are that alternatives exist among abortifacients, [*400] "and that the physician, mindful of the state's interest in protecting viable life, must make a competent and good faith medical judgment on the feasibility of protecting the fetus' chance of survival in a manner consistent with the life and health of the pregnant woman." *Id.*, at 25. We read § 5 (a), however, to be much more problematical.

The statute does not clearly specify, as appellants imply, that the woman's life and health must always prevail over the fetus' life and health when they conflict. The woman's life and health are not mentioned in the first part of the stated standard of care, which sets forth the general duty to the viable fetus; they are mentioned only in the second part which deals with the choice of abortion procedures. Moreover, the second part of the standard directs the physician to employ the abortion technique best suited to fetal survival "so long as a different technique would not be *necessary* in order to preserve the life or health of the mother" (emphasis supplied). In this context, the word "necessary" suggests that a particular technique must be indispensable to the woman's life or health -- not merely desirable -- before it may be adopted. And "the life or health of the mother," as used in § 5 (a), has not been construed by the courts of the Commonwealth to mean, nor does it necessarily imply, that all factors relevant to the welfare of the woman may be taken into account by the physician in

making his decision. Cf. *United States v. Vuitch, 402 U.S., at 71-72*; *Doe v. Bolton, 410 U.S., at 191.*

Consequently, it is uncertain whether the statute permits the physician to consider his duty to the patient to be paramount to his duty to the fetus, or whether it requires the physician to make a "trade-off" between the woman's health and additional percentage points of fetal survival. Serious ethical and constitutional difficulties, that we do not address, lurk behind this ambiguity. We hold only that where conflicting duties of this magnitude are involved, the [*401] State, at the least, must proceed with greater precision before it may subject a physician to possible criminal sanctions.

Appellants' further suggestion that § 5 (a) requires only that the physician make a good-faith selection of the proper abortion procedure finds no support in either the language or an authoritative interpretation of the statute. [26] Certainly, there is nothing to suggest a *mens rea* requirement with respect to a decision whether a particular abortion method is necessary in order to preserve the life or health of the woman. The choice of an appropriate abortion technique, as the record in this case so amply demonstrates, is a complex medical judgment about which experts can -- and do -- disagree. [***613] The lack of any scienter requirement exacerbates the uncertainty of the statute. We conclude that the standard-of-care provision, like the viability-determination requirement, is void for vagueness.

26 Appellants, again, do not argue or suggest that we should abstain from passing on this issue. See n. 9, *supra.*

The judgment of the District Court is affirmed.

It is so ordered.

DISSENT BY: WHITE

DISSENT

MR. JUSTICE WHITE, with whom THE CHIEF JUSTICE and MR. JUSTICE REHNQUIST join, dissenting.

Because the Court now withdraws from the States a substantial measure of the [**689] power to protect fetal life that was reserved to them in *Roe v. Wade, 410 U.S. 113 (1973)*, and reaffirmed in *Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976)*, I file this dissent.

I

In *Roe* v. *Wade*, the Court defined the term "viability" to signify the stage at which a fetus is "potentially able to live outside the mother's womb, albeit with artificial aid." This is the point at which the State's interest in protecting fetal [*402] life becomes sufficiently strong to permit it to "go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother." *410 U.S., at 163-164.*

The Court obviously crafted its definition of viability with some care, and it chose to define that term not as that stage of development at which the fetus actually *is* able or actually *has* the ability to survive outside the mother's womb, with or without artificial aid, but as that point at which the fetus is *potentially* able to survive. In the ordinary usage of these words, being *able* and being *potentially able* do not mean the same thing. Potential ability is not actual ability. It is ability "[existing] in possibility, not in actuality." Webster's New International Dictionary (2d ed. 1958). The Court's definition of viability in *Roe* v. *Wade* reaches an earlier point in the development of the fetus than that stage at which a doctor could say with assurance that the fetus *would* survive outside the womb.

It was against this background that the Pennsylvania statute at issue here was adopted and the District Court's judgment was entered. Insofar as *Roe* v. *Wade* was concerned, Pennsylvania could have defined viability in the language of that case -- "potentially able to live outside the mother's womb" -- and could have forbidden all abortions after this stage of any pregnancy. The Pennsylvania Act, however, did not go so far. It forbade entirely only those abortions where the fetus had attained viability as defined in § 2 of the Act, that is, where the fetus had "the *capability* . . . to live outside the mother's womb albeit with artificial aid." Pa. Stat. Ann., Tit. 35, § 6602 (Purdon 1977) (emphasis added). But the State, understanding that it also had the power under *Roe* v. *Wade* to regulate where the fetus was only "potentially able" to exist outside the womb, also sought to regulate, but not forbid, abortions where there was sufficient reason to believe that the fetus "may be viable"; this language was reasonably [*403] believed by [***614] the State to be equivalent to what the Court meant in 1973 by the term "potentially able to live outside the mother's womb." Under § 5 (a), abortionists must not only determine whether the fetus is viable but also whether there is sufficient reason to believe that the fetus may be viable. If either condition exists, the method of abortion is regulated and a standard of care imposed. Under § 5 (d), breach of these regulations exposes the abortionist to the civil and criminal penalties that would be applicable if a live birth rather than an abortion had been intended.

In the original opinion and judgment of the three-judge court, *Planned Parenthood Assn.* v. *Fitzpatrick, 401 F.Supp. 554 (ED Pa. 1975)*, § 5 (a) was invalidated on two grounds: first, because it required a de-

termination of viability and because that term, as defined in § 2, was held to be unenforceably vague; and second, because the section required a determination of when a fetus may be viable, it was thought to regulate a period of time prior to viability and was therefore considered to be invalid under this Court's cases. The District Court was not disturbed by the fact that its opinion declared the term "viability" as used in this Court's opinion in *Roe* v. *Wade* to be hopelessly vague since it understood that opinion also to have given specific content to that term and to have held that a State could not consider any fetus to be viable prior to the 24th week of pregnancy. This was concrete guidance to the States, and because the "may be viable" provision of § 5 (a) " [**690] [tended] to carve out a . . . period of time of potential viability [which might cover a period of] 20 to 26 weeks gestation," *401 F.Supp., at 572*, the State was unlawfully regulating the second trimester. Because it sought to enforce § 5 (a), § 5 (d) was also invalidated. Section 6 (b), which forbade all abortions after viability, also fell to the challenge of vagueness.

The District Court's judgment was pending on appeal here when *Planned Parenthood of Central Missouri v. Danforth,* [*404] *supra*, was argued and decided. There, the state Act defined viability as "that stage of fetal development when the life of the unborn child may be continued indefinitely outside the womb by natural or artificial life-supportive systems." *428 U.S., at 63.* This definition was attacked as impermissibly expanding the *Roe* v. *Wade* definition of viability; the "mere possibility of momentary survival," it was argued, was not the proper standard under the Court's cases. *428 U.S., at 63.* It was also argued in this Court that the "may be" language of the Missouri statute was vulnerable for the same reasons that the "may be" provision of the Pennsylvania statute had been invalidated by the District Court in the case now before us. Brief for Appellants, O. T. 1975, No. 74-1151, pp. 65-66, quoting *Planned Parenthood Assn.* v. *Fitzpatrick, supra, at 571-572.* This Court, however, rejected these arguments and sustained the Missouri definition as consistent with *Roe*, "even when read in conjunction with" another section of the Act that proscribed all abortions not necessary to preserve the life or health of the mother "unless the attending physician first certifies with reasonable medical certainty that the fetus is not viable," that is, that it has not reached that stage at which it may exist indefinitely outside the mother's womb. *428 U.S., at 63-64.* [***615] The Court noted that one of the appellant doctors "had no particular difficulty with the statutory definition" and added that the Missouri definition might well be considered more favorable to the complainants than the *Roe* definition since the "point when life can be 'continued indefinitely outside the womb' may well occur later in pregnancy than the point where the fetus is 'potentially able to live outside the mother's womb.'" *428 U.S., at 64.* The Court went on to make clear that it was not the proper function of the legislature or of the courts to place viability at a specific point in the gestation period. The "flexibility of the term," which was essentially a medical concept, was to be preserved. *Ibid.* The Court plainly reaffirmed what it had held [*405] in *Roe* v. *Wade*: Viability refers not only to that stage of development when the fetus actually has the capability of existing outside the womb but also to that stage when the fetus *may have* the ability to do so. The Court also reaffirmed that at any time after viability, as so understood, the State has the power to prohibit abortions except when necessary to preserve the life or health of the mother.

In light of *Danforth*, several aspects of the District Court's judgment in the *Fitzpatrick* case were highly questionable, and that judgment was accordingly vacated and remanded to the District Court for reconsideration. *Beal v. Franklin, 428 U.S. 901 (1976).* A drastically modified judgment eventuated. The term "viability" could not be deemed vague in itself, and hence the definition of that term in § 2 and the proscription of § 6 (b) against post-viability abortions were sustained. The District Court, however, in a conclusory opinion adhered to its prior view that § 5 (a) was unconstitutional, as was § 5 (d) insofar as it related to § 5 (a).

Affirmance of the District Court's judgment is untenable. The District Court originally thought § 5 (a) was vague because the term "viability" was itself vague. The Court scotched that notion in *Danforth*, and the District Court then sustained the Pennsylvania definition of viability. In doing so, it necessarily nullified the major reason for its prior invalidation of § 5 (a), which was that it incorporated the supposedly vague standard of § 2. But the District Court had also said that the "may be viable" standard [**691] was invalid as an impermissible effort to regulate a period of "potential" viability. This was the sole remaining articulated ground for invalidating § 5 (a). But this is the very ground that was urged and rejected in *Danforth*, where this Court sustained the Missouri provision defining viability as the stage at which the fetus "may" have the ability to survive outside the womb and reaffirmed the flexible concept of viability announced in *Roe*.

[*406] In affirming the District Court, the Court does not in so many words agree with the District Court but argues that it is too difficult to know whether the Pennsylvania Act simply intended, as the State urges, to go no further than *Roe* permitted in protecting a fetus that is potentially able to survive or whether it intended to carve out a protected period prior to viability as defined in *Roe*. The District Court, although otherwise seriously in error, had no such trouble with the Act. It understood the "may be viable" provision [***616] as

an attempt to protect a period of potential life, precisely the kind of interest that *Roe* protected but which the District Court erroneously thought the State was not entitled to protect. [1] *Danforth*, as I have said, reaffirmed *Roe* in this respect. Only those with unalterable determination to invalidate the Pennsylvania Act can draw any measurable difference insofar as vagueness is concerned between "viability" defined as the ability to survive and "viability" defined as that stage at which the fetus may have the ability to survive. It seems to me that, in affirming, the Court is tacitly disowning the "may be" standard of the Missouri law as well as the "potential ability" [*407] component of viability as that concept was described in *Roe*. This is a further constitutionally unwarranted intrusion upon the police powers of the States.

1 The District Court observed:

> *"Roe* makes it abundantly clear that the compelling point at which a state in the interest of fetal life may regulate, or even prohibit, abortion is not before the 24th week of gestation of the fetus, at which point the Supreme Court recognized the fetus then presumably *has the capability* of meaningful life outside the mother's womb. Consequently, *Roe* recognizes only two periods concerning fetuses. The period prior to viability, when the state may not regulate in the interest of fetal life, and the period after viability, when it may prohibit altogether or regulate as it sees fit. The 'may be viable' provision of Section 5 (a) tends to carve out a third period of time of *potential* viability." *Planned Parenthood Assn.* v. *Fitzpatrick, 401 F.Supp. 554, 572 (ED Pa. 1975)* (emphasis added).
>
> Thus, the court interpreted the term "viability" more restrictively than *Roe*, read in its entirety, permitted but coextensively with the definition in § 2. Based on its misapprehension of *Roe*, the court condemned § 5 (a) essentially for reaching the period when the fetus has the *potential* "capability of meaningful life outside the mother's womb." *Ibid.*

II

Apparently uneasy with its work, the Court has searched for and seized upon two additional reasons to support affirmance, neither of which was relied upon by the District Court. The Court first notes that under § 5 (d), failure to make the determinations required by § 5 (a), or otherwise to comply with its provisions, subjects the abortionist to criminal prosecution under those laws that "would pertain to him had the fetus been a child who was intended to be born and not aborted." Although concededly the Pennsylvania law of criminal homicide conditions guilt upon a finding that the defendant intentionally, knowingly, recklessly, or negligently caused the death of another human being, the Court nevertheless goes on to declare that the abortionist could be successfully prosecuted for criminal homicide without any such fault or omission in determining whether or not the fetus is viable or may be viable. This alleged lack of a scienter requirement, the Court says, fortifies its holding that § 5 (a) is void for vagueness.

This seems to me an incredible construction of the Pennsylvania statutes. The District Court suggested nothing of the sort, and appellees focus entirely on § 5 (a), ignoring the homicide statutes. The latter not only define the specified degrees of scienter [**692] that are required for the various homicides, but also provide that ignorance or mistake as to a matter of fact, for which there is a reasonable explanation, is a defense to a homicide charge if it negatives the mental state necessary for conviction. *Pa. Stat. Ann., Tit. 18, § 304* [***617] (Purdon 1973). Given this background, I do not see how it can be seriously argued that a doctor who makes a good-faith mistake about whether a fetus is or is not viable could be successfully prosecuted [*408] for criminal homicide. This is the State's submission in this Court; the court below did not address the matter; and at the very least this is something the Court should not decide without hearing from the Pennsylvania courts.

Secondly, the Court proceeds to find the standard-of-care provision in § 5 (a) to be impermissibly vague, particularly because of an asserted lack of a *mens rea* requirement. I am unable to agree. In the first place, the District Court found fault with § 5 (a) only because of its viability and "may be viable" provisions. It neither considered nor invalidated the standard-of-care provision. Furthermore, the complaint did not expressly attack § 5 (a) on this ground, and plaintiffs' request for findings and conclusions challenged the section only on the grounds of the overbreadth and vagueness of the viability and the "may be viable" provisions. There was no request to invalidate the standard-of-care provision. Also, the plaintiffs' post-trial brief dealt with the matter in only the most tangential way. Appellees took no cross-appeal; and although they argue the matter in their brief on the merits in this Court, I question whether they are entitled to have still another provision of the Pennsylvania Act declared unconstitutional in this Court in the first instance, thereby and to that extent expanding the relief they obtained in the court below. [2] *United States v. New York Telephone Co., 434 U.S. 159, 166 n. 8 (1977).*

2 Unquestionably, rehabilitating § 5 (a) to satisfy this Court's opinion will be a far more ex-

tensive and more difficult task than that which the State faced under the District Court's ruling.

In any event, I cannot join the Court in its determined attack on the Pennsylvania statute. As in the case with a mistaken viability determination under § 5 (a), there is no basis for asserting the lack of a scienter requirement in a prosecution for violating the standard-of-care provision. I agree with the State that there is not the remotest chance that any abortionist will be prosecuted on the basis of a good-faith [*409] mistake regarding whether to abort, and if he does, with respect to which abortion technique is to be used. If there is substantial doubt about this, the Court should not complain of a lack of an authoritative state construction, as it does, but should direct abstention and permit the state courts to address the issues in the light of the Pennsylvania homicide laws with which those courts are so much more familiar than are we or any other federal court.

III

Although it seems to me that the Court has considerably narrowed the scope of the power to forbid and regulate abortions that the States could reasonably have expected to enjoy under *Roe* and *Danforth*, the Court has not yet invalidated a statute simply requiring abortionists to determine whether a fetus is viable and forbidding the abortion of a viable fetus except where necessary to save the life or health of the mother. [***618] Nor has it yet ruled that the abortionist's determination of viability under such a standard must be final and is immune to civil or criminal attack. Sections 2 and 6 (b) of the Pennsylvania law, for example, remain undisturbed by the District Court's judgment or by the judgment of this Court.

What the Court has done is to issue a warning to the States, in the name of vagueness, that they should not attempt to forbid or regulate abortions when there is a chance for the survival of the fetus, but it is not sufficiently large that the abortionist considers the fetus to be viable. This edict has no constitutional warrant, and I cannot join it.

REFERENCES

1 Am Jur 2d, Abortion 1.5

1 Am Jur Pl & Pr Forms (Rev), Abortion, Forms 1 et seq.

1 Am Jur Proof of Facts 15, Abortion and Miscarriage

US L Ed Digest, Abortion 1; Statutes 18

ALR Digests, Abortion 1; Statutes 29

L Ed Index to Annos, Abortion; Certainty and Definiteness

ALR Quick Index, Abortion; Certainty and Definiteness

Federal Quick Index, Abortion; Certainty and Definiteness

Annotation References:

Validity, under Federal Constitution, of abortion laws. *35 L Ed 2d 735.*

Supreme Court's definition and application of doctrine of "abstention" where questions of state law are controlling in federal civil case. *20 L Ed 2d 1623.*

Indefiniteness of language as affecting validity of criminal legislation or judicial definition of common-law crime. *96 L Ed 374, 16 L Ed 2d 1231.*

Illustrations as to when statute defining criminal offense is subject to attack as vague, indefinite, or uncertain. *83 L Ed 893.*

EXHIBIT “6”

LEXSEE 269 U.S. 385

CONNALLY, COMMISSIONER, ET AL. v. GENERAL CONSTRUCTION COMPANY

No. 314

SUPREME COURT OF THE UNITED STATES

269 U.S. 385; 46 S. Ct. 126; 70 L. Ed. 322; 1926 U.S. LEXIS 929

November 30, December 1, 1925, Argued
January 4, 1926, Decided

PRIOR HISTORY: APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF OKLAHOMA.

APPEAL from a decree of the District Court awarding an interlocutory injunction, upon the bill and a motion to dismiss it (demurrer), in a suit to restrain state and county officials of Oklahoma from enforcing a statute purporting, inter alia, to prescribe a minimum for the wages of workmen employed by contractors in the execution of contracts with the State, and imposing fine or imprisonment for each day's violation.

DISPOSITION: *3 Fed. 2d 666*, affirmed.

LAWYERS' EDITION HEADNOTES:

Criminal law -- sufficiency of penal statute. --

Headnote:

The terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties.

Constitutional law -- validity of vague statute. --

Headnote:

A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.

Constitutional law -- requiring current rate of wages -- uncertainty. --

Headnote:

A statute requiring a contractor, under penalty, to pay his employees "not less than the current rate of per diem wages in the locality where the work is performed," is so uncertain as to deprive contractors of their property without due process of law.

SYLLABUS

1. A criminal statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must guess at its meaning and differ as to its application, lacks the first essential of due process of law. P. 391.

2. Oklahoma Comp. Stats. 1921, §§ 7255, 7257, imposing severe, cumulative punishments upon contractors with the State who pay their workmen less than the "current rate of per diem wages in the locality where the work is performed," -- *held* void for uncertainty. P. 393.

COUNSEL: Messrs. George F. Short, Attorney General of Oklahoma, and J. Berry King, with whom Mr. Leon S. Hirsh was on the brief, for appellants.

The constitutionality of statutes is the strongest presumption known to the courts. *United States v. Brewer, 139 U.S. 278*; *State ex rel. Hastings v. Smith, 35 Neb. 13*; *State v. Lancashire Fire Ins. Co., 66 Ark. 466*; *Commonwealth v. Libbey, 216 Mass. 356*. The "Current Wage Law" meets all the requirements of definiteness considered in cases involving other statutes dependent upon a state of mind, the Oklahoma law being dependent upon a

given state of facts, readily ascertainable. *Waters-Pierce Oil Co. v. Texas, 212 U.S. 86.* Decisions upon the Sherman Anti-Trust Act are undoubtedly of considerable bearing in a case of this type, for had not a more liberal construction been there indulged than is required of the "Current Wage Law," the term "undue and unreasonable restraint of trade" would never have been considered sufficiently definite to sustain a prosecution as due process of law. *Standard Oil Co. v. United States, 221 U.S. 31.* See *United States v. Reading Co., 226 U.S. 84*; *United States v. American Tobacco Co., 221 U.S. 106*; *United States v. Eastman Kodak Co., 226 Fed. 65*; and *Northern Securities Co. v. United States, 193 U.S. 197* -- all defining, in one way or another, what acts are "undue and unreasonable" acts, contracts or combinations resulting in, or tending to result in a monopoly or restraint of trade. *United States v. Trans-Missouri Freight Ass'n., 166 U.S. 290. Nash v. United States, 229 U.S. 373*, foreclosed the entire question of vagueness and uncertainty. *United States v. Patterson, 201 Fed. 697.* In *State v. Tibbetts, 205 Pac. 776*, the question of uncertainty by reason of the term "current rate of per diem wages" was not involved; but the statute was attacked on rehearing for uncertainty of the term "locality" and held to be valid. Indefiniteness as to the term "locality" cannot be asserted by appellee since the Tibbetts Case and the Waters-Pierce Oil Company Case definitely foreclose that question.

Were it not for this proviso as to wages, the entire salutary effect of the "Eight Hour Law" would be aborted. General classes of labor maintain a fairly uniform rate of pay -- what might properly be termed a "market price." Such was the recognition given to the term "prevailing rate of wages" in *Ryan v. City of New York, 79 N. Y. S. 599* and *McMahon v. City of New York, 47 N. Y. S. 1018.* There can be but one prevailing or market scale for each type of labor. In each locality there must be a current rate dictated by the law of supply and demand, modified by the standard of living in the particular community, the price of commodities and other various elements.

See *People ex rel. Rodgers v. Coler, 166 N. Y. 1*; *People v. Crane, 214 N. Y. 154*; *Fox v. Washington, 236 U.S. 273*; *Mutual Film Corp. v. Industrial Commission, 236 U.S. 246*; *Ellis v. United States, 206 U.S. 246*; *Bradford v. State, 78 Tex. Cr. 285*; *Commonwealth v. Reilly, 142 N. E. 915*; *Galveston, H. & S. A. Ry. v. Enderle, 170 S. W. 278*; *State v. Texas & Pacific R. Co., 106 Tex. 18*; *Morse v. Brown, 206 Fed. 232.*

Statutes containing such provisions as prohibiting the driving of vehicles "at a speed greater than is reasonable or prudent" have been held, in numerous cases, to be valid against the charge of vagueness and uncertainty of the offense prescribed. See also *State v. Quinlan, 86 N. J. L. 120*; *United States v. Sacks of Flour, 180 Fed. 518*; *Aiton v. Bd. of Medical Examiners, 13 Ariz. 354*; *People v. Apflebaum, 251 Ill. 18*; *Klafter v. State Bd. of Examiners, 259 Ill. 15*; *Katzman v. Commonwealth, 140 Ky. 124*; *State v. Lawrence, 9 Okla. Cr. 16*; *Stewart v. State, 4 Okla. Cr. 564*; *Mustard v. Elwood, 223 Fed. 225*; *Miller v. United States, 41 App. D. C. 52*; *Keefer v. State, 174 Ind. 255*; *State v. Newman Lbr. Co., 102 Miss. 802*; *Tanner v. Little, 240 U.S. 369*; *Pitney v. Washington, 240 U.S. 387*; *United States v. United States Brewers' Ass'n., 239 Fed. 163*; *Denver Jobbers' Ass'n. v. People ex rel. Dixon, 21 Colo. App. 350.*

A close study of all of the foregoing decisions demonstrates that a mental attitude as the standard of certainty almost invariably sustains the constitutionality of a statute. Where the standard is dependent upon a condition or state of facts, ascertainable by investigation, as a "current rate or per diem wages" in a given locality, a law based thereon is within all requirements of "due process."

There is no unlawful delegation of legislative power in the provision, in the Oklahoma labor laws, that the Commissioner of Labor is to carry into effect all the laws in relation to labor, passed by the Legislature of the State.

The provisions in question are not in conflict with the Federal Constitution as a taking of private property without compensation, nor as an interference with the freedom of contract.

Mr. J. D. Lydick, with whom Messrs. Charles E. McPherren, K. C. Sturdevant and Irvin L. Wilson were on the brief, for appellee.

JUDGES: Taft, Holmes, Van Devanter, McReynolds, Brandeis, Sutherland, Butler, Sanford, Stone.

OPINION BY: SUTHERLAND

OPINION

[*388] [**126] [***327] MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

This is a suit to enjoin certain state and county officers of Oklahoma from enforcing the provisions of § 7255 and § 7257, Compiled Oklahoma Statutes, 1921, challenged as unconstitutional. Section 7255 creates an eight-hour day for all persons employed by or on behalf of the state, etc., and provides "that not less than the current rate of per diem wages in the locality where the work is performed shall be paid to laborers, workmen,

mechanics, prison guards, janitors in public institutions, or other persons so employed by or on behalf of the State, . . . and laborers, workmen, mechanics, or other persons employed by contractors or subcontractors in the execution of any contract or contracts with the State, . . . shall be deemed to be employed by or on behalf of the State, . . ." For any violation of the section, a penalty is imposed by § 7257 of a fine of not less than fifty nor more than five hundred dollars or imprisonment for not less than three nor more than six months. Each day that the violation continues is declared to be a separate offense.

[*389] [**127] The material averments of the bill, shortly stated, are to the following effect: The construction company, under contracts with the state, is engaged in constructing certain bridges within the state. In such work, it employs a number of laborers, workmen and mechanics, with each of whom it has agreed as to the amount of wages to be paid upon the basis of an eight-hour day; and the amount so agreed upon is reasonable and commensurate with the services rendered and agreeable to the employee in each case.

The Commissioner of Labor complained that the rate of wages paid by the company to laborers was only $ 3.20 per day, whereas, he asserted, the current rate in the locality where the work was being done was $ 3.60, and gave notice that, unless advised of an intention immediately to comply with the law, action would be taken to enforce compliance. From the correspondence set forth in the bill, it appears that the commissioner based his complaint upon an investigation made by his representative concerning wages "paid to laborers in the vicinity of Cleveland," Oklahoma, near which town one of the bridges was being constructed. This investigation disclosed the following list of employers with the daily rate of wages paid by each: City, $ 3.60 and $ 4.00; Johnson Refining Co., $ 3.60 and $ 4.05; Prairie Oil & Gas, $ 4.00; Gypsy Oil Co., $ 4.00; Gulf Pipe Line Co., $ 4.00; Brickyard, $ 3.00 and $ 4.00; I. Hansen, $ 3.60; General Construction Co., $ 3.20; Moore & Pitts Ice Co., $ 100 per month; Cotton Gins, $ 3.50 and $ 4.00; Mr. Pitts, $ 4.00; Prairie Pipe Line Co., $ 4.00; C. B. McCormack, $ 3.00; Harry McCoy, $ 3.00. The scale of wages paid by the construction company to its laborers was stated to be as follows: 6 men at $ 3.20 per day; 7 men at $ 3.60; 4 men at $ 4.00; 2 men at $ 4.40; 4 men at $ 4.80; 1 man at $ 5.20; and 1 man at $ 6.50.

In determining the rate of wages to be paid by the company, the commissioner claimed to be acting under [*390] authority of a statute of Oklahoma which imposes [***328] upon him the duty of carrying into effect all laws in relation to labor. In the territory surrounding the bridges being constructed by plaintiff, there is a variety of work performed by laborers, etc., the value of whose services depends upon the class and kind of labor performed and the efficiency of the workmen. Neither the wages paid nor the work performed are uniform; wages have varied since plaintiff entered into its contracts for constructing the bridges and employing its men; and it is impossible to determine under the circumstances whether the sums paid by the plaintiff or the amount designated by the commissioner or either of them constitute the current per diem wage in the locality. Further averments are to the effect that the commissioner has threatened the company and its officers, agents and representatives with criminal prosecutions under the foregoing statutory provisions, and, unless restrained, the county attorneys for various counties named will institute such prosecutions; and that, under § 7257, providing that each day's failure to pay current wages shall constitute a separate offense, maximum penalties may be inflicted aggregating many thousands of dollars in fines and many years of imprisonment.

The constitutional grounds of attack, among others, are that the statutory provisions, if enforced, will deprive plaintiff, its officers, agents and representatives, of their liberty and property without due process of law, in violation of the *Fourteenth Amendment to the federal Constitution*; that they contain no ascertainable standard of guilt; that it cannot be determined with any degree of certainty what sum constitutes a current wage in any locality; and that the term "locality" itself is fatally vague and uncertain. The bill is a long one, and, without further review, it is enough to say that, if the constitutional attack upon the statute be sustained, the averments justify the equitable relief prayed.

[*391] Upon the bill and a motion to dismiss it, in the nature of a demurrer attacking its sufficiency, an application for an interlocutory injunction was heard by a court of three judges, under § 266 Jud. Code, and granted; the allegations of the bill being taken as true. *3 Fed. 2d 666.*

That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law. *International Harvester Co.* v. *Kentucky, 234 U.S. 216, 221*; *Collins v. Kentucky, 234 U.S. 634, 638.*

The question whether given legislative enactments have been thus wanting in certainty has frequently been before this court. In some of the cases the statutes in-

volved were upheld; in others, declared invalid. The precise point of differentiation in some instances is not easy of statement. But it will be enough for present purposes to say generally that the decisions of the court upholding statutes as sufficiently certain, rested upon the conclusion that they employed words or phrases having a technical or other special meaning, well enough known to enable those within their reach to correctly apply them, *Hygrade Provision Co.* v. *Sherman, 266 U.S. 497, 502*; [**128] *Omaechevarria v. Idaho, 246 U.S. 343, 348*, or a well-settled common law meaning, notwithstanding an element of degree in the definition as to which estimates might differ, *Nash v. United States, 229 U.S. 373, 376*; *International Harvester Co. v. Kentucky, supra, p. 223*, or, as broadly stated by Mr. Chief Justice White in *United States v. Cohen Grocery Co., 255 U.S. 81, 92*, "that, for reasons found to [*392] result either from the text of the statutes involved or the subjects with which they dealt, a standard of some sort was afforded." See also, *Waters-Pierce Oil Co.* v. *Texas (No. 1), 212 U.S. 86, 108*. Illustrative cases on the other hand are *International Harvester Co. v. Kentucky, supra, Collins v. Kentucky, supra*, and *United States v. Cohen Grocery Co., supra*, and cases there cited. The *Cohen Grocery Case* involved the validity of § 4 of the Food Control Act of 1917, which imposed a penalty upon any person who should make "any [***329] unjust or unreasonable rate or charge in handling or dealing in or with any necessaries." It was held that these words fixed no ascertainable standard of guilt, in that they forbade no specific or definite act.

Among the cases cited in support of that conclusion is *United States v. Capital Traction Co., 34 App. D. C. 592*, where a statute making it an offense for any street railway company to run an insufficient number of cars to accommodate passengers "without crowding," was held to be void for uncertainty. In the course of its opinion, that court said (pp. 596, 598):

"The statute makes it a criminal offense for the street railway companies in the District of Columbia to run an insufficient number of cars to accommodate persons desiring passage thereon, without crowding the same. What shall be the guide to the court or jury in ascertaining what constitutes a crowded car? What may be regarded as a crowded car by one jury may not be so considered by another. What shall constitute a sufficient number of cars in the opinion of one judge may be regarded as insufficient by another. . . . There is a total absence of any definition of what shall constitute a crowded car. This important element cannot be left to conjecture, or be supplied by either the court or the jury. It is of the very essence of the law itself, and without it the statute is too indefinite and uncertain to support an information or indictment.

[*393] ". . . The dividing line between what is lawful and unlawful cannot be left to conjecture. The citizen cannot be held to answer charges based upon penal statutes whose mandates are so uncertain that they will reasonably admit of different constructions. A criminal statute cannot rest upon an uncertain foundation. The crime, and the elements constituting it, must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course it is lawful for him to pursue. Penal statutes prohibiting the doing of certain things, and providing a punishment for their violation, should not admit of such a double meaning that the citizen may act upon the one conception of its requirements and the courts upon another."

In the light of these principles and decisions, then we come to the consideration of the legislation now under review, requiring the contractor, at the risk of incurring severe and cumulative penalties, to pay his employees "not less than the current rate of per diem wages in the locality where the work is performed."

We are of opinion that this provision presents a double uncertainty, fatal to its validity as a criminal statute. In the first place, the words "current rate of wages" do not denote a specific or definite sum, but minimum, maximum and intermediate amounts, indeterminately, varying from time to time and dependent upon the class and kind of work done, the efficiency of the workmen, etc., as the bill alleges is the case in respect of the territory surrounding the bridges under construction. * The statutory phrase reasonably cannot be confined to any of these amounts, since it imports each and all of them. The [*394] "current rate of wages" is not simple but progressive -- from so much (the minimum) to so much (the maximum), including all between; and to direct the payment of an amount which shall not be less than one of several different amounts, without saying which, is to leave the question of what is meant incapable of any definite answer. See *People ex rel. Rodgers v. Coler, 166 N. Y. 1, 24-25*.

* The commissioner's own investigation shows that wages ranged from $ 3.00 to $ 4.05 per day; and the scale of wages paid by the construction company to its laborers, twenty-five in number, ranged from $ 3.20 to $ 6.50 per day, all but six of them being paid at $ 3.60 or more.

Nor can the question be solved by resort to the established canons of construction that enable a court to look through awkward or clumsy expression, or language wanting in precision, to the intent of the legislature. For the vice of the statute here lies in the impossibility of ascertaining, by any reasonable test, that the legislature meant one thing rather than another, and in the futility of an attempt to apply a requirement, which assumes the

existence of a rate of wages single in amount, to a rate in fact composed of a multitude of gradations. To construe the phrase "current rate of wages" as meaning either the lowest rate or the highest rate or any intermediate rate or, if it were possible to determine the various factors to be considered, an average of all rates, would be as likely to defeat the purpose of the legislature as to promote it. See *State v. Partlow, 91 N. C. 550, 553*; [***330] *Commonwealth* [**129] *v. Bank of Pennsylvania, 3 Watts & S. 173, 177.*

In the second place, additional obscurity is imparted to the statute by the use of the qualifying word "locality." Who can say, with any degree of accuracy, what areas constitute the locality where a given piece of work is being done? Two men moving in any direction from the place of operations, would not be at all likely to agree upon the point where they had passed the boundary which separated the locality of that work from the next locality. It is said that this question is settled for us by the decision of the criminal court of appeals on rehearing in *State v. Tibbetts, 205 Pac. 776, 779.* But all the court did there was to define the word "locality" as meaning "place," [*395] "near the place," "vicinity," or "neighborhood." Accepting this as correct, as of course we do, the result is not to remove the obscurity, but rather to offer a choice of uncertainties. The word "neighborhood" is quite as susceptible of variation as the word "locality." Both terms are elastic and, dependent upon circumstances, may be equally satisfied by areas measured by rods or by miles. See *Schmidt v. Kansas City Distilling Co., 90 Mo. 284, 296*; *Woods v. Cochrane and Smith, 38 Iowa 484, 485*; *State ex rel. Christie v. Meek, 26 Wash. 405, 407-408*; *Millville Imp. Co.* v. *Pitman, etc., Gas Co., 75 N. J. Law 410, 412*; *Thomas* v. *Marshfield*, 10 Pick. 364, 367. The case last cited held that a grant of common to the inhabitants of a certain neighborhood was void because the term "neighborhood" was not sufficiently certain to identify the grantees. In other connections or under other conditions the term "locality" might be definite enough, but not so in a statute such as that under review imposing criminal penalties. Certainly, the expression "near the place" leaves much to be desired in the way of a delimitation of boundaries; for it at once provokes the inquiry, "how near?" And this element of uncertainty cannot here be put aside as of no consequence, for, as the rate of wages may vary -- as in the present case it is alleged it does vary -- among different employers and according to the relative efficiency of the workmen, so it may vary in different sections. The result is that the application of the law depends not upon a word of fixed meaning in itself, or one made definite by statutory or judicial definition, or by the context or other legitimate aid to its construction, but upon the probably varying impressions of juries as to whether given areas are or are not to be included within particular localities. The constitutional guaranty of due process cannot be allowed to rest upon a support so equivocal.

Interlocutory decree affirmed.

[*396] MR. JUSTICE HOLMES and MR. JUSTICE BRANDEIS concur in the result on the ground that the plaintiff was not violating the statute by any criterion available in the vicinity of Cleveland.

EXHIBIT "7"

LEXSEE 408 U.S. 104, 108-109

GRAYNED v. CITY OF ROCKFORD

No. 70-5106

SUPREME COURT OF THE UNITED STATES

408 U.S. 104; 92 S. Ct. 2294; 33 L. Ed. 2d 222; 1972 U.S. LEXIS 26

January 19, 1972, Argued
June 26, 1972, Decided

PRIOR HISTORY: APPEAL FROM THE SUPREME COURT OF ILLINOIS.

DISPOSITION: *46 Ill. 2d 492, 263 N. E. 2d 866*, affirmed in part and reversed in part.

SYLLABUS

1. Antipicketing ordinance, virtually identical with one invalidated as violative of equal protection in *Police Department of Chicago* v. *Mosley, ante*, p. 92, is likewise invalid. P. 107.

2. Antinoise ordinance prohibiting a person while on grounds adjacent to a building in which a school is in session from willfully making a noise or diversion that disturbs or tends to disturb the peace or good order of the school session is not unconstitutionally vague or overbroad. The ordinance is not vague since, with fair warning, it prohibits only actual or imminent, and willful, interference with normal school activity, and is not a broad invitation to discriminatory enforcement. *Cox v. Louisiana, 379 U.S. 536*; *Coates v. Cincinnati, 402 U.S. 611*, distinguished. The ordinance is not overbroad as unduly interfering with *First Amendment* rights since expressive activity is prohibited only if it "materially disrupts classwork." *Tinker v. Des Moines School District, 393 U.S. 503, 513.* Pp. 107-121.

COUNSEL: Sophia H. Hall argued the cause for appellant. With her on the briefs were William R. Ming, Jr., and Aldus S. Mitchell.

William E. Collins argued the cause for appellee. With him on the brief were A. Curtis Washburn and Charles F. Thomas.

JUDGES: Marshall, J., delivered the opinion of the Court, in which Burger, C. J., and Brennan, Stewart, White, Powell, and Rehnquist, JJ., joined. Blackmun, J., filed a statement joining in the judgment and in Part I of the Court's opinion and concurring in the result as to Part II of the opinion, post, p. 121. Douglas, J., filed an opinion dissenting in part and joining in Part I of the Court's opinion, post, p. 121.

OPINION BY: MARSHALL

OPINION

[*105] [***225] [**2297] MR. JUSTICE MARSHALL delivered the opinion of the Court.

Appellant Richard Grayned was convicted for his part in a demonstration in front of West Senior High School in Rockford, Illinois. Negro students at the school had first presented their grievances to school administrators. When the principal took no action on crucial complaints, a more public demonstration of protest was planned. On April 25, 1969, approximately 200 people -- students, their family members, and friends -- gathered next to the school grounds. Appellant, whose brother and twin sisters were attending the school, was part of this group. The demonstrators marched around on a sidewalk about 100 feet from the school building, which was set back from the street. Many carried signs which summarized the grievances: "Black cheerleaders to cheer too"; "Black history with black teachers"; "Equal rights, Negro counselors." Others, without placards, made the "power to the people" sign with their upraised and clenched fists.

[***226] In other respects, the evidence at appellant's trial was sharply contradictory. Government wit-

nesses reported that the demonstrators repeatedly cheered, chanted, baited policemen, and made other noise that was audible in the school; that hundreds of students were distracted from their school activities and lined the classroom windows to watch the demonstration; that some demonstrators successfully yelled to their friends to leave the school building and join the demonstration; that uncontrolled latenesses after period changes in the school were far greater than usual, with late students admitting that they had been watching the demonstration; and that, in general, orderly school procedure was disrupted. Defense witnesses claimed that the demonstrators were at all times quiet and orderly; that they did not seek to violate the law, but only to "make [*106] a point"; that the only noise was made by policemen using loudspeakers; that almost no students were noticeable at the schoolhouse windows; and that orderly school procedure was not disrupted.

[***LEdHR1A] [1A]After warning the demonstrators, the police arrested 40 of them, including appellant. [1] For participating in the [**2298] demonstration, Grayned was tried and convicted of violating two Rockford ordinances, hereinafter referred to as the "antipicketing" ordinance and the "antinoise" ordinance. A $ 25 fine was imposed for each violation. Since Grayned challenged the constitutionality of each ordinance, he appealed directly to the Supreme Court of Illinois. Ill. Sup. Ct. Rule 302. He claimed that the ordinances were invalid on their face, but did not urge that, as applied to him, the ordinances had punished constitutionally protected activity. The Supreme Court of Illinois held that both ordinances were constitutional on their face. *46 Ill. 2d 492, 263 N. E. 2d 866 (1970).* We noted probable jurisdiction, *404 U. S. 820 (1971).* We conclude that the antipicketing ordinance is unconstitutional, but affirm the court below with respect to the antinoise ordinance.

[***LEdHR1B] [1B]

1 Police officers testified that "there was no way of picking out any one in particular" while making arrests. Report of Proceedings in Circuit Court, 17th Judicial Circuit, Winnebago County 66. However, apparently only males were arrested. *Id.*, at 65, 135, 147. Since appellant's sole claim in this appeal is that he was convicted under facially unconstitutional ordinances, there is no occasion for us to evaluate either the propriety of these selective arrests or the sufficiency of evidence that appellant himself actually engaged in conduct within the terms of the ordinances. MR. JUSTICE DOUGLAS, in concluding that appellant's particular behavior was protected by the *First Amendment*, reaches a question not presented by the parties here or in the court below. See Tr. of Oral Arg. 16-17; Jurisdictional Statement 3; *City of Rockford v. Grayned, 46 Ill. 2d 492, 494, 263 N. E. 2d 866, 867 (1970).*

[*107] I

[***LEdHR2] [2] [***LEdHR3A] [3A]At the time of appellant's arrest and conviction, Rockford's antipicketing ordinance provided that

"A person commits disorderly conduct when he knowingly:

. . . .

"(i) Pickets or demonstrates on a public way within 150 feet of any primary or secondary school building while the school is in session and one-half hour before the school is in session and one-half hour after the school session has been concluded, provided that this subsection [***227] does not prohibit the peaceful picketing of any school involved in a labor dispute . . . ." Code of Ordinances, c. 28, § 18.1 (i).

This ordinance is identical to the Chicago disorderly conduct ordinance we have today considered in *Police Department of Chicago* v. *Mosley, ante*, p. 92. For the reasons given in *Mosley*, we agree with dissenting Justice Schaefer below, and hold that § 18.1 (i) violates the *Equal Protection Clause of the Fourteenth Amendment.* Appellant's conviction under this invalid ordinance must be reversed. [2]

[***LEdHR3B] [3B]

2 In November 1971, the antipicketing ordinance was amended to delete the labor picketing proviso. As Rockford notes, "This amendment and deletion has, of course, no effect on Appellant's personal situation." Brief 2. Necessarily, we must consider the facial constitutionality of the ordinance in effect when appellant was arrested and convicted.

II

The antinoise ordinance reads, in pertinent part, as follows:

"No person, while on public or private grounds adjacent to any building in which a school or any [*108] class thereof is in session, shall willfully make or assist in the making of any noise or diversion which disturbs or tends to disturb the peace or good order of such school session or class thereof. . . ." Code of Ordinances, c. 28, § 19.2 (a).

Appellant claims that, on its face, this ordinance is both vague and overbroad, and therefore unconstitution-

al. We conclude, however, that the ordinance suffers from neither of these related infirmities.

A. Vagueness

[***LEdHR4] [4]It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity [**2299] to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. [3] Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. [4] A vague [***228] law impermissibly delegates [*109] 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. [5] Third, but related, where a vague statute "abut[s] upon sensitive areas of basic *First Amendment* freedoms," [6] it "operates to inhibit the exercise of [those] freedoms." [7] Uncertain meanings inevitably lead citizens to "'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked." [8]

3 *E. g., Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972); Cramp v. Board of Public Instruction, 368 U.S. 278, 287 (1961); United States v. Harriss, 347 U.S. 612, 617 (1954); Jordan v. De George, 341 U.S. 223, 230-232 (1951); Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939); Connally v. General Construction Co., 269 U.S. 385, 391 (1926); United States v. Cohen Grocery Co., 255 U.S. 81, 89 (1921); International Harvester Co.* v. *Kentucky, 234 U.S. 216, 223-224 (1914).*

4 *E. g., Papachristou v. City of Jacksonville, supra; Coates v. Cincinnati, 402 U.S. 611, 614 (1971); Gregory v. Chicago, 394 U.S. 111, 120 (1969)* (Black, J., concurring); *Interstate Circuit v. Dallas, 390 U.S. 676, 684-685 (1968); Ashton v. Kentucky, 384 U.S. 195, 200 (1966); Giaccio v. Pennsylvania, 382 U.S. 399 (1966); Shuttlesworth v. Birmingham, 382 U.S. 87, 90-91 (1965); Kunz v. New York, 340 U.S. 290 (1951); Saia v. New York, 334 U.S. 558, 559-560 (1948); Thornhill v. Alabama, 310 U.S. 88, 97-98 (1940); Herndon v. Lowry, 301 U.S. 242, 261-264 (1937).*

5 Where *First Amendment* interests are affected, a precise statute "evincing a legislative judgment that certain specific conduct be . . . proscribed," *Edwards v. South Carolina, 372 U.S. 229, 236 (1963)*, assures us that the legislature has focused on the *First Amendment* interests and determined that other governmental policies compel regulation. See Kalven, The Concept of the Public Forum: Cox v. Louisiana, 1965 Sup. Ct. Rev. 1, 32; *Garner v. Louisiana, 368 U.S. 157, 200, 202 (1961)* (Harlan, J., concurring in judgment).

6 *Baggett v. Bullitt, 377 U.S. 360, 372 (1964).*

7 *Cramp v. Board of Public Instruction, 368 U.S., at 287.*

8 *Baggett v. Bullitt, supra, at 372*, quoting *Speiser v. Randall, 357 U.S. 513, 526 (1958).* See *Interstate Circuit v. Dallas, supra, at 684; Ashton v. Kentucky, supra, at 195, 200-201; Dombrowski v. Pfister, 380 U.S. 479, 486 (1965); Smith v. California, 361 U.S. 147, 150-152 (1959); Winters v. New York, 333 U.S. 507 (1948); Stromberg v. California, 283 U.S. 359, 369 (1931).*

[***LEdHR5A] [5A] [***LEdHR6] [6]Although the question is close, we conclude that the antinoise ordinance is not impermissibly vague. The court below rejected appellant's arguments "that proscribed conduct was not sufficiently specified and that police were given too broad a discretion in determining whether conduct was proscribed." *46 Ill. 2d, at 494, 263 N. E. 2d, at 867.* Although it referred to other, similar statutes it had recently construed and upheld, the court [*110] below [**2300] did not elaborate on the meaning of the antinoise ordinance. [9] In this situation, as Mr. Justice Frankfurter put it, we must "extrapolate its allowable meaning." [10] Here, we are "relegated . . . to the words of the ordinance itself," [11] to the interpretations the court below has given to analogous statutes, [12] and, perhaps to some degree, to the interpretation of the statute given by those charged with enforcing it. [13] "Extrapolation," of course, is a delicate task, for it is not within our power to construe and narrow state laws. [14]

9 The trial magistrate simply charged the jury in the words of the ordinance. The complaint and verdict form used slightly different language. See n. 24, *infra.*

10 *Garner v. Louisiana, 368 U.S., at 174* (concurring in judgment).

11 *Coates v. Cincinnati, 402 U.S., at 614.*

12 *E. g., Gooding v. Wilson, 405 U.S. 518 (1972).*

13 *E. g., Lake Carriers Assn.* v. *MacMullan, 406 U.S. 498, 506-508 (1972); Cole v. Richardson, 405 U.S. 676 (1972); Ehlert v. United States, 402 U.S. 99, 105, 107 (1971)*; cf. *Poe v. Ullman, 367 U.S. 497 (1961).*

14 *United States v. 37 Photographs, 402 U.S. 363, 369 (1971).*

[***LEdHR5B] [5B]With that warning, we find no unconstitutional vagueness in the antinoise ordinance. Condemned to the use of words, we can never expect [***229] mathematical certainty from our language. [15] The words of the Rockford ordinance are marked by "flexibility and reasonable breadth, rather than meticulous specificity," *Esteban v. Central Missouri State College, 415 F.2d 1077, 1088 (CA8 1969)* (Blackmun, J.), cert. denied, *398 U.S. 965 (1970)*, but we think it is clear what the ordinance as a whole prohibits. Designed, according to its preamble, "for the protection of Schools," the ordinance forbids deliberately [*111] noisy or diversionary [16] activity that disrupts or is about to disrupt normal school activities. It forbids this willful activity at fixed times -- when school is in session -- and at a sufficiently fixed place -- "adjacent" to the school. [17] Were we left with just the words of the ordinance, we might be troubled by the imprecision of the phrase "tends to disturb." [18] However, in *Chicago v. Meyer, 44 Ill. 2d 1, 4, 253 N. E. 2d 400, 402 (1969)*, and *Chicago v. Gregory, 39 Ill. 2d 47, 233 N. E. 2d 422 (1968)*, reversed on other grounds, *394 U.S. 111 (1969)*, the Supreme Court of Illinois construed a Chicago ordinance prohibiting, *inter alia*, a "diversion tending to disturb the peace," and held that it permitted conviction only where there was " [**2301] *imminent* threat of violence." (Emphasis supplied.) See *Gregory v. Chicago, 394 U.S. 111, 116-117, 121-122 (1969)* (Black, J., concurring). [19] Since *Meyer* was specifically cited in the opinion below, and it in turn drew heavily on *Gregory*, we think it proper to conclude that the Supreme Court of Illinois would interpret the Rockford ordinance to prohibit only actual [*112] or imminent interference with the "peace or good order" of the school. [20]

15 It will always be true that the fertile legal "imagination can conjure up hypothetical cases in which the meaning of [disputed] terms will be in nice question." *American Communications Assn.* v. *Douds, 339 U.S. 382, 412 (1950).*

16 "Diversion" is defined by *Webster's Third New International Dictionary* as "the act or an instance of diverting from one course or use to another . . . : the act or an instance of diverting (as the mind or attention) from some activity or concern . . . : a turning aside . . . : something that turns the mind from serious concerns or ordinary matters and relaxes or amuses."

17 Cf. *Cox v. Louisiana, 379 U.S. 559, 568-569 (1965)* ("near" the courthouse not impermissibly vague).

18 See *Gregory v. Chicago, 394 U.S., at 119-120* (Black, J., concurring); *Gooding v. Wilson, 405 U.S., at 525-527*; *Craig v. Harney, 331 U.S. 367, 372 (1947)*; cf. *Chaplinsky v. New Hampshire, 315 U.S. 568 (1942)* (statute punishing "fighting words," that have a "*direct* tendency to cause acts of violence," upheld); *Street v. New York, 394 U.S. 576, 592 (1969).*

19 Cf. *Chicago v. Terminiello, 400 Ill. 23, 79 N. E. 2d 39 (1948)*, reversed on other grounds, *337 U. S. 1, 6 (1949).*

20 Some intermediate appellate courts in Illinois appear to have interpreted the phrase "tending to" out of the Chicago ordinance entirely, at least in some contexts. *Chicago v. Hansen, 337 Ill. App. 663, 86 N. E. 2d 415 (1949)*; *Chicago v. Holmes, 339 Ill. App. 146, 88 N. E. 2d 744 (1949)*; *Chicago v. Nesbitt, 19 Ill. App. 2d 220, 153 N. E. 2d 259 (1958)*; but cf. *Chicago v. Williams, 45 Ill. App. 2d 327, 195 N. E. 2d 425 (1963).*

In its brief, the city of Rockford indicates that its sole concern is with *actual* disruption. "[A] court and jury [are] charged with the duty of determining whether or not . . . a school *has been disrupted* and that the defendant's conduct, [no matter what it was,] caused or contributed to cause the disruption." Brief for Appellee 16 (emphasis supplied). This was the theory on which the city tried appellant's case to the jury, Report, *supra*, n. 1, at 12-13, although the jury was instructed in the words of the ordinance. As already noted, *supra*, n. 1, no challenge is made here to the Rockford ordinance as applied in this case.

Although [***230] the prohibited quantum of disturbance is not specified in the ordinance, it is apparent from the statute's announced purpose that the measure is whether normal school activity has been or is about to be disrupted. We do not have here a vague, general "breach of the peace" ordinance, but a statute written specifically for the school context, where the prohibited disturbances are easily measured by their impact on the normal activities of the school. Given this "particular context," the ordinance gives "fair notice to those to whom [it] is directed." [21] Although the Rockford ordinance may not be as precise as the statute we upheld in *Cameron v. Johnson, 390 U.S. 611 (1968)* -- which prohibited picketing "in such a manner as to obstruct or unreasonably interfere with free ingress or egress to and from" any courthouse -- we think that, as in *Cameron*, the ordinance here clearly "delineates its reach in words of common understanding." *Id., at 616.*

21 *American Communications Assn.* v. *Douds, 339 U.S., at 412.*

[*113] *Cox v. Louisiana, 379 U.S. 536 (1965)*, and *Coates v. Cincinnati, 402 U.S. 611 (1971)*, on which appellant particularly relies, presented completely different situations. In *Cox*, a general breach of the peace ordinance had been construed by state courts to mean "to agitate, to arouse from a state of repose, to molest, to interrupt, to hinder, to disquiet." The Court correctly concluded that, as construed, the ordinance permitted persons to be punished for merely expressing unpopular views. [22] In *Coates*, the ordinance punished the sidewalk assembly of three or more persons who "conduct themselves in a manner annoying to [**2302] persons passing by . . ." We held, in part, that the ordinance was impermissibly vague because enforcement depended on the completely subjective standard of "annoyance."

22 Cf. *Edwards v. South Carolina, 372 U.S. 229 (1963)*; *Cantwell v. Connecticut, 310 U.S. 296, 308 (1940)*. Similarly, in numerous other cases, we have condemned broadly worded licensing ordinances which grant such standardless discretion to public officials that they are free to censor ideas and enforce their own personal preferences. *Shuttlesworth v. Birmingham, 394 U.S. 147 (1969)*; *Staub v. City of Baxley, 355 U.S. 313 (1958)*; *Saia v. New York, 334 U.S. 558 (1948)*; *Schneider v. State, 308 U.S. 147, 163-164 (1939)*; *Lovell v. Griffin, 303 U.S. 444 (1938)*; *Hague v. CIO, 307 U.S. 496 (1939)*.

[***LEdHR5C] [5C]In contrast, Rockford's antinoise ordinance does not permit punishment for the expression of an unpopular point of view, and it contains no broad invitation to subjective or discriminatory enforcement. Rockford does not claim the broad power to punish all "noises" and "diversions." [23] The vagueness of these terms, by themselves, is dispelled by the ordinance's requirements that (1) the "noise or diversion" be actually incompatible with normal school activity; (2) there be a demonstrated causality between the disruption that occurs and the "noise or diversion"; and (3) the acts be [*114] "willfully" done. [24] "Undesirables [***231] " or their "annoying" conduct may not be punished. The ordinance does not permit people to "stand on a public sidewalk . . . only at the whim of any police officer." [25] Rather, there must be demonstrated interference with school activities. As always, enforcement requires the exercise of some degree of police judgment, but, as confined, that degree of judgment here is permissible. The Rockford City Council has made the basic policy choices, and has given fair warning as to what is prohibited. "The ordinance defines boundaries sufficiently distinct" for citizens, policemen, juries, and appellate judges. [26] It is not impermissibly vague.

23 Cf. *Cox v. Louisiana, 379 U.S. 536, 546-550 (1965)*; *Edwards v. South Carolina, 372 U.S., at 234-237*.

24 Tracking the complaint, the jury verdict found Grayned guilty of "wilfully causing diversion of good order of public school in session, in that while on school grounds and while school was in session, did wilfully make and assist in the making of a diversion which tended to disturb the peace and good order of the school session and class thereof."

25 *Shuttlesworth v. Birmingham, 382 U.S., at 90*.

26 *Chicago v. Fort, 46 Ill. 2d 12, 16, 262 N. E. 2d 473, 476 (1970)*, a case cited in the opinion below.

B. Overbreadth

[***LEdHR7] [7] [***LEdHR8] [8]A clear and precise enactment may nevertheless be "overbroad" if in its reach it prohibits constitutionally protected conduct. [27] Although appellant does not claim that, as applied to him, the antinoise ordinance has punished protected expressive activity, he claims that the ordinance is overbroad on its face. Because overbroad laws, like vague ones, deter privileged activity, our cases firmly establish appellant's standing to raise an overbreadth challenge. [28] The crucial question, then, is [*115] whether the ordinance sweeps within its prohibitions what may not be punished under the *First* and *Fourteenth Amendments*. Specifically, appellant contends that the Rockford ordinance unduly interferes with *First* and *Fourteenth Amendment* rights to picket on a public sidewalk near a school. We disagree.

27 See *Zwickler v. Koota, 389 U.S. 241, 249-250 (1967)*, and cases cited.

28 *E. g., Gooding v. Wilson, 405 U.S. 518 (1972)*; *Coates v. Cincinnati, 402 U.S., at 616*; *Dombrowski v. Pfister, 380 U.S., at 486*, and cases cited; *Kunz v. New York, 340 U.S. 290 (1951)*.

"

[***LEdHR9] [9]In considering the right of a municipality to control the use of public streets for the expression of religious [or political] views, we start with the words of Mr. Justice Roberts that 'Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing [**2303] public questions.' *Hague v. CIO, 307 U.S. 496, 515 (1939)*." *Kunz v. New York, 340 U.S. 290, 293*

(1951). See *Shuttlesworth v. Birmingham, 394 U.S. 147, 152 (1969)*.The right to use a public place for expressive activity may be restricted only for weighty reasons.

[***LEdHR10] [10] [***LEdHR11] [11]Clearly, government has no power to restrict such activity because of its message. [29] Our cases make equally clear, however, that reasonable "time, place and manner" regulations may be necessary to further significant governmental interests, [***232] and are permitted. [30] For example, two parades cannot march on the same street simultaneously, and government may allow only one. *Cox v. New Hampshire, 312 U.S. 569, 576 (1941)*. A demonstration or parade on a large street during rush hour [*116] might put an intolerable burden on the essential flow of traffic, and for that reason could be prohibited. *Cox v. Louisiana, 379 U.S., at 554*. If overamplified loudspeakers assault the citizenry, government may turn them down. *Kovacs v. Cooper, 336 U.S. 77 (1949)*; *Saia v. New York, 334 U.S. 558, 562 (1948)*. Subject to such reasonable regulation, however, peaceful demonstrations in public places are protected by the *First Amendment*. [31] Of course, where demonstrations turn violent, they lose their protected quality as expression under the *First Amendment*. [32]

29 *Police Department of Chicago* v. *Mosley, ante*, p. 92.

30 *Cox v. New Hampshire, 312 U.S. 569, 575-576 (1941)*; *Kunz v. New York, 340 U.S., at 293-294*; *Poulos v. New Hampshire, 345 U.S. 395, 398 (1953)*; *Cox v. Louisiana, 379 U.S., at 554-555*; *Cox v. Louisiana, 379 U.S. 559 (1965)*; *Adderley v. Florida, 385 U.S. 39, 46-48 (1966)*; *Food Employees v. Logan Valley Plaza, 391 U.S. 308, 320-321 (1968)*; *Shuttlesworth v. Birmingham, 394 U.S. 147 (1969)*.

31 *Police Department of Chicago* v. *Mosley, ante*, at 95-96, and cases cited.

32 See generally T. Emerson, The System of Freedom of Expression 328-345 (1970).

[***LEdHR12] [12] [***LEdHR13] [13] [***LEdHR14] [14]The nature of a place, "the pattern of its normal activities, dictate the kinds of regulations of time, place, and manner that are reasonable." [33] Although a silent vigil may not unduly interfere with a public library, *Brown v. Louisiana, 383 U.S. 131 (1966)*, making a speech in the reading room almost certainly would. That same speech should be perfectly appropriate in a park. The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time. Our cases make clear that in assessing the reasonableness of a regulation, we must weigh heavily the fact that communication is involved; [34] the regulation must be narrowly [*117] tailored [**2304] to further the State's legitimate interest. [35] Access [***233] to the "streets, sidewalks, parks, and other similar public places . . . for the purpose of exercising [*First Amendment* rights] cannot constitutionally be denied broadly . . . ." [36] Free expression "must not, in the guise of regulation, be abridged or denied." [37]

33 Wright, The Constitution on the Campus, 22 Vand. L. Rev. 1027, 1042 (1969). Cf. *Cox v. Louisiana, 379 U.S. 559 (1965)*; *Adderley v. Florida, 385 U.S. 39 (1966)*; *Food Employees v. Logan Valley Plaza, 391 U.S. 308 (1968)*; *Tinker v. Des Moines School District, 393 U.S. 503 (1969)*.

34 *E. g., Schneider v. State, 308 U.S. 147 (1939)*; *Talley v. California, 362 U.S. 60 (1960)*; *Saia v. New York, 334 U.S., at 562*; *Cox v. New Hampshire, 312 U.S., at 574*; *Hague v. CIO, 307 U.S., at 516*. See generally Kalven, The Concept of the Public Forum: Cox v. Louisiana, 1965 Sup. Ct. Rev. 1.

35 *De Jonge v. Oregon, 299 U.S. 353, 364-365 (1937)*; *Lovell v. Griffin, 303 U.S., at 451*; *Schneider v. State, 308 U.S., at 164*; *Cantwell v. Connecticut, 310 U.S., at 307*; *Cox v. Louisiana, 379 U.S., at 562-564*; *Davis v. Francois, 395 F.2d 730 (CA5 1968)*. Cf. *Shelton v. Tucker, 364 U.S. 479, 488 (1960)*; *NAACP v. Button, 371 U.S. 415, 438 (1963)*.

36 *Food Employees v. Logan Valley Plaza, 391 U.S., at 315*.

37 *Hague v. CIO, 307 U.S., at 516*.

[***LEdHR15A] [15A]In light of these general principles, we do not think that Rockford's ordinance is an unconstitutional regulation of activity around a school. Our touchstone is *Tinker v. Des Moines School District, 393 U.S. 503 (1969)*, in which we considered the question of how to accommodate *First Amendment* rights with the "special characteristics of the school environment." *Id., at 506*. *Tinker* held that the Des Moines School District could not punish students for wearing black armbands to school in protest of the Vietnam war. Recognizing that "'wide exposure to . . . robust exchange of ideas'" is an "important part of the educational process" and should be nurtured, *id., at 512*, we concluded that free expression could not be barred from the school campus. We made clear that "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression," *id., at 508*, [38] and that particular expressive activity could not be prohibited because of a "mere desire to avoid the dis-

comfort and unpleasantness that always accompany an unpopular viewpoint," *id., at 509*. But we nowhere suggested that students, teachers, or anyone else has an absolute constitutional right to use [*118] all parts of a school building or its immediate environs for his unlimited expressive purposes. Expressive activity could certainly be restricted, but only if the forbidden conduct "materially disrupts classwork or involves substantial disorder or invasion of the rights of others." *Id., at 513*. The wearing of armbands was protected in *Tinker* because the students "neither interrupted school activities nor sought to intrude in the school affairs or the lives of others. They caused discussion outside of the classrooms, but no interference with work and no disorder." *Id., at 514*. Compare *Burnside v. Byars, 363 F.2d 744 (CA5 1966)*, and *Butts v. Dallas Ind. School District, 436 F.2d 728 (CA5 1971)*, with *Blackwell v. Issaquena County Board of Education, 363 F.2d 749 (CA5 1966)*.

38 Cf. *Hague v. CIO, supra, at 516*.

[***LEdHR16] [16]Just as *Tinker* made clear that school property may not be declared off limits for expressive activity by students, we think it clear that the public sidewalk adjacent to school grounds may not be declared off limits for expressive activity by members of the public. But in each case, expressive activity may be prohibited if it "materially disrupts classwork or involves substantial disorder or invasion of the rights of others." *Tinker v. Des Moines School District, 393 U.S., at 513*.[39]

39 In *Tinker* we recognized that the principle of that case was not limited to expressive activity within the school building itself. *Id., at 512 n. 6, 513-514*. See *Esteban v. Central Missouri State College, 415 F.2d 1077 (CA8 1969)* (Blackmun, J.), cert. denied, *398 U.S. 965 (1970)*; *Jones v. Board of Regents, 436 F.2d 618 (CA9 1970)*; *Hammond v. South Carolina State College, 272 F.Supp. 947 (SC 1967)*, cited in *Tinker*.

[***LEdHR17] [17]We [***234] would be ignoring reality if we did not recognize that the public schools in a community are important institutions, and are often the focus of [**2305] significant grievances. [40] Without interfering with normal school activities, [*119] daytime picketing and handbilling on public grounds near a school can effectively publicize those grievances to pedestrians, school visitors, and deliverymen, as well as to teachers, administrators, and students. Some picketing to that end will be quiet and peaceful, and will in no way disturb the normal functioning of the school. For example, it would be highly unusual if the classic expressive gesture of the solitary picket disrupts anything related to the school, at least on a public sidewalk open to pedestrians. [41] On the other hand, schools could hardly tolerate boisterous demonstrators who drown out classroom conversation, make studying impossible, block entrances, or incite children to leave the schoolhouse. [42]

40 Cf. *Thornhill v. Alabama, 310 U.S., at 102*. It goes without saying that "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider v. State, 308 U.S., at 163*.

41 Cf. *Jones v. Board of Regents, supra.*

42 Cf. *Barker v. Hardway, 283 F.Supp. 228* (SD W. Va.), aff'd, *399 F.2d 638 (CA4 1968)*, cert. denied, *394 U.S. 905 (1969)* (Fortas, J., concurring).

Rockford's antinoise ordinance goes no further than *Tinker* says a municipality may go to prevent interference with its schools. It is narrowly tailored to further Rockford's compelling interest in having an undisrupted school session conducive to the students' learning, and does not unnecessarily interfere with *First Amendment* rights. Far from having an impermissibly broad prophylactic ordinance, [43] Rockford punishes only conduct which disrupts or is about to disrupt normal school activities. That decision is made, as it should be, on an individualized basis, given the particular fact situation. Peaceful picketing which does not interfere with the ordinary functioning of the school is permitted. [*120] And the ordinance gives no license to punish anyone because of what he is saying. [44]

43 See *Jones v. Board of Regents, supra; Hammond v. South Carolina State College, supra.*

44 Compare *Scoville v. Board of Education, 425 F.2d 10* (CA7), cert. denied, *400 U.S. 826 (1970)*; *Dickey v. Alabama State Board of Education, 273 F.Supp. 613 (MD Ala. 1967)* (cited in *Tinker*).

[***LEdHR18] [18]We recognize that the ordinance prohibits some picketing that is neither violent nor physically obstructive. Noisy demonstrations that disrupt or are incompatible with normal school activities are obviously within the ordinance's reach. Such expressive conduct may be constitutionally protected at other places or other times, cf. *Edwards v. South Carolina, 372 U.S. 229 (1963)*;*Cox v. Louisiana, 379 U.S. 536 (1965)*, but next to a school, while classes are in session, it may be prohibited. [45] The [***235] antinoise ordinance imposes no such restriction on expressive activity before or

after the school session, while the student/faculty "audience" enters and leaves the school.

45 Different considerations, of course, apply in different circumstances. For example, restrictions appropriate to a single-building high school during class hours would be inappropriate in many open areas on a college campus, just as an assembly that is permitted outside a dormitory would be inappropriate in the middle of a mathematics class.

[**2306] [***LEdHR15B] [15B]In *Cox v. Louisiana, 379 U.S. 559 (1965)*, this Court indicated that, because of the special nature of the place, [46] persons could be constitutionally prohibited from picketing "in or near" a courthouse "with the intent of interfering with, obstructing, or impeding the administration of justice." Likewise, in *Cameron v. Johnson, 390 U.S. 611 (1968)*, we upheld a statute prohibiting [*121] picketing "in such a manner as to obstruct or unreasonably interfere with free ingress or egress to and from any . . . county . . . courthouses." [47] As in those two cases, Rockford's modest restriction on some peaceful picketing represents a considered and specific legislative judgment that some kinds of expressive activity should be restricted at a particular time and place, here in order to protect the schools. [48] Such a reasonable regulation is not inconsistent with the *First* and *Fourteenth Amendments*. [49] The antinoise ordinance is not invalid on its face. [50]

46 Noting the need "to assure that the administration of justice at all stages is free from outside control and influence," we emphasized that "[a] State may protect against the possibility of a conclusion by the public . . . [that a] judge's action was in part a product of intimidation and did not flow only from the fair and orderly working of the judicial process." *379 U.S., at 562, 565.*

47 Quoting *Schneider v. State, 308 U.S., at 161*, we noted that "'such activity bears no necessary relationship to the freedom to . . . distribute information or opinion.'" *390 U.S., at 617.*

48 Cf. *Garner v. Louisiana, 368 U.S., at 202-203* (Harlan, J., concurring in judgment).

49 Cf. *Adderley v. Florida, 385 U.S. 39 (1966)*. In *Adderley*, the Court held that demonstrators could be barred from jailhouse grounds not ordinarily open to the public, at least where the demonstration obstructed the jail driveway and interfered with the functioning of the jail. In *Tinker* we noted that "a school is not like a hospital or a jail enclosure." *393 U.S., at 512 n. 6.*

50 It is possible, of course, that there will be unconstitutional applications; but that is not a matter which presently concerns us. See *Shuttlesworth v. Birmingham, 382 U.S., at 91*, and n. 1, *supra*.

The judgment is

Affirmed in part and reversed in part.

MR. JUSTICE BLACKMUN joins in the judgment and in Part I of the opinion of the Court. He concurs in the result as to Part II of the opinion.

DISSENT BY: DOUGLAS (In Part)

DISSENT

[***236] MR. JUSTICE DOUGLAS, dissenting in part.

While I join Part I of the Court's opinion, I would also reverse the appellant's conviction under the antinoise ordinance.

[*122] The municipal ordinance on which this case turns is c. 28, § 19.2 (a) which provides in relevant part:

"That no person, while on public or private grounds adjacent to any building in which a school or any class thereof is in session, shall willfully make or assist in the making of any noise or diversion which disturbs or tends to disturb the peace or good order of such school session or class thereof."

Appellant was one of 200 people picketing a school and carrying signs promoting a black cause -- "Black cheerleaders to cheer too," "Black history with black teachers," "We want our rights," and the like. Appellant, however, did not himself carry a picket sign. There was no evidence that he yelled or made any noise whatsoever. Indeed, the evidence reveals that appellant simply marched quietly and on one occasion raised his arm in the "power to the people" salute.

The pickets were mostly students; but they included former students, parents of students, and concerned citizens. They had made proposals to the school board on their demands and were turned down. Hence the picketing. The picketing [**2307] was mostly by black students who were counseled and advised by a faculty member of the school. The school contained 1,800 students. Those counseling the students advised they must be quiet, walk hand in hand, no whispering, no talking.

Twenty-five policemen were stationed nearby. There was noise but most of it was produced by the police who used loudspeakers to explain the local ordinance and to announce that arrests might be made. The

picketing did not stop, and some 40 demonstrators, including appellant, were arrested.

The picketing lasted 20 to 30 minutes and some students went to the windows of the classrooms to observe it. It is not clear how many there were. The picketing [*123] was, however, orderly or, as one officer testified, "very orderly." There was no violence. And appellant made no noise whatever.

What Mr. Justice Roberts said in *Hague v. CIO, 307 U.S. 496, 515-516*, has never been questioned:

"Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied."

[***237] We held in *Cox v. Louisiana, 379 U.S. 536, 544-545*, that a State could not infringe the right of free speech and free assembly by convicting demonsrators under a "disturbing the peace" ordinance where all that the students in that case did was to protest segregation and discrimination against blacks by peaceably assembling and marching to the courthouse where they sang, prayed, and listened to a speech, but where there was no violence, no rioting, no boisterous conduct.

The school where the present picketing occurred was the center of a racial conflict. Most of the pickets were indeed students in the school. The dispute doubtless disturbed the school; and the blaring of the loudspeakers of the police was certainly a "noise or diversion" in the [*124] meaning of the ordinance. But there was no evidence that appellant was noisy or boisterous or rowdy. He walked quietly and in an orderly manner. As I read this record, the disruptive force loosed at this school was an issue dealing with race -- an issue that is preeminently one for solution by *First Amendment* means. * That is all that was done here; and the entire picketing, including appellant's part in it, was done in the best *First Amendment* tradition.

* The majority asserts that "appellant's sole claim . . . is that he was convicted under facially unconstitutional ordinances" and that there is, therefore, no occasion to consider whether his activities were protected by the *First Amendment*. *Ante*, at 106 n. 1. Appellant argues, however, that the ordinance is overly broad in that it punishes constitutionally protected activity. A statute may withstand an overbreadth attack "only if, as authoritatively construed . . . , it is not susceptible of application to speech . . . that is protected by the *First* and *Fourteenth Amendments*." *Gooding v. Wilson, 405 U.S. 518, 520 (1972)*. If the ordinance applies to appellant's activities and if appellant's activities are constitutionally protected, then the ordinance is overly broad and, thus, unconstitutional. There is no merit, therefore, to the Court's suggestion that the question whether "appellant's particular behavior was protected by the *First Amendment*," *ante*, at 106 n. 1, is not presented.

REFERENCES

16 Am Jur 2d, Constitutional Law 346, 500

US L Ed Digest, Constitutional Law 501; Statutes 14, 17

ALR Digests, Constitutional Law 430; Statutes 26, 44

L Ed Index to Anno (Rev ed), Equal Protection of the Laws; Freedom of Speech, Press, Religion, and Assembly

ALR Quick Index, Equal Protection of Law; Freedom of Speech and Press; Picketing

Federal Quick Index, Equal Protection of the Laws; Freedom of Speech and Press; Picketing

Annotation References:

Indefiniteness of language as affecting validity of criminal legislation or judicial definition of common-law crime. *96 L Ed 374, 16 L Ed 2d 1231.*

The Supreme Court and the right of free speech and press. *93 L Ed 1151 ,2 L Ed 2d 1706, 11 L Ed 2d 1116, 16 L Ed 2d 1053, 21 L Ed 2d 976.*

Participation of student in demonstration on or near campus as warranting imposition of criminal liability for breach of peace, disorderly conduct, trespass, unlawful assembly, or similar offense. *32 ALR3d 551.*

Nonlabor picketing or boycott. *93 ALR2d 1284.*

Validity of statute or ordinance against picketing. 35 ALR 1200, 108 ALR 1119, 122 ALR 1043, 125 ALR 963, 130 ALR 1303.

EXHIBIT "8"

LEXSEE 455 U.S. 489

VILLAGE OF HOFFMAN ESTATES ET AL. v. THE FLIPSIDE, HOFFMAN ESTATES, INC.

No. 80-1681

SUPREME COURT OF THE UNITED STATES

455 U.S. 489*; *102 S. Ct. 1186*; *71 L. Ed. 2d 362*; *1982 U.S. LEXIS 78*; *50 U.S.L.W. 4267

December 9, 1981, Argued
March 3, 1982, Decided

SUBSEQUENT HISTORY: Petition for Rehearing Denied April 26, 1982.

PRIOR HISTORY: APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

DISPOSITION: *639 F.2d 373*, reversed and remanded.

DECISION:

Municipal ordinance requiring license to sell "items designed or marketed for use with illegal cannabis or drugs," held not unconstitutionally vague or overbroad.

SUMMARY:

A village enacted an ordinance regulating the sale of drug paraphernalia. The ordinance requires a business to obtain a license if it sells any items that are "designed or marketed for use with illegal cannabis or drugs". A store selling drug paraphernalia in the village brought an action in the United States District Court for the Northern District of Illinois challenging the ordinance prior to its enforcement as unconstitutionally vague and overbroad. The District Court upheld the constitutionality of the ordinance. On appeal, the United States Court of Appeals for the Seventh Circuit reversed, holding that the ordinance was impermissibly vague on its face (*639 F2d 373*).

On appeal, the United States Supreme Court reversed and remanded. In an opinion by Marshall, J., expressing the view of Burger, Ch. J., and Brennan, Blackmun, Powell, Rehnquist, and O'Connor, JJ., it was held that (1) the ordinance did not infringe upon the *First Amendment* rights of a merchandiser of items purported to be regulated by the ordinance and was not overbroad as inhibiting the *First Amendment* rights of other parties since (a) the ordinance does not restrict speech as such but simply regulates the commercial marketing of items that the labels reveal may be used for an illicit purpose and thus the ordinance does not embrace noncommercial speech, (b) insofar as any commercial speech interest was implicated, it was only the attenuated interest in displaying and marketing merchandise in the manner the retailer desires, and (c) it was irrelevant whether the ordinance had an overbroad scope encompassing other persons' commercial speech, (2) the ordinance is not impermissibly vague in all of its applications and could therefore not be challenged on its face as unduly vague in violation of due process as applied to a business engaged in selling drug paraphernalia since (a) the language "designed for use" is not unconstitutionally vague on its face insofar as it is sufficiently clear to cover at least some of the items sold by the business, and (b) the language "marketed for use" gave the business ample warning that its marketing activities required a license.

White, J., concurring in the judgment, expressed the view that the court need not have discussed the overbreadth problem in order to reach the result since the Court of Appeals did not discuss any problem of overbreadth but rather erroneously held the ordinance void for vagueness.

Stevens, J., did not participate.

LAWYERS' EDITION HEADNOTES:

[***LEdHN1]

LAW §952

First Amendment -- drug paraphernalia ordinance -- commercial speech --

Headnote:[1A][1B]

A village's ordinance which requires a business to obtain a license if it sells any items that are "designed or marketed for use with illegal cannabis or drugs" does not infringe upon the *First Amendment* rights of a merchandiser of items purported to be regulated by the ordinance, and is not overbroad as inhibiting the *First Amendment* rights of other parties, even though guidelines interpreting the ordinance utilized the proximity of drug-related literature as an indicium that paraphernalia are "marketed for use with illegal cannabis or drugs" since (1) the ordinance does not restrict speech as such, but simply regulates the commercial marketing of items that the labels reveal may be used for an illicit purpose, (2) insofar as any commercial speech interest is implicated, it is only the attenuated interest in displaying and marketing merchandise in the manner that the retailer desires, and (3) it is irrelevant whether the ordinance has an overbroad scope encompassing protected commercial speech of other persons because the overbreadth doctrine does not apply to commercial speech.

[***LEdHN2]

CORPORATIONS §37.7

drug paraphernalia ordinance -- vagueness --

Headnote:[2A][2B][2C]

A municipal ordinance which requires a business to obtain a license if it sells any items that are "designed or marketed for use with illegal cannabis or drugs" is not impermissibly vague in all of its applications and therefore may not be challenged on its face as unduly vague in violation of due process as applied to a business engaged in selling drug paraphernalia since (1) the language "designed for use" is not unconstitutionally vague on its face insofar as it is sufficiently clear to cover at least some of the items sold by the business and (2) the language "marketed for use" gives the business ample warning that its marketing activities require a license.

[***LEdHN3]

STATUTES §26

statute overbreadth and vagueness challenge --

Headnote:[3]

In a facial challenge to the overbreadth and vagueness of a law, a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct and if it does not, then the overbreadth challenge must fail; the court should then examine the facial vagueness challenge and, assuming the enactment implicates no constitutionally protected conduct, should uphold the challenge only if the enactment is impermissibly vague in all of its applications since a plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others, it being necessary for a court to examine the complainant's conduct before analyzing other hypothetical applications of the law.

[***LEdHN4]

COURTS §810

facial challenge -- state law -- state court construction --

Headnote:[4A][4B]

In evaluating a facial challenge to a state law, a federal court must consider any limiting construction that a state court or state enforcement agency has proffered, and, in making that determination, a court should evaluate the ambiguous as well as the unambiguous scope of the enactment.

[***LEdHN5]

STATUTES §17

vagueness challenge -- criteria --

Headnote:[5A][5B]

Vagueness challenges to statutes which do not involve *First Amendment* freedoms must be examined in the light of the facts of the case at hand.

[***LEdHN6]

STATUTES §26

vagueness challenge -- standing --

Headnote:[6A][6B]

One to whose conduct a statute clearly applies may not successfully challenge it for vagueness, since to sustain such a challenge, the complainant must prove that the enactment is vague not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all.

[***LEdHN7]

LAW §954

First Amendment -- commercial speech -- government regulation --

Headnote:[7]

With regard to the protections of the *First Amendment* on commercial speech, the government may regulate or ban entirely speech proposing an illegal transaction.

[***LEdHN8]

CORPORATIONS §37.7

STATUTES §17

constitutional challenge -- over Breadth --

Headnote:[8]

With regard to whether a municipal ordinance is unconstitutional by virtue of having an overbroad scope, the overbreadth doctrine does not apply to commercial speech; however, a law that does not reach constitutionally protected conduct and therefore satisfies the overbreadth doctrine may nevertheless be challenged on its face as unduly vague in violation of due process, although in order to succeed the complainant must demonstrate that the law is impermissibly vague in all of its applications.

[***LEdHN9]

LAW §710

drug paraphernalia ordinance; substantive due process --

Headnote:[9A][9B]

A retailer's right to sell smoking accessories, and the purchaser's right to buy and use them, are entitled only to minimal due process protection, regulation of items that have some lawful as well as unlawful uses not being an irrational means of discouraging drug use; accordingly, a municipal "drug paraphernalia" ordinance which requires a business to obtain a license if it sells certain items does not constitute a denial of substantive due process on the grounds that it would inhibit innocent users of items covered by the ordinance.

[***LEdHN10]

STATUTES §33

drug paraphernalia law -- vagueness challenge --

Headnote:[10A][10B]

In the event that a state court should construe a municipal drug paraphernalia licensing ordinance as prohibiting the sale of all pipes, of whatever description, then a seller of corncob pipes could not complain that the law is unduly vague, but could object that the law is not intended to cover such items.

[***LEdHN11]

CORPORATIONS §37.7

municipal ordinance -- vagueness challenge --

Headnote:[11]

The degree of vagueness that the Federal Constitution tolerates of a municipal ordinance depends in part on the nature of the enactment, and therefore economic regulation is subject to a less strict vagueness test because its subject-matter is often more narrow, and because businesses can be expected to consult relevant legislation in advance of action; perhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of a constitutionally protected right such as, for example, if the law interferes with the right of free speech or of association, a more stringent vagueness test should apply.

[***LEdHN12]

CORPORATIONS §37.7

vagueness -- standards for enforcement --

Headnote:[12A][12B][12C]

A municipal ordinance regulating the sale of drug paraphernalia which requires a business to obtain a license if it sells any items that are "designed or marketed for use with illegal cannabis or drugs" is not void for vagueness in a preenforcement challenge to it on the grounds that it provides insufficient standards for enforcement, especially where the ordinance is sufficiently clear to overcome the speculative danger of arbitrary enforcement and where the possibility exists that the village enacting the ordinance will take further steps to minimize the dangers of arbitrary enforcement; the theoretical possibility that the village will enforce its ordinance against a paperclip placed next to certain literature is of no due process significance unless the possibility ripens into a prosecution.

[***LEdHN13]

CORPORATIONS §37.7

facial vagueness -- business regulation --

Headnote:[13]

In reviewing a municipal business regulation for facial vagueness, the principle inquiry is whether the law affords fair warning of what is proscribed.

[***LEdHN14]

COURTS §123

drug paraphernalia ordinance -- inquiry into wisdom and effectiveness -- Supreme Court --

Headnote:[14]

Whether municipal ordinances regulating or prohibiting the sale of drug paraphernalia are wise or effective is not the province of the United States Supreme Court.

SYLLABUS

An ordinance of appellant village requires a business to obtain a license if it sells any items that are "designed or marketed for use with illegal cannabis or drugs." Guidelines define the items (such as "roach clips," which are used to smoke cannabis, "pipes," and "paraphernalia"), the sale of which is required to be licensed. Appellee, which sold a variety of merchandise in its store, including "roach clips" and specially designed pipes used to smoke marihuana, upon being notified that it was in possible violation of the ordinance, brought suit in Federal District Court, claiming that the ordinance is unconstitutionally vague and overbroad, and requesting injunctive and declaratory relief and damages. The District Court upheld the ordinance and awarded judgment to the village defendants. The Court of Appeals reversed on the ground that the ordinance is unconstitutionally vague on its face.

Held: The ordinance is not facially overbroad or vague but is reasonably clear in its application to appellee. Pp. 494-505.

(a) In a facial challenge to the overbreadth and vagueness of an enactment, a court must first determine whether the enactment reaches a substantial amount of constitutionally protected conduct. If it does not, the overbreadth challenge must fail. The court should then examine the facial vagueness challenge and should uphold such challenge only if the enactment is impermissibly vague in all of its applications. Pp. 494-495.

(b) The ordinance here does not violate appellee's *First Amendment* rights nor is it overbroad because it inhibits such rights of other parties. The ordinance does not restrict speech as such but simply regulates the commercial marketing of items that the labels reveal may be used for an illicit purpose and thus does not embrace noncommercial speech. With respect to any commercial speech interest implicated, the ordinance's restriction on the manner of marketing does not appreciably limit appellee's communication of information, except to the extent it is directed at commercial activity promoting or encouraging illegal drug use, an activity which, if deemed "speech," is speech proposing an illegal transaction and thus subject to government regulation or ban. It is irrelevant whether the ordinance has an overbroad scope encompassing other persons' commercial speech, since the overbreadth doctrine does not apply to commercial speech. Pp. 495-497.

(c) With respect to the facial vagueness challenge, appellee has not shown that the ordinance is impermissibly vague in all of its applications. The ordinance's language "designed . . . for use" is not unconstitutionally vague on its face, since it is clear that such standard encompasses at least an item that is principally used with illegal drugs by virtue of its objective features, *i. e.*, features designed by the manufacturer. Thus, the "designed for use" standard is sufficiently clear to cover at least some of the items that appellee sold, such as "roach clips" and the specially designed pipes. As to the "marketed for use" standard, the guidelines refer to the display of paraphernalia and to the proximity of covered items to otherwise uncovered items, and thus such standard requires scienter on the part of the retailer. Under this test, appellee had ample warning that its marketing activities required a license, and by displaying a certain magazine and certain books dealing with illegal drugs physically close to pipes and colored rolling paper, it was in clear violation of the guidelines, as it was in selling "roach clips." Pp. 499-503.

(d) The ordinance's language is sufficiently clear that the speculative danger of arbitrary enforcement does not render it void for vagueness in a pre-enforcement facial challenge. Pp. 503-504.

COUNSEL: Richard N. Williams argued the cause and filed briefs for appellants.

Michael L. Pritzker argued the cause and filed a brief for appellee.

* Ronald A. Zumbrun and John H. Findley filed a brief for Community Action Against Drug Abuse as amicus curiae urging reversal.

Charles A. Trost filed a brief for American Businesses for Constitutional Rights as amicus curiae urging affirmance.

Briefs of amici curiae were filed for the State of Arkansas et al. by Steve Clark, Attorney General of Arkansas, J. D. MacFarlane, Attorney General of Colorado, Carl R. Ajello, Attorney General of Connecticut, Richard S. Gebelein, Attorney General of Delaware, Jim Smith, Attorney General of Florida, and Mitchell D. Franks, David H. Leroy, Attorney General of Idaho, Linley E. Pearson, Attorney General of Indiana, Robert T. Stephan, Attorney General of Kansas,

William J. Guste, Jr., Attorney General of Louisiana, James E. Tierney, Attorney General of Maine, Stephen H. Sachs, Attorney General of Maryland, and Paul F. Strain, Dennis M. Sweeney, and Linda H. Lamone, Assistant Attorneys General, Paul L. Douglas, Attorney General of Nebraska, Richard H. Bryan, Attorney General of Nevada, James R. Zazzali, Attorney General of New Jersey, Jeff Bingaman, Attorney General of New Mexico, Rufus L. Edmisten, Attorney General of North Carolina, and David S. Crump and James L. Wallace, Jr., Deputy Attorneys General, Jan Eric Cartwright, Attorney General of Oklahoma, Leroy S. Zimmerman, Attorney General of Pennsylvania, Mark White, Attorney General of Texas, David L. Wilkinson, Attorney General of Utah, and Kenneth O. Eikenberry, Attorney General of Washington; and for the Village of Wilmette, Illinois, by Robert J. Mangler.

JUDGES: MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, BLACKMUN, POWELL, REHNQUIST, and O'CONNOR, JJ., joined. WHITE, J., filed an opinion concurring in the judgment, post, p. 507. STEVENS, J., took no part in the consideration or decision of the case.

OPINION BY: MARSHALL

OPINION

[*491] [***367] [**1189] JUSTICE MARSHALL delivered the opinion of the Court.

[***LEdHR1A] [1A] [***LEdHR2A] [2A]This case presents a pre-enforcement facial challenge to a drug paraphernalia ordinance on the ground that it is unconstitutionally vague and overbroad. The ordinance in question requires a business to obtain a license if it sells any items that are "designed or marketed for use with illegal cannabis or drugs." Village of Hoffman Estates Ordinance No. 969-1978. The United States Court of Appeals for the Seventh Circuit held that the ordinance is vague on its face. *639 F.2d 373 (1981)*. We noted probable jurisdiction, *452 U.S. 904 (1981)*, and now reverse.

I

For more than three years prior to May 1, 1978, appellee The Flipside, Hoffman Estates, Inc. (Flipside), sold a variety of merchandise, including phonographic records, smoking accessories, novelty devices, and jewelry, in its store located in the [**1190] village of Hoffman Estates, Ill. (village). [1] On February [*492] 20, 1978, the village enacted an ordinance regulating drug paraphernalia, to be effective May 1, 1978. [2] The ordinance makes it unlawful for any person "to sell any items, effect, paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drugs, as defined by Illinois Revised Statutes, without obtaining a license therefor." The license fee is $ 150. A business must also file affidavits that the licensee and its employees have not been convicted of a drug-related offense. Moreover, the business must keep a record of each sale of a regulated item, including the name and address of the [***368] purchaser, to be open to police inspection. No regulated item may be sold to a minor. A violation is subject to a fine of not less than $ 10 and not more than $ 500, and each day that a violation continues gives rise to a separate offense. A series of licensing guidelines prepared by the Village Attorney define "Paper," "Roach Clips," "Pipes," and "Paraphernalia," the sale of which is required to be licensed. [3]

1 More specifically, the District Court found:

"[Flipside] sold literature that included 'A Child's Garden of Grass,' 'Marijuana Grower's Guide,' and magazines such as 'National Lampoon,' 'Rolling Stone,' and 'High Times.' The novelty devices and tobacco-use related items plaintiff displayed and sold in its store ranged from small commodities such as clamps, chain ornaments and earrings through cigarette holders, scales, pipes of various types and sizes, to large water pipes, some designed for individual use, some which as many as four persons can use with flexible plastic tubes. Plaintiff also sold a large number of cigarette rolling papers in a variety of colors. One of plaintiff's displayed items was a mirror, about seven by nine inches with the word 'Cocaine' painted on its surface in a purple color. Plaintiff sold cigarette holders, 'alligator clips,' herb sifters, vials, and a variety of tobacco snuff." *485 F.Supp. 400, 403 (ND Ill. 1980)*.

2 The text of the ordinance is set forth in the Appendix to this opinion.

3 The guidelines provide:

"LICENSE GUIDELINES FOR ITEMS, EFFECT, PARAPHERNALIA, ACCESSORY OR THING WHICH IS DESIGNED OR MARKETED FOR USE WITH ILLEGAL CANNABIS OR DRUGS

"Paper -- white paper or tobacco oriented paper not necessarily designed for use with illegal cannabis or drugs may be displayed. Other paper of colorful design, names oriented for use with illegal cannabis or drugs and displayed are covered.

"Roach Clips -- designed for use with illegal cannabis or drugs and therefore covered.

"Pipes -- if displayed away from the proximity of nonwhite paper or tobacco oriented paper, and not displayed within proximity of roach clips, or literature encouraging illegal use of cannabis or illegal drugs are not covered; otherwise, covered.

"Paraphernalia -- if displayed with roach clips or literature encouraging illegal use of cannabis or illegal drugs it is covered."

[*493] After an administrative inquiry, the village determined that Flipside and one other store appeared to be in violation of the ordinance. The Village Attorney notified Flipside of the existence of the ordinance, and made a copy of the ordinance and guidelines available to Flipside. Flipside's owner asked for guidance concerning which items were covered by the ordinance; the Village Attorney advised him to remove items in a certain section of the store "for his protection," and he did so. App. 71. The items included, according to Flipside's description, a clamp, chain ornaments, an "alligator" clip, key chains, necklaces, earrings, cigarette holders, glove stretchers, scales, strainers, a pulverizer, squeeze bottles, pipes, water pipes, pins, an herb sifter, mirrors, vials, cigarette rolling papers, and tobacco snuff. On May 30, 1978, instead of applying for a license or seeking clarification via the administrative procedures that the village had established for its licensing ordinances, [4] Flipside filed this lawsuit in the United States District Court for the Northern District of Illinois.

4 Ordinance No. 932-1977, the Hoffman Estates Administrative Procedure Ordinance, was enacted prior to the drug paraphernalia ordinance, and provides that an interested person may petition for the adoption of an interpretive rule. If the petition is denied, the person may place the matter on the agenda of an appropriate village committee for review. The Village Attorney indicated that no interpretive rules had been adopted with respect to the drug paraphernalia ordinance because no one had yet applied for a license. App. 68.

[**1191] The complaint alleged, *inter alia*, that the ordinance is unconstitutionally vague and overbroad, and requested injunctive and declaratory relief and damages. The District Court, after hearing testimony, declined to grant a preliminary injunction. The case was tried without a jury on additional evidence and stipulated testimony. The court issued [*494] an opinion upholding the constitutionality of the ordinance, and awarded judgment to the village defendants. *485 F.Supp. 400 (1980).*

The Court of Appeals reversed on the ground that the ordinance is unconstitutionally vague on its face. The court reviewed the language of the ordinance and guidelines and found it vague with respect to certain conceivable applications, such [***369] as ordinary pipes or "paper clips sold next to *Rolling Stone* magazine." *639 F.2d, at 382.* It also suggested that the "subjective" nature of the "marketing" test creates a danger of arbitrary and discriminatory enforcement against those with alternative lifestyles. *Id., at 384.* Finally, the court determined that the availability of administrative review or guidelines cannot cure the defect. Thus, it concluded that the ordinance is impermissibly vague on its face.

II

[***LEdHR3] [3] [***LEdHR4A] [4A] [***LEdHR5A] [5A] [***LEdHR6A] [6A]In a facial challenge to the overbreadth and vagueness of a law, [5] a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct. [6] If it does not, then the overbreadth challenge must fail. The court should then examine the facial vagueness challenge and, assuming the enactment implicates [*495] no constitutionally protected conduct, should uphold the challenge only if the enactment is impermissibly vague in all of its applications. A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others. [7] A court should therefore examine the complainant's conduct before analyzing other hypothetical applications of the law.

[***LEdHR4B] [4B]

5 A "facial" challenge, in this context, means a claim that the law is "invalid *in toto* -- and therefore incapable of any valid application." *Steffel v. Thompson, 415 U.S. 452, 474 (1974).* 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. *Grayned v. City of Rockford, 408 U.S. 104, 110 (1972).*

6 In making that determination, a court should evaluate the ambiguous as well as the unambiguous scope of the enactment. To this extent, the vagueness of a law affects overbreadth analysis. The Court has long recognized that ambiguous meanings cause citizens to "'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked." *Baggett v. Bullitt, 377 U.S. 360, 372 (1964)*, quoting

Speiser v. Randall, 357 U.S. 513, 526 (1958); see *Grayned, supra, at 109*; cf. *Young v. American Mini Theatres, Inc., 427 U.S. 50, 58-61 (1976).*

[***LEdHR5B] [5B] [***LEdHR6B] [6B]

7 "[Vagueness] challenges to statutes which do not involve *First Amendment* freedoms must be examined in the light of the facts of the case at hand." *United States v. Mazurie, 419 U.S. 544, 550 (1975).* See *United States v. Powell, 423 U.S. 87, 92-93 (1975)*; *United States v. National Dairy Products Corp., 372 U.S. 29, 32-33, 36 (1963).* "One to whose conduct a statute clearly applies may not successfully challenge it for vagueness." *Parker v. Levy, 417 U.S. 733, 756 (1974).* The rationale is evident: to sustain such a challenge, the complainant must prove that the enactment is vague "'not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all.' *Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971).* Such a provision simply has *no* core." *Smith v. Goguen, 415 U.S. 566, 578 (1974).*

The Court of Appeals in this case did not explicitly consider whether the ordinance reaches constitutionally protected conduct and is overbroad, nor whether the ordinance is vague in all of its applications. Instead, the court determined that the ordinance is void for vagueness because it is unclear in *some* of its applications to the [**1192] conduct of Flipside and of other hypothetical parties. [***370] Under a proper analysis, however, the ordinance is not facially invalid.

III

[***LEdHR1B] [1B]We first examine whether the ordinance infringes Flipside's *First Amendment* rights or is overbroad because it inhibits the *First Amendment* rights of other parties. Flipside makes the exorbitant claim that the village has imposed a "prior restraint" on speech because the guidelines treat the proximity of drug-related literature as an indicium that paraphernalia are "marketed for use with illegal cannabis or [*496] drugs." Flipside also argues that because the presence of drug-related designs, logos, or slogans on paraphernalia may trigger enforcement, the ordinance infringes "protected symbolic speech." Brief for Appellee 25.

These arguments do not long detain us. First, the village has not directly infringed the noncommercial speech of Flipside or other parties. The ordinance licenses and regulates the sale of items displayed "with" or "within proximity of" "literature encouraging illegal use of cannabis or illegal drugs," Guidelines, *supra* n. 3, but does not prohibit or otherwise regulate the sale of literature itself. Although drug-related designs or names on cigarette papers may subject those items to regulation, the village does not restrict speech as such, but simply regulates the commercial marketing of items that the labels reveal may be used for an illicit purpose. The scope of the ordinance therefore does not embrace noncommercial speech.

[***LEdHR7] [7] [***LEdHR8] [8] [***LEdHR9A] [9A] [***LEdHR10A] [10A]Second, insofar as any *commercial* speech interest is implicated here, it is only the attenuated interest in displaying and marketing merchandise in the manner that the retailer desires. We doubt that the village's restriction on the manner of marketing appreciably limits Flipside's communication of information [8] -- with one obvious and telling exception. The ordinance is expressly directed at commercial activity promoting or encouraging illegal drug use. If that activity is deemed "speech," then it is speech proposing an illegal transaction, which a government may regulate or ban entirely. *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n, 447 U.S. 557, 563-564 (1980)*; *Pittsburgh Press Co.* v. *Human Relations Comm'n, 413 U.S. 376, 388 (1973).* Finally, it is irrelevant whether the ordinance has an [*497] overbroad scope encompassing protected commercial speech of other persons, because the overbreadth doctrine does not apply to commercial speech. *Central Hudson, supra*, at 565, n. 8. [9]

8 Flipside explained that it placed items that the village considers drug paraphernalia in locations near a checkout counter because some are "point of purchase" items and others are small and apt to be shoplifted. App. 43. Flipside did not assert that its manner of placement was motivated in any part by a desire to communicate information to its customers.

[***LEdHR9B] [9B] [***LEdHR10B] [10B]

9 Flipside also argues that the ordinance is "overbroad" because it could extend to "innocent" and "lawful" uses of items as well as uses with illegal drugs. Brief for Appellee 10, 33-35. This argument seems to confuse vagueness and overbreadth doctrines. If Flipside is objecting that it cannot determine whether the ordinance regulates items with some lawful uses, then it is complaining of vagueness. We find that claim unpersuasive in this pre-enforcement facial challenge. See *infra*, at 497-504. If Flipside is objecting that the ordinance would inhibit innocent uses of items found to be covered by the ordinance, it is complaining of denial of substantive

due process. The latter claim obviously lacks merit. A retailer's right to sell smoking accessories, and a purchaser's right to buy and use them, are entitled only to minimal due process protection. Here, the village presented evidence of illegal drug use in the community. App. 37. Regulation of items that have some lawful as well as unlawful uses is not an irrational means of discouraging drug use. See *Exxon Corp.* v. *Governor of Maryland, 437 U.S. 117, 124-125 (1978)*.The hostility of some lower courts to drug paraphernalia laws -- and particularly to those regulating the sale of items that have many innocent uses, see, *e. g., 639 F.2d 373, 381-383 (1981)*; *Record Revolution No. 6, Inc.* v. *City of Parma, 638 F.2d 916, 928 (CA6 1980)*, vacated and remanded, *451 U.S. 1013 (1981)* -- may reflect a belief that these measures are ineffective in stemming illegal drug use. This perceived defect, however, is not a defect of clarity. In the unlikely event that a state court construed this ordinance as prohibiting the sale of all pipes, of whatever description, then a seller of corncob pipes could not complain that the law is unduly vague. He could, of course, object that the law was not intended to cover such items.

[***371] [**1193] IV

A

[***LEdHR2B] [2B]A law that does not reach constitutionally protected conduct and therefore satisfies the overbreadth test may nevertheless be challenged on its face as unduly vague, in violation of due process. To succeed, however, the complainant must demonstrate that the law is impermissibly vague in all of its applications. Flipside makes no such showing.

[*498] The standards for evaluating vagueness were enunciated in *Grayned v. City of Rockford, 408 U.S. 104, 108-109 (1972)*:

"Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. 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 applications" (footnotes omitted).

[***LEdHR11] [11]These standards should not, of course, be mechanically applied. The degree of vagueness that the Constitution tolerates -- as well as the relative importance of fair notice and fair enforcement -- depends in part on the nature of the enactment. Thus, economic regulation is subject to a less strict vagueness test because its subject matter is often more narrow, [10] and because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action. [11] Indeed, the regulated enterprise may have the ability [***372] to clarify the meaning of the regulation by its own inquiry, or by resort to an administrative process. [12] The Court has also expressed greater tolerance of [*499] enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe. [13] And the Court has recognized that a scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed. [14]

10 *Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972)* (dictum; collecting cases).

11 See, *e. g., United States v. National Dairy Products Corp., 372 U.S. 29 (1963)*. Cf. *Smith v. Goguen, 415 U.S., at 574*.

12 See *Joseph E. Seagram & Sons, Inc.* v. *Hostetter, 384 U.S. 35, 49 (1966)*; *McGowan v. Maryland, 366 U.S. 420, 428 (1961)*.

13 See *Barenblatt v. United States, 360 U.S. 109, 137 (1959)* (Black, J., with whom Warren, C. J., and Douglas, J., joined, dissenting); *Winters v. New York, 333 U.S. 507, 515 (1948)*.

14 See, *e. g., Colautti v. Franklin, 439 U.S. 379, 395 (1979)*; *Boyce Motor Lines v. United States, 342 U.S. 337, 342 (1952)*; *Screws v. United States, 325 U.S. 91, 101-103 (1945)* (plurality opinion). See Note, The Void-for-Vagueness Doctrine in the Supreme Court, 109 U. Pa. L. Rev. 67, 87, n. 98 (1960).

Finally, perhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights. If, for example, the law interferes with the right of free speech [**1194] or of association, a more stringent vagueness test should apply. [15]

15 See, *e. g., Papachristou, supra; Grayned, 408 U.S., at 109*.

B

[***LEdHR2C] [2C]This ordinance simply regulates business behavior and contains a scienter requirement with respect to the alternative "marketed for use" standard. The ordinance nominally imposes only civil

penalties. However, the village concedes that the ordinance is "quasi-criminal," and its prohibitory and stigmatizing effect may warrant a relatively strict test. [16] [*500] Flipside's facial challenge fails because, under the test appropriate to either a quasi-criminal or a criminal law, the ordinance is sufficiently clear as applied to Flipside.

16 The village stipulated that the purpose of the ordinance is to discourage use of the regulated items. App. 33. Moreover, the prohibitory and stigmatizing effects of the ordinance are clear. As the Court of Appeals remarked, "few retailers are willing to brand themselves as sellers of drug paraphernalia, and few customers will buy items with the condition of signing their names and addresses to a register available to the police." *639 F.2d, at 377*. The proposed register is entitled, "Retail Record for Items Designed or Marketed for Use with Illegal Cannabis or Drugs." Record, Complaint, App. B. At argument, counsel for the village admitted that the ordinance is "quasi-criminal." Tr. of Oral Arg. 4-5.

The ordinance requires Flipside to obtain a license if it sells "any items, effect, paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drugs, as defined by the Illinois Revised Statutes." Flipside expresses no uncertainty about which drugs this description encompasses; as the District Court noted, *485 F.Supp., at 406*, Illinois law clearly defines cannabis and numerous other controlled drugs, including cocaine. Ill. Rev. Stat., ch. 56 1/2, paras. 703 and 1102(g) (1980). On the other hand, the words "items, effect, paraphernalia, accessory or thing" do not identify the type of merchandise that the village [***373] desires to regulate. [17] Flipside's challenge thus appropriately focuses on the language "designed or marketed for use." Under either the "designed for use" or "marketed for use" standard, we conclude that at least some of the items sold by Flipside are covered. Thus, Flipside's facial challenge is unavailing.

17 The District Court apparently relied principally on the growing vernacular understanding of "paraphernalia" as drug-related items, and therefore did not separately analyze the meaning of "designed or marketed for use." *485 F.Supp., at 405-407*. We agree with the Court of Appeals that a regulation of "paraphernalia" alone would not provide much warning of the nature of the items regulated. *639 F.2d, at 380*.

1. "Designed for use"

The Court of Appeals objected that "designed . . . for use" is ambiguous with respect to whether items must be inherently suited only for drug use; whether the retailer's intent or manner of display is relevant; and whether the intent of a third party, the manufacturer, is critical, since the manufacturer is the "designer." *639 F.2d, at 380-381*. For the reasons that follow, we conclude that this language is not unconstitutionally vague on its face.

The Court of Appeals' speculation about the meaning of "design" is largely unfounded. The guidelines refer to "paper [*501] of colorful design" and to other specific items as conclusively "designed" or not "designed" for illegal use. [18] A principal meaning [**1195] of "design" is "[to] fashion according to a plan." Webster's New International Dictionary of the English Language 707 (2d ed. 1957). Cf. *Lanzetta v. New Jersey, 306 U.S. 451, 454, n. 3 (1939)*. It is therefore plain that the standard encompasses at least an item that is principally used with illegal drugs by virtue of its objective features, *i. e.*, features designed by the manufacturer. A business person of ordinary intelligence would understand that this term refers to the design of the manufacturer, not the intent of the retailer or customer. It is also sufficiently clear that items which are principally used for nondrug purposes, such as ordinary pipes, are not "designed for use" with illegal drugs. Moreover, no issue of fair warning is present in this case, since Flipside concedes that the phrase refers to structural characteristics of an item. [19]

18 The guidelines explicitly provide that "white paper . . . may be displayed," and that "Roach Clips" are "designed for use with illegal cannabis or drugs *and therefore* covered" (emphasis added). The Court of Appeals criticized the latter definition for failing to explain what a "roach clip" is. This criticism is unfounded because that technical term has sufficiently clear meaning in the drug paraphernalia industry. Without undue burden, Flipside could easily determine the meaning of the term. See American Heritage Dictionary of the English Language 1122 (1980) (defining "roach" as "[the] butt of a marijuana cigarette"); R. Lingeman, Drugs from A to Z: A Dictionary 213-214 (1969) (defining "roach" and "roach holder"). Moreover, the explanation that a retailer may display certain paper "not necessarily designed for use" clarifies that the ordinance at least embraces items that are necessarily designed for use with cannabis or illegal drugs.

19 "It is readily apparent that under the Hoffman Estates scheme, the 'designed for use' phrase refers to the physical characteristics of items deemed *per se* fashioned for use with drugs; and that, if any intentional conduct is implicated by the phrase, it is the intent of the 'designer' (i. e.

patent holder or manufacturer) whose intent for an item or 'design' is absorbed into the physical attributes, or structural 'design' of the finished product." Brief for Appellee 42-43. Moreover, the village President described drug paraphernalia as items *"[manufactured]* for that purpose and marketed for that purpose." App. 82 (emphasis added).

[*502] The [***374] ordinance and guidelines do contain ambiguities. Nevertheless, the "designed for use" standard is sufficiently clear to cover at least some of the items that Flipside sold. The ordinance, through the guidelines, explicitly regulates "roach clips." Flipside's co-operator admitted that the store sold such items, see Tr. 26, 30, and the village Chief of Police testified that he had never seen a "roach clip" used for any purpose other than to smoke cannabis. App. 52. The Chief also testified that a specially designed pipe that Flipside marketed is typically used to smoke marihuana. *Ibid.* Whether further guidelines, administrative rules, or enforcement policy will clarify the more ambiguous scope of the standard in other respects is of no concern in this facial challenge.

2. "Marketed for use"

Whatever ambiguities the "designed . . . for use" standard may engender, the alternative "marketed for use" standard is transparently clear: it describes a retailer's intentional display and marketing of merchandise. The guidelines refer to the display of paraphernalia, and to the proximity of covered items to otherwise uncovered items. A retail store therefore must obtain a license if it deliberately displays its wares in a manner that appeals to or encourages illegal drug use. The standard requires scienter, since a retailer could scarcely "market" items "for" a particular use without intending that use.

Under this test, Flipside had ample warning that its marketing activities required a license. Flipside displayed the magazine High Times and books entitled Marijuana Grower's Guide, Children's Garden of Grass, and The Pleasures of Cocaine, physically close to pipes and colored rolling papers, in clear violation of the guidelines. As noted above, Flipside's co-operator admitted that his store sold "roach clips," which are principally used for illegal purposes. Finally, in the [*503] same section of the store, Flipside had posted the sign, "You must be 18 or older to purchase any head supplies." [20] Tr. 30.

20 The American Heritage Dictionary of the English Language 606 (1980) gives the following alternative definition of "head": "Slang. One who is a frequent user of drugs."

V

[***LEdHR12A] [12A] [***LEdHR13] [13]The Court of Appeals also held that the ordinance provides insufficient standards for enforcement. Specifically, the court feared that the ordinance might be used to harass individuals with alternative lifestyles and views. *639 F.2d, at 384.*In reviewing a business regulation for facial vagueness, however, the principal inquiry is whether the law affords fair warning [**1196] of what is proscribed. Moreover, this emphasis is almost inescapable in reviewing a pre-enforcement challenge to a law. Here, no evidence has been, or could be, introduced to indicate whether the ordinance has been enforced in a discriminatory manner or with the aim of inhibiting unpopular speech. The language of the ordinance is sufficiently clear that the speculative danger of arbitrary enforcement does not render the ordinance void for vagueness. Cf. *Papachristou v. City of Jacksonville, 405 U.S. 156, 168-171* [***375] *(1972); Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971).*

[***LEdHR12B] [12B]We do not suggest that the risk of discriminatory enforcement is insignificant here. Testimony of the Village Attorney who drafted the ordinance, the village President, and the Police Chief revealed confusion over whether the ordinance applies to certain items, as well as extensive reliance on the "judgment" of police officers to give meaning to the ordinance and to enforce it fairly. At this stage, however, we are not prepared to hold that this risk jeopardizes the entire ordinance. [21]

[***LEdHR12C] [12C]

21 The theoretical possibility that the village will enforce its ordinance against a paper clip placed next to Rolling Stone magazine, *639 F.2d, at 382*, is of no due process significance unless the possibility ripens into a prosecution.

[*504] Nor do we assume that the village will take no further steps to minimize the dangers of arbitrary enforcement. The village may adopt administrative regulations that will sufficiently narrow potentially vague or arbitrary interpretations of the ordinance. In economic regulation especially, such administrative regulation will often suffice to clarify a standard with an otherwise uncertain scope. We also find it significant that the village, in testimony below, primarily relied on the "marketing" aspect of the standard, which does not require the more ambiguous item-by-item analysis of whether paraphernalia are "designed for" illegal drug use, and which therefore presents a lesser risk of discriminatory enforcement. "Although it is possible that specific future applications . . . may engender concrete problems of constitutional dimension, it will be time enough to consider any such problems when they arise."

Joseph E. Seagram & Sons, Inc. v. *Hostetter, 384 U.S. 35, 52 (1966).* [22]

22 The Court of Appeals also referred to potential *Fourth Amendment* problems resulting from the recordkeeping requirement, which "implies that a customer who purchases an item 'designed or marketed for use with illegal cannabis or drugs' intends to *use* the item with illegal cannabis or drugs. A further implication could be that a customer is subject to police scrutiny or even to a search warrant on the basis of the purchase of a legal item." *Id., at 384.* We will not address these *Fourth Amendment* issues here. In a pre-enforcement challenge it is difficult to determine whether *Fourth Amendment* rights are seriously threatened. Flipside offered no evidence of a concrete threat below. In a postenforcement proceeding Flipside may attempt to demonstrate that the ordinance is being employed in such an unconstitutional manner, and that it has standing to raise the objection. It is appropriate to defer resolution of these problems until such a showing is made.

VI

[***LEdHR14] [14]Many American communities have recently enacted laws regulating or prohibiting the sale of drug paraphernalia. [*505] To determine whether these laws are wise or effective is not, of course, the province of this Court. See *Ferguson v. Skrupa, 372 U.S. 726, 728-730 (1963).*We hold only that such legislation is not facially overbroad or vague if it does not reach constitutionally protected conduct and is reasonably clear in its application to the complainant.

Accordingly, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings [***376] consistent with this opinion.

It is so ordered.

JUSTICE STEVENS took no part in the consideration or decision of this case.

[**1197] APPENDIX TO OPINION OF THE COURT

Village of Hoffman Estates Ordinance No. 969-1978

AN ORDINANCE AMENDING THE MUNICIPAL CODE OF THE VILLAGE OF HOFFMAN ESTATES BY PROVIDING FOR REGULATION OF ITEMS DESIGNED OR MARKETED FOR USE WITH ILLEGAL CANNABIS OR DRUGS

WHEREAS, certain items designed or marketed for use with illegal drugs are being retailed within the Village of Hoffman Estates, Cook County, Illinois, and

WHEREAS, it is recognized that such items are legal retail items and that their sale cannot be banned, and

WHEREAS, there is evidence that these items are designed or marketed for use with illegal cannabis or drugs and it is in the best interests of the health, safety and welfare of the citizens of the Village of Hoffman Estates to regulate within the Village the sale of items designed or marketed for use with illegal cannabis or drugs.

NOW THEREFORE, BE IT ORDAINED by the President and Board of Trustees of the Village of Hoffman Estates, Cook County, Illinois as follows:

[*506] *Section 1*: That the Hoffman Estates Municipal Code be amended by adding thereto an additional Section, Section 8-7-16, which additional section shall read as follows:

Sec. 8-7-16 -- ITEMS DESIGNED OR MARKETED FOR USE WITH ILLEGAL CANNABIS OR DRUGS

A. License Required:

It shall be unlawful for any person or persons as principal, clerk, agent or servant to sell any items, effect, paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drugs, as defined by Illinois Revised Statutes, without obtaining a license therefor. Such licenses shall be in addition to any or all other licenses held by applicant.

B. Application:

Application to sell any item, effect, paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drugs shall, in addition to requirements of Article 8-1, be accompanied by affidavits by applicant and each and every employee authorized to sell such items that such person has never been convicted of a drug-related offense.

C. Minors:

It shall be unlawful to sell or give items as described in Section 8-7-16A in any form to any male or female child under eighteen years of age.

D. Records:

Every licensee must keep a record of every item, effect, paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drugs which is sold and this record shall be open [***377] to the

inspection of any police officer at any time during the hours of business. Such record shall contain the name and address of the purchaser, the name and quantity of the product, the date and time of the sale, and the licensee or agent of the licensee's signature, such records shall be retained for not less than two (2) years.

[*507] E. Regulations:

The applicant shall comply with all applicable regulations of the Department of Health Services and the Police Department.

Section 2: That the Hoffman Estates Municipal Code be amended by adding to Sec. 8-2-1 Fees: Merchants (Products) the additional language as follows:

Items designed or marketed for use with illegal cannabis or drugs $ 150.00

Section 3: Penalty. Any person violating any provision of this ordinance shall be fined not less than ten dollars ($ 10.00) nor more than five hundred dollars ($ 500.00) for the first offense and succeeding offenses during the same calendar year, and each day that such violation shall continue shall be deemed a separate and distinct offense.

[**1198] *Section 4*: That the Village Clerk be and is hereby authorized to publish this ordinance in pamphlet form.

Section 5: That this ordinance shall be in full force and effect May 1, 1978, after its passage, approval and publication according to law.

CONCUR BY: WHITE

CONCUR

JUSTICE WHITE, concurring in the judgment.

I agree that the judgment of the Court of Appeals must be reversed. I do not, however, believe it necessary to discuss the overbreadth problem in order to reach this result. The Court of Appeals held the ordinance to be void for vagueness; it did not discuss any problem of overbreadth. That opinion should be reversed simply because it erred in its analysis of the vagueness problem presented by the ordinance.

I agree with the majority that a facial vagueness challenge to an economic regulation must demonstrate that "the enactment is impermissibly vague in all of its applications." *Ante*, at 495. I also agree with the majority's statement that the "marketed for use" standard in the ordinance is "sufficiently clear." There is, in my view, no need to go any further: If it [*508] is "transparently clear" that some particular conduct is restricted by the ordinance, the ordinance survives a facial challenge on vagueness grounds.

Technically, overbreadth is a standing doctrine that permits parties in cases involving *First Amendment* challenges to government restrictions on noncommercial speech to argue that the regulation is invalid because of its effect on the *First Amendment* rights of others not presently before the Court. *Broadrick v. Oklahoma, 413 U.S. 601, 612-615 (1973)*. Whether the appellee may make use of the overbreadth doctrine depends, in the first instance, on whether or not it has a colorable claim that the ordinance infringes on constitutionally protected, [***378] noncommercial speech of others. Although appellee claims that the ordinance does have such an effect, that argument is tenuous at best and should be left to the lower courts for an initial determination.

Accordingly, I concur in the judgment reversing the decision below.

REFERENCES

16 Am Jur 2d, Constitutional Law 522; *56 Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions 367*

USCS, *Constitution, 1st Amendment*

US L Ed Digest, Constitutional Law 952, 954; Municipal Corporations 37.7

L Ed Index to Annos, Freedom of Speech, Press, Religion and Assembly; Licenses and License Taxes; Municipal Corporations

ALR Quick Index, Freedom of Speech and Press; Licenses and Permits; Municipal Corporations

Federal Quick Index, Freedom of Speech and Press; Licenses and Permits; Municipal Corporations

Annotation References:

Supreme Court's views as to overbreadth of legislation in connection with *First Amendment* rights. *45 L Ed 2d 725*.

Supreme Court's application of vagueness doctrine to noncriminal statutes or ordinances . *40 L Ed 2d 823*.

EXHIBIT “9”

LEXSEE 461 U.S. 352

KOLENDER, CHIEF OF POLICE OF SAN DIEGO, ET AL. v. LAWSON

No. 81-1320

SUPREME COURT OF THE UNITED STATES

461 U.S. 352; 103 S. Ct. 1855; 75 L. Ed. 2d 903; 1983 U.S. LEXIS 159; 51 U.S.L.W. 4532

November 8, 1982, Argued
May 2, 1983, Decided

PRIOR HISTORY: APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

DISPOSITION: *658 F.2d 1362*, affirmed and remanded.

DECISION:

California loitering statute requiring "credible and reliable" identification at police request held unconstitutionally vague.

SUMMARY:

An individual who had been detained or arrested on approximately 15 occasions under a California statute, which required persons who loiter or wander on the streets to provide a credible and reliable identification and to account for their presence when requested by a peace officer under circumstances that would justify a valid stop, brought a civil action seeking a declaratory judgment that the statute was unconstitutional, a mandatory injunction seeking to restrain enforcement of the statute, and compensatory and punitive damages against the various officers who detained him. The United States District Court for the Southern District of California held that the statute was overbroad and enjoined enforcement of the statute but held that damages were not recoverable. The United States Court of Appeals for the Ninth Circuit affirmed the District Court determination as to the statute's unconstitutionality (*658 F2d 1362*).

On appeal, the United States Supreme Court affirmed and remanded. In an opinion by O'Connor, J., joined by Burger, Ch. J., and Brennan, Marshall, Blackmun, Powell, and Stevens, JJ., it was held that the statute was unconstitutionally vague on its face within the meaning of the *due process clause of the Fourteenth Amendment* because it encouraged arbitrary enforcement by failing to clarify what is contemplated by the requirement that a suspect provide a credible and reliable identification.

White, J., joined by Rehnquist, J., dissented, expressing the view that the statute was not unconstitutionally vague since a criminal statute is not unconstitutionally vague on its face unless it is impermissibly vague in all of its possible applications.

LAWYERS' EDITION HEADNOTES:

[***LEdHN1]

STATUTES §18.9

loitering statute -- vagueness --

Headnote:[1A][1B][1C]

A state criminal statute that requires persons who loiter or wander on the streets to provide a credible and reliable identification and to account for their presence when requested by a peace officer under circumstances that would justify a valid stop is unconstitutionally vague on its face within the meaning of the *due process clause of the Fourteenth Amendment* because it encourages arbitrary enforcement by failing to clarify what is contemplated by the requirement that a suspect provide a credible and reliable identification. (White and Rehnquist, JJ., dissented from this holding.)

[***LEdHN2]

COURTS §810

facial challenge -- state law -- state court construction --

Headnote:[2]

In evaluating a facial challenge to a state law, a federal court must consider any limiting construction that a state court or enforcement agency has proffered.

[***LEdHN3]

COURTS §805.3

vagueness of state statute -- interpretation by state court --

Headnote:[3A][3B]

For the purpose of determining whether a state statute is too vague and indefinite to constitute valid legislation the United States Supreme Court must take the statute as though it read precisely as the highest court of the state has interpreted it.

[***LEdHN4]

COURTS §790.3

construction of state statute by state intermediate appellate court --

Headnote:[4A][4B]

An opinion by a state intermediate appellate court is authoritative for purposes of defining a state statute where the opinion has construed the statute, where the state's highest court has refused review, and where the opinion has been the law of the state for 9 years.

[***LEdHN5]

ARREST §2

objective facts --

Headnote:[5A][5B]

Fourth Amendment concerns are implicated where a state statute permits investigative detentions in situations where the police officers lack a reasonable suspicion of criminal activity based on objective facts.

[***LEdHN6]

STATUTES §17

limitation on individual freedoms --

Headnote:[6]

Statutory limitations on constitutional individual freedoms are examined for substantive authority and content as well as for definiteness or certainty of expression.

[***LEdHN7]

STATUTES §18

void-for-vagueness doctrine -- penal statute --

Headnote:[7]

The void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.

[***LEdHN8]

STATUTES §18

void-for-vagueness doctrine -- arbitrary enforcement --

Headnote:[8]

Although the void-for-vagueness doctrine focuses both on actual notice to citizens and arbitrary enforcement, the more important aspect of vagueness doctrine is not actual notice, but the other principal element of the doctrine, which is the requirement that a legislature establish minimal guidelines to govern law enforcement.

[***LEdHN9]

STATUTES §18

facial challenge -- penal statute --

Headnote:[9A][9B]

The United States Supreme Court permits a facial void-for-vagueness challenge to a statute if a law reaches a substantial amount of constitutionally protected conduct; where a statute imposes criminal penalties, the standard of certainty is higher (White and Rehnquist, JJ., dissented from this holding.)

[***LEdHN10]

WITNESSES §72

questioning of citizens -- compulsion --

Headnote:[10A][10B]

While police have the right to request citizens to answer voluntarily questions concerning unsolved crimes they have no right to compel them to answer.

[***LEdHN11]

SEIZURE §11

detention -- level of suspicion sufficient to justify stop --

Headnote:[11]

In providing that a detention under a state statute may occur only where there is the level of suspicion sufficient to justify a constitutional stop, a state insures the existence of neutral limitations on the conduct of individual officers.

[***LEdHN12]

STATUTES §18

definiteness and clarity -- penal statute --

Headnote:[12]

The concern with curbing criminal activity cannot justify legislation that would otherwise fail to meet constitutional standards for definiteness and clarity.

[***LEdHN13]

ERROR §1339

constitutional questions -- review --

Headnote:[13A][13B]

On appeal from a United States Court of Appeals judgment affirming a United States District Court's judgment holding a state statute unconstitutional, the United States Supreme Court, in affirming the judgment on the ground of the statute's unconstitutionality as void for vagueness, would not decide other questions raised by the parties where its resolution of the other issues would decide constitutional questions in advance of the necessity of doing so.

SYLLABUS

A California statute requires persons who loiter or wander on the streets to identify themselves and to account for their presence when requested by a peace officer. The California Court of Appeal has construed the statute to require a person to provide "credible and reliable" identification when requested by a police officer who has reasonable suspicion of criminal activity sufficient to justify a stop under the standards of *Terry v. Ohio, 392 U.S. 1*. The California court has defined "credible and reliable" identification as "carrying reasonable assurance that the identification is authentic and providing means for later getting in touch with the person who has identified himself." Appellee, who had been arrested and convicted under the statute, brought an action in Federal District Court challenging the statute's constitutionality. The District Court held the statute unconstitutional and enjoined its enforcement, and the Court of Appeals affirmed.

Held: The statute, as drafted and as construed by the state court, is unconstitutionally vague on its face within the meaning of the *Due Process Clause of the Fourteenth Amendment* by failing to clarify what is contemplated by the requirement that a suspect provide a "credible and reliable" identification. As such, the statute vests virtually complete discretion in the hands of the police to determine whether the suspect has satisfied the statute and must be permitted to go on his way in the absence of probable cause to arrest. Pp. 355-361.

COUNSEL: A. Wells Petersen, Deputy Attorney General of California, argued the cause for appellants. With him on the briefs were George Deukmejian, Attorney General, Robert H. Philibosian, Chief Assistant Attorney General, Daniel J. Kremer, Assistant Attorney General, and Jay M. Bloom, Deputy Attorney General.

Mark D. Rosenbaum, by invitation of the *Court, 459 U.S. 964*, argued the cause as amicus curiae in support of the judgment below. With him on the brief were Dennis M. Perluss, Fred Okrand, Mary Ellen Gale, Robert H. Lynn, and Charles S. Sims. *

* Briefs of amici curiae urging reversal were filed by William L. Cahalan, Edward Reilly Wilson, and Timothy A. Baughman for the Wayne County Prosecutor's Office; and by Wayne W. Schmidt, James P. Manak, and Fred E. Inbau for Americans for Effective Law Enforcement, Inc., et al.

Briefs of amici curiae urging affirmance were filed by Eugene G. Iredale for the California Attorneys for Criminal Justice; and by Michael Ratner for the Center for Constitutional Rights.

Briefs of amici curiae were filed by John K. Van de Kamp, Harry B. Sondheim, and John W. Messer for the Appellate Committee of the California District Attorneys Association; by Dan Stormer, John Huerta, and Peter Schey for the National Lawyers Guild et al.; and by Quin Denvir and William Blum for the State Public Defender of California.

JUDGES: O'CONNOR, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, MARSHALL, BLACKMUN, POWELL, and STEVENS, JJ., joined. BRENNAN, J., filed a concurring opinion, post, p. 362. WHITE, J., filed a dissenting opinion, in which REHNQUIST, J., joined, post, p. 369.

OPINION BY: O'CONNOR

OPINION

[*353] [***906] [**1856] JUSTICE O'CONNOR delivered the opinion of the Court.

[***LEdHR1A] [1A]This appeal presents a facial challenge to a criminal statute that requires persons who loiter or wander on the streets to provide a "credible and reliable" identification and to account for their presence when requested by a peace officer under circumstances that would justify a stop under the standards of *Terry v. Ohio, 392 U.S. 1 (1968).* [1] We conclude that the statute as it has been construed is unconstitutionally vague within the meaning of the *Due Process Clause of the Fourteenth Amendment* by failing to clarify what is contemplated [*354] by the requirement that a suspect provide a "credible and reliable" identification. [***907] Accordingly, we affirm the judgment of the court below.

1 -

California Penal Code Ann. § 647(e) (West 1970) provides:

"Every person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor: . . . (e) Who loiters or wanders upon the streets or from place to place without apparent reason or business and who refuses to identify himself and to account for his presence when requested by any peace officer so to do, if the surrounding circumstances are such as to indicate to a reasonable man that the public safety demands such identification."

I

Appellee Edward Lawson was detained or arrested on approximately 15 occasions between March 1975 and January 1977 pursuant to *Cal. Penal Code Ann. § 647(e)* (West 1970). [2] Lawson was prosecuted only twice, and was convicted once. The second charge was dismissed.

2 The District Court failed to find facts concerning the particular occasions on which Lawson was detained or arrested under *§ 647(e).* However, the trial transcript contains numerous descriptions of the stops given both by Lawson and by the police officers who detained him. For example, one police officer testified that he stopped Lawson while walking on an otherwise vacant street because it was late at night, the area was isolated, and the area was located close to a high crime area. Tr. 266-267. Another officer testified that he detained Lawson, who was walking at a late hour in a business area where some businesses were still open, and asked for identification because burglaries had been committed by unknown persons in the general area. *Id.*, at 207. The appellee states that he has never been stopped by police for any reason apart from his detentions under *§ 647(e).*

Lawson then brought a civil action in the District Court for the Southern District of California seeking a declaratory judgment that *§ 647(e)* is unconstitutional, a mandatory injunction to restrain enforcement of the statute, and compensatory and punitive damages against the various officers who detained him. The District Court found that *§ 647(e)* was overboard because "a person who is stopped on less than probable cause cannot be punished for failing to identify himself." App. to Juris. Statement A-78. The District Court enjoined enforcement of the statute, but held that Lawson could not recover damages because the officers involved acted in the good-faith belief that each detention or arrest was lawful.

Appellant H. A. Porazzo, Deputy Chief Commander of the California Highway Patrol, appealed the District Court decision to the Court of Appeals for the Ninth Circuit. Lawson [*355] cross-appealed, arguing that he [**1857] was entitled to a jury trial on the issue of damages against the officers. The Court of Appeals affirmed the District Court determination as to the unconstitutionality of *§ 647(e). 658 F.2d 1362 (1981).* The appellate court determined that the statute was unconstitutional in that it violates the *Fourth Amendment's* proscription against unreasonable searches and seizures, it contains a vague enforcement standard that is susceptible to arbitrary enforcement, and it fails to give fair and adequate notice of the type of conduct prohibited. Finally, the Court of Appeals reversed the District Court as to its holding that Lawson was not entitled to a jury trial to determine the good faith of the officers in his damages action against them, and remanded the case to the District Court for trial.

The officers appealed to this Court from that portion of the judgment of the Court of Appeals which declared *§ 647(e)* unconstitutional and which enjoined its enforcement. We noted probable jurisdiction pursuant to *28 U. S. C. § 1254(2). 455 U.S. 999 (1982).*

II

[***LEdHR2] [2] [***LEdHR3A] [3A] [***LEdHR4A] [4A] [***LEdHR5A] [5A]In the courts below, Lawson mounted an attack on the [***908] facial validity of *§ 647(e).* [3] "In evaluating a facial challenge to a state law, a federal court must, of course, consider any limiting construction that a state court or en-

forcement agency has proffered." *Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494, n. 5 (1982)*. As construed by the California Court of Appeal, [4] *§ 647(e)* requires that an individual [*356] provide "credible and reliable" identification when requested by a police officer who has reasonable suspicion of criminal activity sufficient to justify a *Terry* detention. [5] *People v. Solomon, 33 Cal. App. 3d 429,* [**1858] *108 Cal. Rptr. 867* [*357] *(1973)*. "Credible and reliable" identification is defined by the State Court of Appeal as identification "carrying reasonable assurance that the identification is authentic and providing means for later getting in touch with the person who has identified himself." *Id., at 438, 108 Cal. Rptr., at 873*. In addition, a suspect may be required to "*account for his presence* . . . to the extent that it assists in producing credible and reliable identification . . . ." *Id., at 438, 108 Cal. Rptr., at 872*. Under the [***909] terms of the statute, failure of the individual to provide "credible and reliable" identification permits the arrest. [6]

3 The appellants have apparently never challenged the propriety of declaratory and injunctive relief in this case. See *Steffel v. Thompson, 415 U.S. 452 (1974)*. Nor have appellants ever challenged Lawson's standing to seek such relief. We note that Lawson has been stopped on approximately 15 occasions pursuant to *§ 647(e)*, and that these 15 stops occurred in a period of less than two years. Thus, there is a "credible threat" that Lawson might be detained again under *§ 647(e)*. See *Ellis v. Dyson, 421 U.S. 426, 434 (1975)*.

[***LEdHR3B] [3B] [***LEdHR4B] [4B]

4 In *Wainwright v. Stone, 414 U.S. 21, 22-23 (1973)*, we held that "[for] the purpose of determining whether a state statute is too vague and indefinite to constitute valid legislation 'we must take the statute as though it read precisely as the highest court of the State has interpreted it.' *Minnesota ex rel. Pearson v. Probate Court, 309 U.S. 270, 273 (1940)*." The Court of Appeals for the Ninth Circuit noted in its decision that the state intermediate appellate court has construed the statute in *People v. Solomon, 33 Cal. App. 3d 429, 108 Cal. Rptr. 867 (1973)*, that the State Supreme Court has refused review, and that *Solomon* has been the law of California for nine years. In these circumstances, we agree with the Ninth Circuit that the *Solomon* opinion is authoritative for purposes of defining the meaning of *§ 647(e)*. See *658 F.2d 1362, 1364-1365, n. 3 (1981)*.

[***LEdHR5B] [5B]

5 The *Solomon* court apparently read *Terry v. Ohio, 392 U.S. 1 (1968)*, to hold that the test for a *Terry* detention was whether the officer had information that would lead a reasonable man to believe that the intrusion was appropriate. The Ninth Circuit noted that according to *Terry*, the applicable test under the *Fourth Amendment* requires that the police officer making a detention "be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *392 U.S., at 21*. The Ninth Circuit then held that although what *Solomon* articulated as the *Terry* standard differed from what *Terry* actually held, "[we] believe that the *Solomon* court meant to incorporate in principle the standards enunciated in *Terry*." *658 F.2d, at 1366, n. 8*. We agree with that interpretation of *Solomon*. Of course, if the *Solomon* court misread *Terry* and interpreted *§ 647(e)* to permit investigative detentions in situations where the officers lack a reasonable suspicion of criminal activity based on objective facts, *Fourth Amendment* concerns would be implicated. See *Brown v. Texas, 443 U.S. 47 (1979)*.

In addition, the *Solomon* court appeared to believe that both the *Terry* detention *and* frisk were proper under the standard for *Terry* detentions, and since the frisk was more intrusive than the request for identification, the request for identification *must* be proper under *Terry*. See *33 Cal. App. 3d, at 435, 108 Cal. Rptr., at 870-871*. The Ninth Circuit observed that the *Solomon* analysis was "slightly askew." *658 F.2d, at 1366, n. 9*. The court reasoned that under *Terry*, the frisk, as opposed to the detention, is proper only if the detaining officer reasonably believes that the suspect may be armed and dangerous, in addition to having an articulable suspicion that criminal activity is afoot.

6 In *People v. Caylor, 6 Cal. App. 3d 51, 56, 85 Cal. Rptr. 497, 501 (1970)*, the court suggested that the State must prove that a suspect detained under *§ 647(e)* was loitering or wandering for "evil purposes." However, in *Solomon*, which the court below and the parties concede is "authoritative" in the absence of a California Supreme Court decision on the issue, there is no discussion of any requirement that the State prove "evil purposes."

III

[***LEdHR6] [6]Our Constitution is designed to maximize individual freedoms within a framework of

ordered liberty. Statutory limitations on those freedoms are examined for substantive authority and content as well as for definiteness or certainty of expression. See generally M. Bassiouni, Substantive Criminal Law 53 (1978).

[***LEdHR7] [7] [***LEdHR8] [8]As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. *Hoffman Estates v. Flipside, Hoffman Estates, Inc., supra; Smith v. Goguen, 415 U.S. 566 (1974)*; *Grayned v. City of Rockford, 408 U.S. 104 (1972)*; *Papachristou v. City of Jacksonville, 405 U.S. 156 (1972)*; *Connally v. General Construction Co., 269 U.S. 385 (1926)*. Although the doctrine focuses [*358] both on actual notice to citizens and arbitrary enforcement, we have recognized recently that the more important aspect of the vagueness doctrine "is not actual notice, but the other principal element of the doctrine -- the requirement that a legislature establish minimal guidelines to govern law enforcement." *Smith, 415 U.S., at 574*. Where the legislature fails to provide such minimal guidelines, a criminal statute may permit "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections." *Id., at 575*. [7]

> 7 Our concern for minimal guidelines finds its roots as far back as our decision in *United States v. Reese, 92 U.S. 214, 221 (1876)*:
>
> "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 set at large. This would, to some extent, substitute the judicial for the legislative department of government."

[***LEdHR9A] [9A]*Section 647(e)*, as presently drafted and as construed by the state courts, contains no standard for determining what a suspect has to do in order to satisfy the requirement to provide a "credible and reliable" identification. As such, the statute vests virtually complete discretion in the hands of the police to determine whether the suspect has satisfied the statute and must be permitted to go on his way in the absence of probable cause to arrest. An individual, whom police may think is suspicious but do not have probable cause to believe has committed a crime, is entitled to continue to walk the public streets "only at the whim of any police officer" who happens to stop that individual under *§ 647(e). Shuttlesworth v. City of Birmingham, 382 U.S. 87, 90* [**1859] *(1965)*. [***910] Our concern here is based upon the "potential for arbitrarily suppressing *First Amendment* liberties. . . ." *Id., at 91*. In addition, *§ 647(e)* implicates consideration of the constitutional right to freedom of movement. See *Kent v. Dulles, 357 U.S. 116, 126 (1958)*; *Aptheker v. Secretary of State, 378 U.S. 500, 505-506 (1964)*. [8]

[***LEdHR9B] [9B]

> 8 In his dissent, JUSTICE WHITE claims that "[the] upshot of our cases . . . is that whether or not a statute purports to regulate constitutionally protected conduct, it should not be held unconstitutionally vague on its face unless it is vague in all of its possible applications." *Post*, at 370. The description of our holdings is inaccurate in several respects. First, it neglects the fact that we permit a facial challenge if a law reaches "a substantial amount of constitutionally protected conduct." *Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494 (1982)*. Second, where a statute imposes criminal penalties, the standard of certainty is higher. See *Winters v. New York, 333 U.S. 507, 515 (1948)*. This concern has, at times, led us to invalidate a criminal statute on its face even when it could conceivably have had some valid application. See, *e. g., Colautti v. Franklin, 439 U.S. 379, 394-401 (1979)*; *Lanzetta v. New Jersey, 306 U.S. 451 (1939)*. The dissent concedes that "the overbreadth doctrine permits facial challenge of a law that reaches a substantial amount of conduct protected by the *First Amendment*. . . ." *Post*, at 371. However, in the dissent's view, one may not "confuse vagueness and overbreadth by attacking the enactment as being vague as applied to conduct other than his own." *Post*, at 370. But we have traditionally viewed vagueness and overbreadth as logically related and similar doctrines. See, *e. g., Keyishian v. Board of Regents, 385 U.S. 589, 609 (1967)*; *NAACP v. Button, 371 U.S. 415, 433 (1963)*. See also Note, The Void-for-Vagueness Doctrine in the Supreme Court, 109 U. Pa. L. Rev. 67, 110-113 (1960).
>
> No authority cited by the dissent supports its argument about facial challenges in the arbitrary enforcement context. The dissent relies heavily on *Parker v. Levy, 417 U.S. 733 (1974)*, but in that case we deliberately applied a less stringent vagueness analysis "[because] of the factors differentiating military society from civilian society." *Id., at 756. Hoffman Estates, supra*, also relied upon by the dissent, does not support its position. In addition to reaffirming the validity of facial challenges in situations where free speech

or free association are affected, see *455 U.S., at 494, 495, 498-499*, the Court emphasized that the ordinance in *Hoffman Estates* "simply regulates business behavior" and that "economic regulation is subject to a less strict vagueness test because its subject matter is often more narrow." *Id., at 499, 498.*

[*359] *Section 647(e)* is not simply a "stop-and-identify" statute. Rather, the statute requires that the individual provide a "credible and reliable" identification that carries a "reasonable assurance" of its authenticity, and that provides "means for later getting in touch with the person who has identified himself." *Solomon, 33 Cal. App. 3d, at 438, 108 Cal. Rptr., at 872-873.* In addition, the suspect may also have to account for his presence "to the extent it assists in producing [*360] credible and reliable identification." *Id., at 438, 108 Cal. Rptr., at 872.*

[***LEdHR10A] [10A]At oral argument, the appellants confirmed that a suspect violates *§ 647(e)* unless "the officer [is] satisfied that the identification is reliable." Tr. of Oral Arg. 6. In giving examples of how suspects would satisfy the requirement, appellants explained that a jogger, who was not carrying identification, could, depending on the particular officer, be required to answer a series of questions concerning the route that he followed to arrive at the place where the officers detained him, [9] or could satisfy the identification requirement [***911] simply by reciting his name and address. See *Id., at 6-10.*

[***LEdHR10B] [10B]

9 To the extent that *§ 647(e)* criminalizes a suspect's failure to answer such questions put to him by police officers, *Fifth Amendment* concerns are implicated. It is a "settled principle that while the police have the right to request citizens to answer voluntarily questions concerning unsolved crimes they have no right to compel them to answer." *Davis v. Mississippi, 394 U.S. 721, 727, n. 6 (1969).*

[***LEdHR1B] [1B] [***LEdHR11] [11]It is clear that the full discretion accorded to the police to determine whether the suspect has provided a "credible and reliable" identification necessarily "[entrusts] [**1860] lawmaking 'to the moment-to-moment judgment of the policeman on his beat.'" *Smith, supra, at 575* (quoting *Gregory v. Chicago, 394 U.S. 111, 120 (1969)* (Black, J., concurring)). *Section 647(e)* "furnishes a convenient tool for 'harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure,'" *Papachristou, 405 U.S., at 170* (quoting *Thornhill v. Alabama, 310 U.S. 88, 97-98 (1940)*), and "confers on police a virtually unrestrained power to arrest and charge persons with a violation." *Lewis v. City of New Orleans, 415 U.S. 130, 135 (1974)* (POWELL, J., concurring in result). In providing that a detention under *§ 647(e)* may occur only where there is the level of suspicion sufficient to justify a *Terry* stop, the State ensures the existence of "neutral limitations on the conduct of individual officers." *Brown v. Texas, 443* [*361] *U.S., at 51.*Although the initial detention is justified, the State fails to establish standards by which the officers may determine whether the suspect has complied with the subsequent identification requirement.

[***LEdHR12] [12]Appellants stress the need for strengthened law enforcement tools to combat the epidemic of crime that plagues our Nation. The concern of our citizens with curbing criminal activity is certainly a matter requiring the attention of all branches of government. As weighty as this concern is, however, it cannot justify legislation that would otherwise fail to meet constitutional standards for definiteness and clarity. See *Lanzetta v. New Jersey, 306 U.S. 451 (1939). Section 647(e)*, as presently construed, requires that "suspicious" persons satisfy some undefined identification requirement, or face criminal punishment. Although due process does not require "impossible standards" of clarity, see *United States v. Petrillo, 332 U.S. 1, 7-8 (1947)*, this is not a case where further precision in the statutory language is either impossible or impractical.

IV

[***LEdHR1C] [1C] [***LEdHR13A] [13A]We conclude *§ 647(e)* is unconstitutionally vague on its face because it encourages arbitrary enforcement by failing to describe with sufficient particularity what a suspect must do in order to satisfy the statute. [10] Accordingly, the judgment of [*362] the Court of Appeals is affirmed, [***912] and the case is remanded for further proceedings consistent with this opinion.

[***LEdHR13B] [13B]

10 Because we affirm the judgment of the court below on this ground, we find it unnecessary to decide the other questions raised by the parties because our resolution of these other issues would decide constitutional questions in advance of the necessity of doing so. See *Burton v. United States, 196 U.S. 283, 295 (1905)*; *Liverpool, N. Y. & P. S.S. Co.* v. *Commissioners of Emigration, 113 U.S. 33, 39 (1885).* See also *Ashwander v. TVA, 297 U.S. 288, 346-347 (1936)* (Brandeis, J., concurring). The remaining issues raised by the parties include whether *§ 647(e)*

implicates *Fourth Amendment* concerns, whether the individual has a legitimate expectation of privacy in his identity when he is detained lawfully under *Terry*, whether the requirement that an individual identify himself during a *Terry* stop violates the *Fifth Amendment* protection against compelled testimony, and whether inclusion of the *Terry* standard as part of a criminal statute creates other vagueness problems. The appellee also argues that *§ 647(e)* permits arrests on less than probable cause. See *Michigan v. DeFillippo, 443 U.S. 31, 36 (1979).*

It is so ordered.

CONCUR BY: BRENNAN

CONCUR

JUSTICE BRENNAN, concurring.

I join the Court's opinion; it demonstrates convincingly that the California statute at issue in this case, *Cal. Penal Code Ann. § 647(e)* (West 1970), as interpreted by California courts, is unconstitutionally vague. Even if the defect identified by the Court were cured, however, I would hold that this statute violates the *Fourth* [**1861] *Amendment.* [1] Merely to facilitate the general law enforcement objectives of investigating and preventing unspecified crimes, States may not authorize the arrest and criminal prosecution of an individual for failing to produce identification or further information on demand by a police officer.

1 We have not in recent years found a state statute invalid directly under the *Fourth Amendment*, but we have long recognized that the government may not "authorize police conduct which trenches upon *Fourth Amendment* rights, regardless of the labels which it attaches to such conduct." *Sibron v. New York, 392 U.S. 40, 61 (1968).* In *Sibron*, and in numerous other cases, the *Fourth Amendment* issue arose in the context of a motion by the defendant in a criminal prosecution to suppress evidence against him obtained as the result of a police search or seizure of his person or property. The question thus has always been whether particular conduct by the police violated the *Fourth Amendment*, and we have not had to reach the question whether state law purporting to authorize such conduct also offended the Constitution. In this case, however, appellee Edward Lawson has been repeatedly arrested under authority of the California statute, and he has shown that he will likely be subjected to further seizures by the police in the future if the statute remains in force. See *Los Angeles* v. *Lyons, ante*, at 105-109; *Gomez v. Layton, 129 U. S. App. D. C. 289, 394 F.2d 764 (1968).* It goes without saying that the *Fourth Amendment* safeguards the rights of those who are not prosecuted for crimes as well as the rights of those who are.

[*363] It has long been settled that the *Fourth Amendment* prohibits the seizure and detention or search of an individual's person unless there is probable cause to believe that he has committed a crime, except under certain conditions strictly defined by the legitimate requirements of law enforcement and by the limited extent of the resulting intrusion on individual liberty and privacy. See *Davis v. Mississippi, 394 U.S. 721, 726-727 (1969).* The scope of that exception to the probable-cause requirement for seizures of the person has been defined by a series of cases, beginning with *Terry v. Ohio, 392 U.S. 1 (1968)*, holding that a police officer with reasonable suspicion of criminal activity, based on articulable facts, may detain a suspect [***913] briefly for purposes of limited questioning and, in so doing, may conduct a brief "frisk" of the suspect to protect himself from concealed weapons. See, *e. g., United States v. Brignoni-Ponce, 422 U.S. 873, 880-884 (1975); Adams v. Williams, 407 U.S. 143, 145-146 (1972).* Where probable cause is lacking, we have expressly declined to allow significantly more intrusive detentions or searches on the *Terry* rationale, despite the assertion of compelling law enforcement interests. "For all but those narrowly defined intrusions, the requisite 'balancing' has been performed in centuries of precedent and is embodied in the principle that seizures are 'reasonable' only if supported by probable cause." *Dunaway v. New York, 442 U.S. 200, 214 (1979).* [2]

2 A brief detention is usually sufficient as a practical matter to accomplish all legitimate law enforcement objectives with respect to individuals whom the police do not have probable cause to arrest. For longer detentions, even though they fall short of a full arrest, we have demanded not only a high standard of law enforcement necessity, but also objective indications that an individual would not consider the detention significantly intrusive. Compare *Dunaway v. New York, 442 U.S., at 212-216* (seizure of suspect without probable cause and custodial interrogation in police station violates *Fourth Amendment*), and *Davis v. Mississippi, 394 U.S. 721, 727-728 (1969)* (suspect may not be summarily detained and taken to police station for fingerprinting but may be ordered to appear at a specific time), with *Michigan v. Summers, 452 U.S. 692, 701-705 (1981)* (suspect may be detained in his own home without probable cause for time necessary to search the premises pursuant to a valid warrant sup-

ported by probable cause). See also *Florida v. Royer, 460 U.S. 491, 500 (1983)* (opinion of WHITE, J.) ("least intrusive means" requirement for searches not supported by probable cause).

[*364] *Terry* and the cases following it give full recognition to law enforcement officers' need for an "intermediate" response, short [**1862] of arrest, to suspicious circumstances; the power to effect a brief detention for the purpose of questioning is a powerful tool for the investigation and prevention of crimes. Any person may, of course, direct a question to another person in passing. The *Terry* doctrine permits police officers to do far more: If they have the requisite reasonable suspicion, they may use a number of devices with substantial coercive impact on the person to whom they direct their attention, including an official "show of authority," the use of physical force to restrain him, and a search of the person for weapons. *Terry v. Ohio, supra, at 19, n. 16*; see *Florida v. Royer, 460 U.S. 491, 498-499 (1983)* (opinion of WHITE, J.); *United States v. Mendenhall, 446 U.S. 544, 554 (1980)* (opinion of Stewart, J.). During such an encounter, few people will ever feel free not to cooperate fully with the police by answering their questions. Cf. 3 W. LaFave, Search and Seizure § 9.2, pp. 53-55 (1978). Our case reports are replete with examples of suspects' cooperation during *Terry* encounters, even when the suspects have a great deal to lose by cooperating. See, *e. g., Sibron v. New York, 392 U.S. 40, 45 (1968)*; *Florida v. Royer, supra, at 493-495.*

The price of that effectiveness, [***914] however, is intrusion on individual interests protected by the *Fourth Amendment.* We have held that the intrusiveness of even these brief stops for purposes of questioning is sufficient to render them "seizures" under the *Fourth Amendment.* See *Terry v. Ohio, 392 U.S., at 16.* For precisely that reason, the scope of seizures of the person on less than probable cause that *Terry* [*365] permits is strictly circumscribed to limit the degree of intrusion they cause. *Terry* encounters must be brief; the suspect must not be moved or asked to move more than a short distance; physical searches are permitted only to the extent necessary to protect the police officers involved during the encounter; and, most importantly, the suspect must be free to leave after a short time and to decline to answer the questions put to him.

"[The] person may be briefly detained against his will while pertinent questions are directed to him. Of course, the person stopped is not obliged to answer, answers may not be compelled, and refusal to answer furnishes no basis for an arrest, although it may alert the officer to the need for continued observation." *Id., at 34* (WHITE, J., concurring).

Failure to observe these limitations converts a *Terry* encounter into the sort of detention that can be justified only by probable cause to believe that a crime has been committed. See *Florida v. Royer, 460 U.S., at 501* (opinion of WHITE, J.); *id., at 509-511* (BRENNAN, J., concurring in result); *Dunaway v. New York, supra, at 216.*

The power to arrest -- or otherwise to prolong a seizure until a suspect had responded to the satisfaction of the police officers -- would undoubtedly elicit cooperation from a high percentage of even those very few individuals not sufficiently coerced by a show of authority, brief physical detention, and a frisk. We have never claimed that expansion of the power of police officers to act on reasonable suspicion alone, or even less, would further no law enforcement interests. See, *e. g., Brown v. Texas, 443 U.S. 47, 52 (1979).* But the balance struck by the *Fourth Amendment* between the public interest in effective law enforcement and the equally public interest in safeguarding individual freedom and privacy from arbitrary governmental interference forbids such expansion. See *Dunaway v. New York, supra; United States v. Brignoni-Ponce, 422 U.S., at 878.* Detention beyond the limits [*366] of *Terry* without probable cause would improve the effectiveness of legitimate police investigations by only a small margin, [**1863] but it would expose individual members of the public to exponential increases in both the intrusiveness of the encounter and the risk that police officers would abuse their discretion for improper ends. Furthermore, regular expansion of *Terry* encounters into more intrusive detentions, without a clear connection to any specific underlying crimes, is likely to exacerbate ongoing tensions, where they exist, between the police and the public. See Report of the National Advisory Commission on Civil Disorders 157-168 (1968).

[***915] In sum, under the *Fourth Amendment*, police officers with reasonable suspicion that an individual has committed or is about to commit a crime may detain that individual, using some force if necessary, for the purpose of asking investigative questions. [3] They may ask their questions in a way calculated to obtain an answer. But they may not *compel* an answer, and they must allow the person to leave after a reasonably brief period of time unless the information they have acquired during the encounter has given them probable cause sufficient to justify an arrest. [4]

3 Police officers may have a similar power with respect to persons whom they reasonably believe to be material witnesses to a specific crime. See, *e. g.*, ALI Model Code of

Pre-Arraignment Procedure § 110.2(1)(b) (Proposed Official Draft 1975).

4 Of course, some reactions by individuals to a properly limited *Terry* encounter, *e. g.*, violence toward a police officer, in and of themselves furnish valid grounds for arrest. Other reactions, such as flight, may often provide the necessary information, in addition to that which the officers already possess, to constitute probable cause. In some circumstances it is even conceivable that the mere fact that a suspect refuses to answer questions once detained, viewed in the context of the facts that gave rise to reasonable suspicion in the first place, would be enough to provide probable cause. A court confronted with such a claim, however, would have to evaluate it carefully to make certain that the person arrested was not being penalized for the exercise of his right to refuse to answer.

California cannot abridge this constitutional rule by making it a crime to refuse to answer police questions during a [*367] *Terry* encounter, any more than it could abridge the protections of the *Fifth* and *Sixth Amendments* by making it a crime to refuse to answer police questions once a suspect has been taken into custody. To begin, the statute at issue in this case could not be constitutional unless the intrusions on *Fourth Amendment* rights it occasions were necessary to advance some specific, legitimate state interest not already taken into account by the constitutional analysis described above. Yet appellants do not claim that *§ 647(e)* advances any interest other than general facilitation of police investigation and preservation of public order -- factors addressed at length in *Terry, Davis*, and *Dunaway*. Nor do appellants show that the power to arrest and to impose a criminal sanction, in addition to the power to detain and to pose questions under the aegis of state authority, is so necessary in pursuit of the State's legitimate interests as to justify the substantial additional intrusion on individuals' rights. Compare Brief for Appellants 18-19 (asserting that *§ 647(e)* is justified by state interest in "detecting and preventing crime" and "protecting the citizenry from criminal acts"), and *People v. Solomon, 33 Cal. App. 3d 429, 436-437, 108 Cal. Rptr. 867, 872 (1973)* (*§ 647(e)* justified by "the public need involved," *i. e.*, "protection of society against crime"), with *United States v. Brignoni-Ponce, supra, at 884* (federal interest in immigration control permits stops at the border itself without reasonable suspicion), and *California v. Byers, 402 U.S. 424, 456-458 (1971)* (Harlan, J., concurring in judgment) (state interest in regulating automobiles justifies making it a crime to refuse to stop after an automobile accident and report it). Thus, because the State's interests extend only so far as to justify the limited searches and seizures defined by [***916] *Terry*, the balance of interests described in that case and its progeny must control.

Second, it goes without saying that arrest and the threat of a criminal sanction [**1864] have a substantial impact on interests protected by the *Fourth Amendment*, far more severe than [*368] we have ever permitted on less than probable cause. Furthermore, the likelihood that innocent persons accosted by law enforcement officers under authority of *§ 647(e)* will have no realistic means to protect their rights compounds the severity of the intrusions on individual liberty that this statute will occasion. The arrests it authorizes make a mockery of the right enforced in *Brown v. Texas, 443 U.S. 47 (1979)*, in which we held squarely that a State may not make it a crime to refuse to provide identification on demand in the absence of reasonable suspicion. [5] If *§ 647(e)* remains in force, the validity of such arrests will be open to challenge only after the fact, in individual prosecutions for failure to produce identification. Such case-by-case scrutiny cannot vindicate the *Fourth Amendment* rights of persons like appellee, many of whom will not even be prosecuted after they are arrested, see *ante*, at 354. A pedestrian approached by police officers has no way of knowing whether the officers have "reasonable suspicion" -- without which they may not demand identification even under *§ 647(e)*, *ante*, at 356, and n. 5 -- because that condition depends solely on the objective facts known to the officers and evaluated in light of their experience, see *Terry v. Ohio, 392 U.S., at 30*; *United States v. Brignoni-Ponce, 422 U.S., at 884-885*. The pedestrian will know that to assert his rights may subject him to arrest and all that goes with it: new acquaintances among jailers, lawyers, prisoners, and bail bondsmen, firsthand knowledge of local jail conditions, a "search incident to arrest," and the expense of defending against a possible prosecution. [6] The only response to be [*369] expected is compliance with the officers' requests, whether or not they are based on reasonable suspicion, and without regard to the possibility of later vindication in court. Mere reasonable suspicion does not justify subjecting the innocent to such a dilemma. [7]

5 In *Brown* we had no need to consider whether the State can make it a crime to refuse to provide identification on demand during a seizure permitted by *Terry*, when the police have reasonable suspicion but not probable cause. See *443 U.S., at 53, n. 3*.

6 Even after arrest, however, he may not be forced to answer questions against his will, and -- in contrast to what appears to be normal procedure during *Terry* encounters -- he will be so informed. See *Miranda v. Arizona, 384 U.S. 436 (1966)*. In fact, if he indicates a desire to remain

silent, the police should cease questioning him altogether. *Id., at 473-474.*

7 When law enforcement officers have probable cause to believe that a person has committed a crime, the balance of interests between the State and the individual shifts significantly, so that the individual may be forced to tolerate restrictions on liberty and invasions of privacy that possibly will never be redressed, even if charges are dismissed or the individual is acquitted. Such individuals may be arrested, and they may not resist. But probable cause, and nothing less, represents the point at which the interests of law enforcement justify subjecting an individual to any significant intrusion beyond that sanctioned in *Terry*, including either arrest or the need to answer questions that the individual does not want to answer in order to avoid arrest or end a detention.

[***917] By defining as a crime the failure to respond to requests for personal information during a *Terry* encounter, and by permitting arrests upon commission of that crime, California attempts in this statute to compel what may not be compelled under the Constitution. Even if *§ 647(e)* were not unconstitutionally vague, the *Fourth Amendment* would prohibit its enforcement.

DISSENT BY: WHITE

DISSENT

JUSTICE WHITE, with whom JUSTICE REHNQUIST joins, dissenting.

The usual rule is that the alleged vagueness of a criminal statute must be judged in light of the conduct that is charged to be violative of the statute. See, *e. g., United States v. Mazurie, 419 U.S. 544, 550 (1975); United States v. Powell, 423 U.S. 87, 92-93 (1975).* If the actor is given sufficient notice that [**1865] his conduct is within the proscription of the statute, his conviction is not vulnerable on vagueness grounds, even if as applied to other conduct, the law would be unconstitutionally vague. None of our cases "suggests that one who has received fair warning of the criminality of his own conduct from the statute in question is nonetheless entitled to [*370] attack it because the language would not give similar fair warning with respect to other conduct which might be within its broad and literal ambit. One to whose conduct a statute clearly applies may not successfully challenge it for vagueness." *Parker v. Levy, 417 U.S. 733, 756 (1974).* The correlative rule is that a criminal statute is not unconstitutionally vague on its face unless it is "impermissibly vague in all of its applications." *Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 497 (1982).*

These general rules are equally applicable to cases where *First Amendment* or other "fundamental" interests are involved. The Court has held that in such circumstances "more precision in drafting may be required because of the vagueness doctrine in the case of regulation of expression," *Parker v. Levy, supra, at 756*; a "greater degree of specificity" is demanded than in other contexts. *Smith v. Goguen, 415 U.S. 566, 573 (1974).* But the difference in such cases "relates to how strict a test of vagueness shall be applied in judging a particular criminal statute." *Parker v. Levy, 417 U.S., at 756.* It does not permit the challenger of the statute to confuse vagueness and overbreadth by attacking the enactment as being vague as applied to conduct other than his own. See *ibid.* Of course, if his own actions are themselves protected by the *First Amendment* or other constitutional provision, or if the statute does not fairly warn that it is proscribed, he may not be convicted. But it would be unavailing for him to claim that although he knew his own conduct was unprotected and was plainly enough forbidden by the statute, others may be in doubt as to whether their acts are banned by the law.

The upshot of our cases, therefore, is that whether or not a statute purports to regulate constitutionally [***918] protected conduct, it should not be held unconstitutionally vague on its face unless it is vague in all of its possible applications. If any fool would know that a particular category of conduct would be within the reach of the statute, if there is an unmistakable core that a reasonable person would know is forbidden by the [*371] law, the enactment is not unconstitutional on its face and should not be vulnerable to a facial attack in a declaratory judgment action such as is involved in this case. Under our cases, this would be true, even though as applied to other conduct the provision would fail to give the constitutionally required notice of illegality.

Of course, the overbreadth doctrine permits facial challenge of a law that reaches a substantial amount of conduct protected by the *First Amendment*; and, as I have indicated, I also agree that in *First Amendment* cases the vagueness analysis may be more demanding. But to imply, as the majority does, *ante*, at 358-359, n. 8, that the overbreadth doctrine requires facial invalidation of a statute which is not vague as applied to a defendant's conduct but which is vague as applied to other acts is to confound vagueness and overbreadth, contrary to *Parker v. Levy, supra.*

If there is a range of conduct that is clearly within the reach of the statute, law enforcement personnel, as well as putative arrestees, are clearly on notice that arrests for such conduct are authorized by the law. There would be nothing arbitrary or discretionary about such arrests. If the officer arrests for an act that both he and the lawbreaker know is clearly barred by the statute, it

seems to me an untenable exercise of judicial review to invalidate a state conviction because in some other circumstance the officer may arbitrarily misapply the statute. That the law might not give sufficient guidance to arresting officers [**1866] with respect to other conduct should be dealt with in those situations. See, *e. g., Hoffman Estates, supra, at 504.* It is no basis for fashioning a further brand of "overbreadth" and invalidating the statute on its face, thus forbidding its application to identifiable conduct that is within the State's power to sanction.

I would agree with the majority in this case if it made at least some sense to conclude that the requirement to provide "credible and reliable identification" after a valid stop on reasonable suspicion of criminal conduct is "impermissibly vague in all of its applications." *Hoffman Estates v. Flipside,* [*372] *supra, at 495.* * But the [***919] statute is not vulnerable on this ground; and the majority, it seems to me, fails to demonstrate that it is. Suppose, for example, an officer requests identification information from a suspect during a valid *Terry* stop and the suspect answers: "Who I am is just none of your business." Surely the suspect would know from the statute that a refusal to provide any information at all would constitute a violation. It would be absurd to suggest that in such a situation only the unfettered discretion of a police officer, who has legally stopped a person on reasonable suspicion, would serve to determine whether a violation of the statute has occurred.

"It is self-evident that there is a whole range of conduct that anyone with at least a semblance of common sense would know is [a failure to provide credible and reliable identification] and that would be covered by the statute . . . . In these instances, there would be ample notice to the actor and no room for undue discretion by enforcement officers. There may be a variety of other conduct that might or might not be claimed [to have failed to meet the statute's requirements] by the State, but unpredictability in those situations does not change the certainty in others." *Smith v. Goguen, 415 U.S., at 584* (WHITE, J., concurring in judgment).

See *id., at 590* (BLACKMUN, J., joined by BURGER, C. J., agreeing with WHITE, J., on the vagueness issue). Thus, even if, as the majority cryptically asserts, the statute here [*373] implicates *First Amendment* interests, it is not vague on its face, however more strictly the vagueness doctrine should be applied. The judgment below should therefore not be affirmed but reversed and appellee Lawson remitted to challenging the statute as it has been or will be applied to him.

* The majority attempts to underplay the conflict between its decision today and the decision last Term in *Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, by suggesting that we applied a "less strict vagueness test" because economic regulations were at issue. The Court there also found that the ordinances challenged might be characterized as quasi-criminal or criminal in nature and held that because at least some of respondent's conduct clearly was covered by the ordinance, the facial challenge was unavailing even under the "relatively strict test" applicable to criminal laws. *455 U.S., at 499-500.*

The majority finds that the statute "contains no standard for determining what a suspect has to do in order to satisfy the requirement to provide a 'credible and reliable' identification." *Ante*, at 358. At the same time, the majority concedes that "credible and reliable" has been defined by the state court to mean identification that carries reasonable assurance that the identification is authentic and that provides means for later getting in touch with the person. The narrowing construction given this statute by the state court cannot be likened to the "standardless" statutes involved in the cases cited by the majority. For example, *Papachristou v. City of Jacksonville, 405 U.S. 156 (1972)*, involved a statute that made it a crime to be a "vagrant." The statute provided:

"'Rogues and vagabonds, or dissolute persons who go about begging, common gamblers, . . . common drunkards, common night walkers, . . . lewd, wanton and lascivious persons, . . . common railers and brawlers, persons wandering or strolling around from place to place without [**1867] any lawful purpose or object, habitual loafers, . . . shall be deemed vagrants.'" *Id., at 156-157, n. 1.*

In *Lewis v. City of New Orleans, 415 U.S. 130, 132 (1974)*, [***920] the statute at issue made it a crime "'for any person wantonly to curse or revile or to use obscene or opprobrious language toward or with reference to any member of the city police while in the actual performance of his duty.'" The present statute, as construed by the state courts, does not fall in the same category.

The statutes in *Lewis* v. *City of New Orleans and Smith v. Goguen, supra*, as well as other cases cited by the majority clearly involved threatened infringements of *First Amendment* [*374] freedoms. A stricter test of vagueness was therefore warranted. Here, the majority makes a vague reference to potential suppression of *First Amendment* liberties, but the precise nature of the liberties threatened is never mentioned. *Shuttlesworth v. City of Birmingham, 382 U.S. 87 (1965)*, is cited, but that case dealt with an ordinance making it a crime to "'stand

or loiter upon any street or sidewalk . . . after having been requested by any police officer to move on,'" *id., at 90*, and the *First Amendment* concerns implicated by the statute were adequately explained by the Court's reference to *Lovell v. City of Griffin, 303 U.S. 444 (1938)*, and *Schneider v. State, 308 U.S. 147 (1939)*, which dealt with the *First Amendment* right to distribute leaflets on city streets and sidewalks. There are no such concerns in the present case.

Of course, if the statute on its face violates the *Fourth* or *Fifth Amendment* -- and I express no views about that question -- the Court would be justified in striking it down. But the majority apparently cannot bring itself to take this course. It resorts instead to the vagueness doctrine to invalidate a statute that is clear in many of its applications but which is somehow distasteful to the majority. As here construed and applied, the doctrine serves as an open-ended authority to oversee the States' legislative choices in the criminal law area and in this case leaves the State in a quandary as to how to draft a statute that will pass constitutional muster.

I would reverse the judgment of the Court of Appeals.

REFERENCES

Supreme Court's views regarding validity of criminal disorderly conduct statutes under void-for-vagueness doctrine

21 Am Jur 2d, Criminal Law 15-17; *39 Am Jur 2d, Highways, Streets, and Bridges 250*

7 Am Jur Pl & Pr Forms (Rev), Constitutional Law, Forms 21, 38

USCS, *Constitution, 14th Amendment*

US L Ed Digest, Statutes 18, 18.9

L Ed Index to Annos, Certainty and Definiteness; Criminal Law; Due Process of Law

ALR Quick Index, Certainty and Definiteness; Criminal Law; Due Process of Law; Loitering

Federal Quick Index, Certainty and Definiteness; Criminal Law; Due Process of Law; Loitering

Annotation References:

Supreme Court's views regarding validity of criminal disorderly conduct statutes under void-for-vagueness doctrine. *75 L Ed 2d 1049.*

Indefiniteness of language as affecting validity of criminal legislation or judicial definition of common-law crime. *96 L Ed 374, 16 L Ed 2d 1231.*

Validity of loitering statutes and ordinances. 25 ALR3d 836.

Validity of vagrancy statutes and ordinances. 25 ALR3d 792.

EXHIBIT "10"

LEXSEE 383 U.S. 569

MALAT ET UX. v. RIDDELL, DISTRICT DIRECTOR OF INTERNAL REVENUE

No. 487

SUPREME COURT OF THE UNITED STATES

383 U.S. 569; 86 S. Ct. 1030; 16 L. Ed. 2d 102; 1966 U.S. LEXIS 2016; 66-1 U.S. Tax Cas. (CCH) P9317; 17 A.F.T.R.2d (RIA) 604

March 3, 1966, Argued
March 21, 1966, Decided

PRIOR HISTORY: CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

DISPOSITION: *347 F.2d 23*, vacated and remanded.

SUMMARY:

In an action to obtain a federal income tax refund, the District Court for the Southern District of California denied the taxpayer relief, holding that certain income received in connection with a real-estate venture was derived from property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business, so as to be taxable under 1221(1) of the 1954 Internal Revenue Code as ordinary income rather than as income from capital gains. The Court of Appeals for the Ninth Circuit affirmed (*347 F2d 23*), both the District Court and the Court of Appeals relying upon earlier decisions which had held that under 1221(1) property is held "primarily" for sale to customers in the ordinary course of trade or business if such sale is a "substantial" purpose of holding the property, even if it is not the "principal" purpose.

On certiorari, the United States Supreme Court vacated the judgments below and remanded the case to the District Court. In a per curiam opinion expressing the views of seven members of the Court, it was held that the term "primarily" as used in 1221(1) means "of first importance" or "principally," and that the District Court should make fresh findings of fact addressed to the statute as so construed.

Black, J., would affirm the judgments of the lower courts.

White, J., did not participate.

LAWYERS' EDITION HEADNOTES:

[***LEdHN1]

REVENUE §1.5

STATUTES §166

ordinary meaning --

Headnote:[1]

The words of statutes--including revenue acts--should be interpreted where possible in their ordinary, everyday senses.

[***LEdHN2]

STATUTES §100.5

departure from literal meaning --

Headnote:[2]

Departure from a literal reading of statutory language may, on occasion, be indicated by relevant internal evidence of the statute itself and necessary in order to effect the legislative purpose, but there is no occasion for such a departure where a literal reading of a statute is consistent with its legislative purpose.

[***LEdHN3]

TAXES §48

STATUTES §167.5

property held "primarily" for sale -- literal construction --

Headnote:[3]

The purpose of 1221(1) of the 1954 Internal Revenue Code, providing that income from property held "primarily" for sale to customers in the ordinary course of business is taxable as ordinary income rather than as income from capital gains, is to differentiate between the profits and losses arising from the everyday operation of a business on the one hand and the realization of appreciation in value accrued over a substantial period of time on the other, and a literal reading of the term "primarily" is consistent with this legislative purpose.

[***LEdHN4]

TAXES §48

ordinary income or capital gains -- property held "primarily" for sale --

Headnote:[4]

As used in 1221(1) of the 1954 Internal Revenue Code, providing that income from property held "primarily" for sale to customers in the ordinary course of business is taxable as ordinary income rather than as income from capital gains, the term "primarily" means "of first importance" or "principally."

[***LEdHN5]

ERROR §1698

remanding for findings --

Headnote:[5]

Rather than considering whether the result would be supportable on the facts if the lower courts had applied the correct legal standard in construing a federal income tax statute, the United States Supreme Court will remand a case to the Federal District Court for fresh factfindings, addressed to the statute as construed by the Supreme Court, where both the District Court and the Court of Appeals have applied an incorrect standard in construing the statute.

SYLLABUS

Upon the sale of real estate which had been acquired by a joint venture in which petitioners participated, petitioners reported the profits therefrom as capital gains. Respondent argued that the venture had a dual purpose, to develop the property for rental or to sell it, and that the profit was taxable as ordinary income. The District Court ruled that petitioners failed to establish that the property was not held primarily for sale to customers in the ordinary course of business, and that the profits were not capital gains under *26 U. S. C. § 1221 (1)*. The Court of Appeals affirmed. Respondent urges the construction of "primarily" as meaning that a purpose may be "primary" if it is a "substantial" one. *Held*: The word "primarily," as used in *§ 1221 (1)*, means "of first importance" or "principally."

COUNSEL: George T. Altman argued the cause and filed briefs for petitioners.

Jack S. Levin argued the cause for respondent. With him on the brief were Solicitor General Marshall, Acting Assistant Attorney General Roberts, Melva M. Graney and Carolyn R. Just.

JUDGES: Warren, Fortas, Harlan, Brennan, Black, Stewart, Clark, Douglas; White took no part in the decision of this case.

OPINION BY: PER CURIAM

OPINION

[*569] [***103] [**1031] Petitioner [1] was a participant in a joint venture which acquired a 45-acre parcel of land, the intended use for which is somewhat in dispute. Petitioner contends that the venturers' intention was to develop and operate an apartment project on the land; the respondent's position [*570] is that there was a "dual purpose" of developing the property for rental purposes or selling, whichever proved to be the more profitable. In any event, difficulties in obtaining the necessary financing were encountered, and the interior lots of the tract were subdivided and sold. The profit from those sales was reported and taxed as ordinary income.

1 The taxpayer and his wife who filed a joint return are the petitioners, but for simplicity are referred to throughout as "petitioner."

The joint venturers continued to explore the possibility of commercially developing the remaining exterior parcels. Additional frustrations in the form of zoning restrictions were encountered. These difficulties persuaded petitioner and another of the joint venturers of the desirability of terminating the venture; accordingly, they sold out their interests in the remaining [***104] property. Petitioner contends that he is entitled to treat the profits from this last sale as capital gains; the respondent takes the position that this was "property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business," [2] and thus subject to taxation as ordinary income.

2 Internal Revenue Code of 1954, *§ 1221 (1), 26 U. S. C. § 1221 (1)*:

"For purposes of this subtitle, the term 'capital asset' means property held by the taxpayer (whether or not connected with his trade or business), but does not include --

"(1) . . . property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business."

The District Court made the following finding:

"The members of [the joint venture], as of the date the 44.901 acres were acquired, intended either to sell the property or develop it for rental, depending upon which course appeared to be most profitable. The venturers realized that they had made a good purchase price-wise [**1032] and, if they were unable to obtain acceptable construction financing or rezoning . . . which would be prerequisite to commercial development, they would sell the property [*571] in bulk so they wouldn't get hurt. The purpose of either selling or developing the property continued during the period in which [the joint venture] held the property."

The District Court ruled that petitioner had failed to establish that the property was not held *primarily* for sale to customers in the ordinary course of business, and thus rejected petitioner's claim to capital gain treatment for the profits derived from the property's resale. The Court of Appeals affirmed, *347 F.2d 23*. We granted certiorari (*382 U.S. 900*) to resolve a conflict among the courts of appeals [3] with regard to the meaning of the term "primarily" as it is used in *§ 1221 (1) of the Internal Revenue Code of 1954*.

3 Compare *Rollingwood Corp.* v. *Commissioner, 190 F.2d 263, 266* (C. A. 9th Cir.); *American Can Co.* v. *Commissioner, 317 F.2d 604, 605* (C. A. 2d Cir.), with *United States v. Bennett, 186 F.2d 407, 410-411* (C. A. 5th Cir.); *Municipal Bond Corp.* v. *Commissioner, 341 F.2d 683, 688-689* (C. A. 8th Cir.). Cf. *Recordak Corp.* v. *United States, 163 Ct. Cl. 294, 300-301, 325 F.2d 460, 463-464*.

The statute denies capital gain treatment to profits reaped from the sale of "property held by the taxpayer *primarily* for sale to customers in the ordinary course of his trade or business." (Emphasis added.) The respondent urges upon us a construction of "primarily" as meaning that a purpose may be "primary" if it is a "substantial" one.

[***LEdHR1] [1] [***LEdHR2] [2] [***LEdHR3] [3] [***LEdHR4] [4]As we have often said, "the words of statutes -- including revenue acts -- should be interpreted where possible in their ordinary, everyday senses." *Crane v. Commissioner, 331 U.S. 1, 6*.And see *Hanover Bank v. Commissioner, 369 U.S. 672, 687-688*; *Commissioner v. Korell, 339 U.S. 619, 627-628*. Departure from a literal reading of statutory language may, on occasion, be indicated by relevant internal evidence of the statute itself [*572] and necessary in order to effect the legislative purpose. See, *e. g., Board of Governors v. Agnew, 329 U.S. 441, 446-448*. But this is not such an occasion. The purpose of the statutory provision with which we deal is to differentiate [***105] between the "profits and losses arising from the everyday operation of a business" on the one hand (*Corn Products Co.* v. *Commissioner, 350 U.S. 46, 52)* and "the realization of appreciation in value accrued over a substantial period of time" on the other. (*Commissioner v. Gillette Motor Co., 364 U.S. 130, 134*.) A literal reading of the statute is consistent with this legislative purpose. We hold that, as used in *§ 1221 (1)*, "primarily" means "of first importance" or "principally."

[***LEdHR5] [5]Since the courts below applied an incorrect legal standard, we do not consider whether the result would be supportable on the facts of this case had the correct one been applied. We believe, moreover, that the appropriate disposition is to remand the case to the District Court for fresh fact-findings, addressed to the statute as we have now construed it.

Vacated and remanded.

MR. JUSTICE BLACK would affirm the judgments of the District Court and the Court of Appeals.

MR. JUSTICE WHITE took no part in the decision of this case.

REFERENCES

Annotation References:

Federal income tax: when property is deemed to be held primarily for sale to customers in ordinary course of trade or business. *46 ALR2d 615*.

Federal income tax: when real estate is deemed to be held primarily for sale to customers in ordinary course of trade or business. *46 ALR2d 767*.

EXHIBIT "11"

LEXSEE 415 U.S. 566

SMITH, SHERIFF v. GOGUEN

No. 72-1254

SUPREME COURT OF THE UNITED STATES

415 U.S. 566; 94 S. Ct. 1242; 39 L. Ed. 2d 605; 1974 U.S. LEXIS 113

November 12, 1973, Argued
March 25, 1974, Decided

PRIOR HISTORY: APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

DISPOSITION: *471 F.2d 88*, affirmed.

SUMMARY:

The appellee, who wore a small cloth version of the United States 606'flag sewn on the seat of his trousers, was convicted under a Massachusetts statute which imposed criminal liability on anyone who publicly "treats contemptuously" the United States flag. Following the affirmance of his conviction by the *Massachusetts Supreme Judicial Court (____ Mass ____, 279 NE2d 666)*, the appellee was ordered released on a writ of habeas corpus by the United States District Court for the District of Massachusetts on the ground that the contempt portion of the Massachusetts statute was impermissibly vague under the *due process clause of the Fourteenth Amendment* as well as overbroad under the *First Amendment (343 F Supp 161)*. The Court of Appeals for the First Circuit affirmed (*471 F2d 88*).

On appeal, the United States Supreme Court affirmed. In an opinion by Powell, J., expressing the view of five members of the court, it was held that the "treats contemptuously" portion of the statute was void for vagueness under the *due process clause of the Fourteenth Amendment* because the statutory provision did not adequately give notice of what acts were criminal and did not set reasonable standards to guide law enforcement officers and juries.

White, J., concurring in the judgment, expressed the view that although the portion of the statute at issue was not unconstitutionally vague, it was unconstitutional under the *First* and *Fourteenth Amendments*.

Blackmun, J., joined by Burger, Ch. J., dissenting, expressed the view that the challenged part of the statute was neither unconstitutionally vague nor was it violative of the *First Amendment* since the Supreme Judicial Court of Massachusetts had interpreted the statute as being limited to the protection of the physical integrity of the flag.

Rehnquist, J., joined by Burger, Ch. J., dissenting, expressed the view that the statute was not unconstitutionally vague nor was it violative of the *First Amendment* freedoms since the Supreme Judicial Court of Massachusetts would interpret the statute as being limited to acts which affect the physical integrity of the flag so that the statute validly prohibited the impairment of the physical integrity of a unique national symbol.

LAWYERS' EDITION HEADNOTES:

[***LEdHN1]

STATUTES §18

flag misuse -- vagueness --

Headnote:[1]

A state statute imposing criminal liability on one who publicly "treats contemptuously" the United States flag is violative of the *Fourteenth Amendment's* due process doctrine of vagueness because such provision does not adequately give notice of what acts are criminal and does not set reasonable standards to guide law enforcement officers and juries.

[***LEdHN2]

STATUTES §17

vagueness -- notice -- enforcement guidelines --

Headnote:[2]

The *Fourteenth Amendment's* due process doctrine concerning vagueness of statutes incorporates notions of fair notice or warning and requires legislatures to set reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent arbitrary and discriminatory enforcement.

[***LEdHN3]

STATUTES §18

flag misuse -- vagueness -- protected expression --

Headnote:[3]

A state statute which imposes criminal liability on one who publicly "treats contemptuously" the flag of the United States has a scope which, if unaided by a narrowing state court interpretation, is capable of reaching expression sheltered by the *First Amendment*, so that the *Fourteenth Amendments'* due process doctrine of vagueness demands a greater degree of specificity than in other contexts.

[***LEdHN4]

STATUTES §18

flag misuse -- vagueness -- standards --

Headnote:[4]

In light of present tendencies to treat the flag unceremoniously, a state statute imposing criminal liability on one who publicly "treats contemptuously" the flag of the United States, fails to draw reasonably clear lines between the kinds of nonceremonial treatment that are criminal and those that are not and thereby fails to satisfy the notice standards of due process which require that all persons be informed as to what the state commands or forbids and that men of common intelligence not be forced to guess at the meaning of the criminal law.

[***LEdHN5]

STATUTES §107

interpretation -- avoiding constitutional question --

Headnote:[5]

The United States Supreme Court is without authority to provide a narrowing interpretation of a state statute concerning flag misuse so as to avoid violation of the vagueness doctrine of the *due process clause of the Fourteenth Amendment.*

[***LEdHN6]

STATUTES §18

flag misuse -- vagueness -- enforcement standards --

Headnote:[6]

Legislatures may not abdicate their responsibilities for setting the standards of the criminal law as by enacting a provision imposing criminal liability on one who publicly "treats contemptuously" the flag of the United States, since such language is sufficiently unbounded to prohibit any public deviation from formal flag etiquette and allows policemen, prosecutors, and juries to pursue their personal predilections.

[***LEdHN7]

STATUTES §17

vagueness -- selective enforcement --

Headnote:[7]

There is a denial of due process where inherently vague statutory language permits selective law enforcement.

[***LEdHN8]

HABEAS CORPUS §14.5

exhaustion of remedies --

Headnote:[8A][8B]

The substance of a federal habeas corpus petitioner's claim concerning a state statute's facial vagueness is without doubt fairly presented to state courts so as to satisfy the standards of exhaustion of remedies where the petitioner, before a state Superior Court, files a motion to dismiss the complaint in which he cites the *Fourteenth Amendment* and alleges that the statute under which he was charged is impermissibly vague and incapable of fair and reasonable interpretation by public officials, which motion was incorporated in petitioner's bill of exceptions presented to the state Supreme Judicial Court, and where, additionally, the petitioner raises vagueness points and cites vagueness cases in his brief before the state Supreme Judicial Court.

[***LEdHN9]

STATUTES §18

vagueness -- hardcore violation --

Headnote:[9]

Although there are statutes that by their terms or as authoritatively construed apply without question to cer-