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## SOME STATUTORY CONSTRUCTION PROBLEMS AND APPROACHES IN CRIMINAL LAW

JAMES C. QUARLES\*

Statutory construction and interpretation, important in every field of law, is vital in a field containing a large number of legislative acts and a considerable body of appellate court decisions construing them. For this reason alone, statutory construction problems are particularly significant in criminal law. Many American jurisdictions punish no activity other than that expressly declared criminal by statute.<sup>1</sup> The Federal Government, which of course punishes no crimes except those defined by Congress, has contributed to this growth of the criminal law through the imposition of many duties and the proscription of various activities relating to the collection of revenue, national defense, regulation of interstate and foreign commerce and the several other fields into which Federal Government activity is continually expanding. Without the reinforcement of statutory specifications, several states punish conduct which was punishable under common law principles. Even in these jurisdictions, the complexities of our present civilization have required definition of additional conduct the community feels departs from its presently accepted standards. The expansion of state government, also, into fields not previously regulated, and the emergence of many types of conduct unknown to the common law, have made statutory crimes of the first importance.

Thus every jurisdiction has a large body of criminal law consisting of "shall" and "shall not" commands emanating from the legislature. The language of these legislatures usually lacks mathematical precision. This imprecision is in part due to poor draftsmanship, but is primarily due to the innate frailties of human language. Regardless of its cause, this lack of precision in criminal statutes affords numerous opportunities for astute and zealous defense counsel to discover or to create ambiguity in the meaning of a statute and then to urge an interpretation that will place the conduct of his client in a less unfavorable light. Courts and attorneys are therefore faced with a large array of precedents on the construction of criminal statutes, and in typical obedience to the common law rules of precedent, it is to these cases that the profession looks.

The second and most important cause for the controlling importance of statutory construction in the field of criminal law is the meticulous care with which courts consider legislative language when conviction or release of the accused individual depends upon the interpretation the courts accept.

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1. 1 BURDICK, *LAW OF CRIME* 97 (1946); MICHAEL AND WECHSLER, *CRIMINAL LAW AND ITS ADMINISTRATION* 1074 (1940).

Courts' reaction to criminal statutes is, with exceptions to be mentioned later, largely based upon the traditional Anglo-American view that the individual is to be treated fairly by the legislature and that it is the duty of the courts to examine legislative acts with the purpose of protecting the accused. This attitude has found expression in the maxims *nulla poena sine lege* and *nullem crimen sine lege*. The former expresses the view that criminal conduct is not to be met with a sanction not specified anterior to the conduct; the latter, the view that no activity is punishable unless the sovereign has so declared.<sup>2</sup> These terms are sometimes used interchangeably, and they do not differ in fundamental philosophy.<sup>3</sup>

Two principal postulates have grown out of the philosophy that an individual's life and liberty are to be vigilantly safeguarded. One rule is that criminal statutes are to be strictly construed; the other, that a statute which fails to meet certain requirements for definiteness of standard is not a legal basis for punishment. These approaches are often the same because they are rooted in the same basic consideration and because the distinction between them is primarily one of degree. Thus, the question in strict construction is whether particular conduct falls within the scope of the statute. The problem of vagueness, on the other hand, presents this question and in addition the question whether a court or individual *ever* can tell when conduct is or is not included and therefore whether the statute should fall completely.

In applying these two rules, the courts ostensibly seek to effectuate the collective will of the people as enunciated by their spokesmen in the legislature and at the same time to make sure that the conduct of which an individual is accused is actually contrary to the expressed will of the group. Since both rules set limitations upon the legislature, it is to be expected that their application will usually bring about results favorable to the defendant.

Although it is not always possible to predict accurately what result will be reached by an application of the rule of strict construction of criminal statutes, the rule itself can be simply stated and readily applied. It is applied when a criminal statute may mean more than one thing, and one meaning will condemn the defendant's conduct while the other will not include it. In such a case, the rule of strict construction requires the court to reject the meaning which would declare defendant's conduct illegal.

The usual approach to any problem of statutory construction is to seek the intention of the legislature, and this approach is also considered basic to the construction of criminal statutes. Thus, many courts indicate that the rule of strict construction is a part of the larger purpose of ascertaining legislative intent, and that it is not the only means for determining that intent.

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2. The principle of legality is fully considered in J. HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* c. 2 (1947).

3. HALL *op. cit. supra*, note 2 at 20. See also Note, *The Use of Analogy in Criminal Law*, 47 *COL. L. REV.* 613 (1947).

If courts were to approach criminal statutes with only the rule of strict construction in mind, the restrictions put upon legislatures would undoubtedly be more oppressive than they are now. But courts approach the problem with the many other construction aids, and if the application of other principles of statutory construction give ready answer to the question of whether the legislature has made defendant's conduct punishable, the inquiry may be ended. The evil sought to be corrected by the statute, the legislative history of the statute, statutes *in pari materia*, and all the other devices traditionally used by courts may be and frequently are brought to bear on criminal statutes. Strict construction, however, is often more than a mere hand tool, to be tried and tossed aside if it fails to do the job at once. It is rather, a pervasive attitude which determines finally, when ambiguity remains after resort to other rules, that the legislature did not mean to punish the accused for engaging in the activity in question.

The rule of strict construction of criminal statutes has a long history, although its origins are not clear. The rule may have arisen almost as early as the process of construction itself.<sup>4</sup> Certainly a form of the doctrine may be found in Roman law,<sup>5</sup> but it probably reached its greatest usefulness in England because of the desirability of mitigating the severity of the early criminal law.<sup>6</sup>

It has been suggested that the rule of strict construction of criminal statutes is based upon the "tenderness of the law for the rights of individuals,"<sup>7</sup> and the ripening of the rule to its fullest extent and most vigorous application at a time when there was need to relax the rigor of criminal law is some indication that "tenderness" is its true source. This reason for strict construction, however, seems inconsistent with the principle that the legislature, rather than the courts, makes the law. It is of course the duty of the legislature to define the crime and prescribe the punishment which may be imposed. The fact that the court considers the penalty excessive when compared with the court's ideas of the culpability of the conduct may simply mean that the legislature took a more severe view of the conduct than the court does. Since legislatures usually have investigative facilities superior to those of any court, and are in closer touch with the current needs of the community, severe punishment of offenses probably means the legislature has reason to view that conduct as especially dangerous. At the time of almost unbridled severity of the criminal law of England, the strict construction of criminal laws was a purposeful perversion and thwarting of legislative intention—a result unjustified in

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4. *United States v. Wiltberger*, 5 Wheat. 76, 95, 5 L. Ed. 37, 42 (U.S. 1820).

5. See J. HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 21 (1947).

6. See L. Hall, *Strict or Liberal Construction of Penal Statutes*, 48 HARV. L. REV. 748 (1935).

7. *United States v. Wiltberger*, 5 Wheat. 76, 95, 5 L. Ed. 37, 42 (U.S. 1820).

days of laws enacted by an informed legislature whose members are in every way representative of the governed.

The argument is sometimes advanced that strict construction of criminal statutes is advisable because of the separation of powers among the branches of government. This argument must assume that courts punish or legislate when they construe statutes liberally or at least non-strictly and that the power to punish is given to the legislature alone. The answer to this proposition is obvious. It is the primary duty of the legislature rather than the judiciary to make the law, but the courts often make law by confining or broadening the principles of the common law. The function of the courts is primarily to construe or interpret the laws, but this requirement does not mean that the courts should construe or interpret the law in any particular manner. Separation of powers is a doctrine which may militate against the validity of a statute when the statute is so vague as actually to have no meaning. If a court should by interpretation or construction give vitality to a meaningless combination of words, it would undoubtedly be legislating and its action would be obnoxious to general principles of government in this country. But when a statute is ambiguous, interpretation is necessary. And if the court is "making law" when it interprets the statute, it is making law regardless of whether its interpretation is strict or liberal. To say that a court is legislating when it construes a statute to include doubtful conduct seems to require the concession that a strict construction, by limiting the operation of the statute, repeals the statute in part, and thus legislates just as fully as in the converse situation.

The most frequently stated reason for construing criminal statutes strictly is to determine the intention of the legislature.<sup>8</sup> Yet the entire question of legislative intention is one fraught with difficulty. It has been contended that the legislature actually has no intention that a court can ascertain.<sup>9</sup> The idea of searching out the legislature's meaning has become so well established, however, that it is likely to remain for long as the primary goal and guiding principle. Assuming, therefore, that there is a legislative intention, that it should if possible be discovered, and that in most instances (when a statute is not too vague, that is) it can be, the question is presented as to whether the rule of strict construction leads to that end. If strict construction of criminal statutes actually leads to a discovery of the legislative intention, it seems that it would have to work somewhat like this: A statute clearly punishes a certain type of conduct. The defendant engages in conduct which is similar to that described plainly in the statute, but his activity is not unequivocally included within the the scope of the legislative language. In other words, there is doubt

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8. See, *e.g.*, *People v. Lund*, 382 Ill. 213, 46 N.E.2d 929 (1943); *State v. Mears*, 213 Ind. 257, 12 N.E.2d 343 (1925).

9. For a discussion of different views regarding whether there is a legislative intention and how it can be discovered, see CRAWFORD, *STATUTORY CONSTRUCTION* § 163 (1940).

as to whether the legislative intent was to punish this particular act. If there is doubt, strict construction requires its resolution in defendant's favor, and therefore, the court in effect says "the legislature may or may not have intended to include this act; therefore, it did not intend to include it." The logic of this approach when viewed as a device for determining legislative intention thus is at best doubtful. The view imputes a tender and benevolent attitude to the legislature when it was passing a statute designed to forbid certain conduct and impose sanctions upon those who engage in it. It might be more reasonably argued that the intention of the legislature—its primary attitude and purpose—was at least punitive and probably vindictive.

Perhaps the most compelling argument against the thesis that a strict construction of criminal statutes effectuates the legislative intention is the legislative reaction to this postulate. Apparently dissatisfied with the thwarting of their actual intention by the application of this rule, many legislatures have sought to mitigate its vigorous application or abrogate it entirely by prescribing a different approach either in particular criminal statutes or in a statute applicable to all criminal legislation. The reaction of courts to such statutes has not been favorable—the typical court either ignoring the statute or otherwise failing to carry out the legislature's purpose.<sup>10</sup> This situation presents courts and legislatures as antagonists, and of course is directly contrary to the avowed purpose of the judiciary to ascertain the legislatures' meaning.

The operation of the rule of strict construction can be best shown and evaluated through a brief examination of a representative case in which the premise was accepted without question and the rule was applied directly and with as much logic as the rule itself permits. The question facing the court in a recent Federal decision<sup>11</sup> was the guilt or innocence of a defendant who had admittedly deposited for carriage in interstate commerce some phonograph records upon which obscene matter was inscribed. The statute under which the accused was prosecuted made it unlawful to deposit with an express company for carriage in interstate commerce "any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character."<sup>12</sup> The court reached the conclusion that the statute was not broad enough to punish defendant's activity. In arriving at this decision, the court made controlling use of the doctrine of *ejusdem generis*. The doctrine of *ejusdem generis* is of particular application in construing criminal statutes because the doctrine—which requires the meaning of general words following specific words to be limited

10. Statutes of this sort and the reactions of courts to them are considered in 3 SUTHERLAND, STATUTORY CONSTRUCTION § 5607 (3d ed., Horack, 1943); L. Hall, *Strict or Liberal Construction of Penal Statutes*, 48 HARV. L. REV. 748 (1935).

11. *Alpers v. United States*, 175 F.2d 137 (9th Cir. 1949).

12. 18 U.S.C. § 1462 (1948).

to a meaning like that of the specific words—is essentially a rule of strict construction. It necessarily restricts, never expands, the meaning of a statute because it narrows the general words. The court came to the conclusion that the salient characteristic of the articles specified in the statute was visual representation, and decided that phonograph records were on the other hand a means of auditory representation. Therefore, an obscene phonograph record was not “matter of indecent character” as those words were used in the statute. The argument that phonograph records were “prints” within the meaning of the statute was also advanced by the Government. Notwithstanding the fact that copies of the original recording were made from a mold, the court rejected this contention on the theory that what is recorded on phonograph records is understandable only after a process “so radically different from that of imparting to the senses the meaning and contents of prints ordinarily associated with the printing art that one cannot say there is not a reasonable doubt that Congress intended to include them.”<sup>13</sup>

The result reached in this case is no better and no worse than the usual outcome of construing a criminal statute strictly, and the result may well be questioned. The first question is whether the statute was in need of interpretation. Was it ambiguous? To a reader of the statute who was not versed in the canons of construction, probably no question would arise, and he would unhesitatingly say that the defendant's conduct not only ought to be punished, but was clearly punishable under the statute involved. To anyone familiar with the attitude of courts, however, any statute containing a series of nouns followed by the phrase, “or other,” a different approach is indicated. Such a reader would at once be tempted to think of other nouns and try to say whether they would or would not be included under the “or other” clause. The answer to the question of ambiguity, therefore, seems to be that the statute is not doubtful unless the reader has at his command devices ostensibly devised and utilized for making clear the meaning of statutory language. To anyone so possessed, the statute is ambiguous, for it is not readily apparent to him whether “phonograph records” are “other matter of indecent character.” Assuming, then, that the unfortunate reader has at his command aids for construing statutes and therefore is confused as to the statute's meaning, the next question is, What does this general language cover? The characteristics of the articles Congress obviously sought to ban must then be determined. To the ordinary person, the statute seems to be directed towards obscenity. There is more similarity between an obscene book and an obscene phonograph record than there is between an

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13. 175 F.2d at 139. [After this article had been prepared and submitted, the Supreme Court reversed the judgment of the court of appeals in a 5-3 decision and affirmed the judgment of the district court. 70 Sup. Ct. 352 (Feb. 6, 1950). The majority opinion used reasoning similar to that expressed herein.]

obscene book and a non-obscene book, if one has in mind the Congressional intent. Yet the opinion considered the question of whether an obscene book written in Braille would fall within the condemnation of the statute, and indicated that it would not. By using general words following specific ones in criminal statutes, the legislature probably meant to strike directly at the wrongs it specifically made punishable and to include all other wrongs basically and naturally considered the same, whether the other wrongs existed at the time or whether new modes of committing the wrong were developed by new practices or inventions. Courts in following this approach would probably come closer to finding the legislature's actual intention, and the approach has been adopted in resolving questions similar to those encountered in applying *ejusdem generis*. Thus, when confronted with the question of whether use of a passport obtained by false statements to aid the holder in returning to the United States was punishable under a statute prohibiting "use" of a passport obtained by false statements, the court decided the statute covered that act, even though passports were, at the time the statute was passed, customarily used for convenience in traveling abroad and not for returning to this country.<sup>14</sup> "Old crimes may be committed under new conditions. Old laws apply to changed situations. . . . While a statute speaks from its enactment, even a criminal statute embraces everything which subsequently falls within its scope."<sup>15</sup>

Contrasted to the restrictive interpretation of the obscene matter statute is the liberal interpretation accorded the Mann Act. The latter forbids the transportation in interstate commerce of "any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose."<sup>16</sup> Here, again, we have particular words, "prostitution" and "debauchery" followed by general words—"any other immoral purpose." The problem then arises as to what purposes other than prostitution or debauchery are within the scope of the statute. One can readily agree with one of the Supreme Court's early interpretations of this statute—that it covered transporting a woman for the purpose of securing a mistress. More recently, however, the Court has construed the statute as covering transportation as a part of the practice of polygamy.<sup>17</sup> The dissenting justices felt that polygamy is in the category of marriage rather than prostitution and debauchery and under the *ejusdem generis* doctrine should have been excluded from the statutory prohibition. It seems that polygamy and prostitution have less in common than obscene writings and obscene phonograph records, and if this is true, the rule of strict construction has not been consistently applied. Despite arguments

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14. *Browder v. United States*, 312 U.S. 335, 61 Sup. Ct. 599, 85 L. Ed. 862 (1941).

15. 312 U.S. at 339.

16. 18 U.S.C. § 2421 (1948).

17. *Cleveland v. United States*, 329 U.S. 14, 67 Sup. Ct. 13, 91 L. Ed. 12 (1946).



to the courts and almost unflinching dissents among members of them, the Mann Act has received almost as broad interpretation as could be possible. In regard to the Federal Kidnaping Act,<sup>18</sup> also, the courts have dealt liberally with the general term "or otherwise" following enumeration of "ransom" and "reward," and have in effect said that benefit to the transporter is the only requirement of purpose.<sup>19</sup>

Courts have often adopted the view that there should be a distinction between criminal statutes in general and criminal statutes relating to particular subjects. It is said, for example, that statutes designed to protect the public health are to be liberally construed, notwithstanding the fact that they impose criminal sanctions. However much one may agree with the results reached in particular cases in which this distinction is drawn, it seems clear that it is a departure from the *nullem crimen* approach, and, if strict construction is approved, a liberal construction of any criminal statutes is to be criticized. The Federal Food, Drug and Cosmetic Act,<sup>20</sup> however beneficial its purpose and however great the need for such legislation, contains provisions that are highly penal. It seems logical to say that all statutes punishing injury to the person of another are designed for the protection of public health. If this is so, no reason is immediately suggested for saying that a rape, murder or aggravated assault statute should be construed on a basis different from one punishing shipment in interstate commerce of misbranded drugs. Yet under the Food, Drug and Cosmetic Act one is forbidden to introduce into interstate commerce misbranded drugs, the drugs being misbranded if the labeling is false, and labeling being printed matter which accompanies the drug. This seems simple enough, but a defendant can be convicted of violating these provisions if he sends the drug at one time and the labeling more than a year later.<sup>21</sup>

Whether a strict or liberal interpretation should be given to criminal statutes, it might be preferable to give the same sort of treatment to all criminal statutes, rather than make differentiations upon the basis of the purpose of the statute. All criminal statutes presumably are designed to deter conduct the community feels is inimical to its interests. The value of the interest sought to be protected should determine the seriousness of the defendant's conduct and this seriousness should be indicated by the severity

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18. 18 U.S.C. § 1201 (1948).

19. Thus *Gooch v. United States*, 297 U.S. 124, 56 Sup. Ct. 395, 80 L. Ed. 522 (1936), held the statute violated by one who, for the purpose of avoiding arrest, kidnaped officers and transported them across a state line.

20. 21 U.S.C.A. §§ 301 *et seq.* (1938).

21. *Kordel v. United States*, 335 U.S. 345, 69 Sup. Ct. 106 (1948). The intermediate appellate court expressed its view of strict construction of the statute thus: "Appellant contends that, since the current proceedings are criminal, he is entitled to a strict construction of the Act, with proof of the violation, if any, beyond a reasonable doubt. Courts for a long time have been committed to the doctrine of giving statutes intended to protect the public health a very liberal construction." *United States v. Kordel*, 164 F.2d 913, 917 (7th Cir. 1947).

of the punishment annexed to its commission, on the theory that individuals will be more strongly deterred as the penalty is increased. The breakdown of crimes into felonies and misdemeanors, and the variations in degree of punishment within those categories should provide sufficient distinction between the various unlawful acts. The relevant consideration in interpreting all criminal statutes should be whether a penalty is to be imposed, and not the amount of penalty or the reason a particular activity is made criminal; a six-month jail sentence may be more serious and greater punishment to one man than a five-year sentence to another. Aside from informed sentencing practices, no distinction can be made between individuals on this basis, however. But the fact of criminality should not be determined by a court's varying its interpretation of statutes according to the nature of criminality with the exception that more should be required of the legislature in defining conduct punishable by imprisonment than in defining conduct punishable by a fine.

The second important approach in the construction of criminal statutes is that a statute must be sufficiently definite to serve as a guide.<sup>22</sup> Like the rule of strict construction, which is found in fields other than the construction of criminal statutes, indefiniteness may exist in statutes on any subject. Because of the *nullem crimen sine lege* approach and the basic criminal law attitudes thus expressed, however, the requirement of definiteness is more relevant and more demanding in this field than elsewhere.<sup>23</sup> The purpose of this requirement is to set a standard so that there will be a law to guide individuals in their conduct and enable them to ascertain in advance whether proposed conduct will deviate from the prescribed norm.

The requirement of definiteness duplicates to some extent the rule of strict construction.<sup>24</sup> Thus, in the famous *McBoyle* case,<sup>25</sup> the court strictly construed a statute prohibiting the transportation in interstate commerce of stolen "motor vehicles," defined by the act as including "an automobile, automobile truck, automobile wagon, motor cycle, or any other self-propelled vehicle not designed for running on rails," and came to the conclusion that the statute did not apply to an airplane. Following the *ejusdem generis* approach, the court characterized the named objects as running vehicles rather than flying vehicles, and thus presumably found and effectuated the

22. For a collection of cases considering indefiniteness of criminal statutes classified according to subject matter, see Note, 83 L. Ed. 893 (1938). See also the excellent Note, *Due Process Requirements of Definiteness in Statutes*, 62 HARV. L. REV. 77 (1948).

23. "The standards of certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanction for enforcement." *Winters v. New York*, 333 U.S. 507, 515, 68 Sup. Ct. 665, 92 L. Ed. 840 (1948).

24. See SUTHERLAND, STATUTORY CONSTRUCTION § 5605 (3d ed., Horack, 1943): "The rule that penal statutes are strictly construed establishes a requirement of definiteness which must be met by the legislative draftsmen. Thus it is not uncommon to find penal statutes declared void for indefiniteness."

25. *McBoyle v. United States*, 283 U.S. 25, 51 Sup. Ct. 340, 75 L. Ed. 816 (1931).

legislative intent. But the important reason advanced by the court was that the legislature should give fair warning "in language that the common world will understand, of what the law intends to do if a certain line is passed."<sup>26</sup> Thus when a court examines a statute to see if it is a sufficient conduct-guide, it construes the statute strictly. This approach has the effect of subordinating the intention of the legislature, and it admonishes the law-making body to make clear to the individual what it expects of him. The attitude, rarely expressed, seems to be that the court knows the legislature intended to punish activity of the type defendant has engaged in, but raises the question whether this language would have brought that meaning home to the defendant. This approach of indefiniteness of course does not invalidate the entire statute. A defendant who knowingly transported a stolen automobile in interstate commerce, or who sends obscene pictures through its channels can of course be punished under the statutes considered above—strict construction having, in such cases, only the effect of keeping from the scope of the statute's operation those activities which are not expressly within it.

More drastic results follow when the operation of the statute is so uncertain that it is impossible, or so a court believes, ever to tell whether particular conduct offends the statute. Thus when a statute forbids one to be a "gangster," and provides only that a gangster is one who is known to be a member of any gang of two or more persons and who is not engaged in any lawful occupation and who has been convicted of any crime or thrice convicted of being a disorderly person, the entire provision falls.<sup>27</sup> It is of course possible to determine whether an individual has been convicted of a crime or of a specified offense a certain number of times, and presumably it is possible to determine whether one is engaged in a lawful occupation. When one who satisfied these requirements becomes a member of a "gang" is uncertain, however, since it is impossible to determine what a "gang" is. In addition, it is impossible to determine whether one is "known to be a member" of such an aggregation, since such questions as whether actual or only putative membership is required, who must have the knowledge, and what constitutes membership, cannot be ascertained. Here, the question is one of degree, and the entire statute falls because the degree of departure from certainty is so great. Of course most persons should determine that they did not come within the statute's scope—everyone who has a lawful occupation is excluded, and so are those who, regardless of occupation, have not been convicted of a crime or of being disorderly three times. But the impact of the statute is upon those who meet the plain requirements of occupation and criminal record, and these persons, so the court felt, cannot

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26. 283 U.S. at 27.

27. *Lanzetta v. New Jersey*, 306 U.S. 451, 59 Sup. Ct. 618, 83 L. Ed. 888 (1939).

tell whether they are violating the law. Thus no one can tell when the law applies to the only persons to whom it can apply. The principle of legality requires greater certainty; the statute falls.

The essential difference between strict construction and the problem of indefiniteness is really the extent of definiteness. An ambiguous statute and a vague statute are both indefinite. But as to the first, the statute is sufficiently definite to condemn some conduct. Such a statute has clearly hit some conduct, and the objects at which it may or may not have aimed (and therefore, under the strict construction approach, did not hit) can have no effect on the validity of the statute. An indefinite statute, however, has never clearly outlawed any particular conduct. An apparent exception to this statement is found in the examples of statutes which are so broad and indefinite that they would punish acts which the legislature can and apparently did mean to punish and also punish acts which the legislature cannot constitutionally punish,<sup>28</sup> or obviously did not intend to punish.<sup>29</sup> The reasoning leading to this result is the same, however, since a sufficiently definite standard is not provided to the community at large when a statute covers and by its terms prohibits two distinct kinds of activity. An honest citizen is given a guide which is too restrictive by reason of being too broad, and he could not tell, when measuring his conduct against the rule of the statute, how his conduct would be characterized.

It may be well at this point to examine the reasons for the rule requiring invalidation of statutes which are indefinite, for the reason determines whether the statute must fall. The reason most commonly advanced is that the individual must have sufficient warning.<sup>30</sup> It has been suggested that an additional purpose for requiring a criminal statute to be definite is to permit the courts to apply the statute, the theory being that if the standard is not definite enough to guide the court so that the judge may instruct the jury and the jury determine the facts under those instructions, the statute is, for a crucial purpose, meaningless. As a matter of strict logic this seems to be true, but as a practical matter a statute apprising the individual can be made to apprise the court and jury. It does not seem likely that a court

28. *Herndon v. Lowery*, 301 U.S. 242, 259, 57 Sup. Ct. 732, 81 L. Ed. 1066, (1937); *Stromberg v. California*, 283 U.S. 359, 369, 51 Sup. Ct. 532, 75 L. Ed. 1117, 73 A.L.R. 1484 (1931); *State v. Tsutomu Ikeda*, 61 Ariz. 41, 143 P.2d 880 (1943); *State v. Menderson*, 57 Ariz. 103, 111 P.2d 622 (1941); *Ex parte Bell*, 19 Cal. 2d 488, 122 P.2d 22 (1942).

29. *State v. Diamond*, 27 N.M. 477, 202 Pac. 988, 991 (1921).

30. Probably the most frequently quoted statement of the rule is that contained in *Connally v. General Const. Co.*, 269 U.S. 385, 391, 46 Sup. Ct. 126, 70 L. Ed. 322 (1926): "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."

will be unable to make a determination the individual can make. Therefore, the important function in the requirement of definiteness of a criminal statute is to give notice to the individual. Even in those statutes which might be vague to the world at large but are sufficiently definite to notify persons of the group toward whom it is directed, the court may have itself and the jury informed as to what the standard is, so long as the defendant has prior notice.<sup>31</sup> It is, of course, imperative that the judge and jury have a standard sufficiently definite for application to given factual situations. But this requirement simply means that, if such a standard is lacking, the defendant may be punished just because the jury believes his conduct is blameworthy. The requirement of adequate notice to the defendant is protection against this sort of result because it advises the individual in advance of what conduct is punishable. Thus in *United States v. L. Cohen Grocery Co.*,<sup>32</sup> the court in declaring unconstitutional as too vague a statute on unreasonable charges and excessive prices, referred to the "conflicting results" arrived at by judges trying to apply the statute. The basic fault with the statute, however, was not the uncertainty of the courts or juries as to what it meant, but the fact that no one to whom the statute was directed could guard against the imposition of its sanctions because he was not put on notice of the conduct forbidden. If persons in that class could have decided, the court could have. Therefore, if a statute is sufficiently definite for the individual to inform himself as to the nature of his conduct, the court and jury can be informed.

Requiring that a statute be sufficiently definite to put the defendant on notice is to some extent, like the doctrine of strict construction, based upon the tenderness the law has for the rights of individuals. Courts realize that "it is not likely that a criminal will carefully consider the text of the law before he murders or steals."<sup>33</sup> They require, however, that the text of the law, if he had considered it, would have advised him that his proposed conduct was forbidden. When a criminal is about to embark upon an enterprise he realizes is both morally wrong and in violation of statute, the fact that he discovers later that he has violated another statute carrying substantially the same punishment and of which he knew nothing should not for that reason exempt him from punishment under the latter statute. The same result should follow when he considers a statute but is unable to ascertain whether his conduct will be in violation of it. If the defendant is a wilful violator of the law, his knowledge of a particular law need not be required. He has sufficient notice from other sources to be conscious of the

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31. Thus experts can testify as to what the words "legitimate purposes" mean when used in a criminal statute regulating sales of poisons by druggists ". . . so that the trial court and jury may be informed as to what is recognized as a legitimate purpose for which these drugs may be sold. . . ." *Katzman v. Commonwealth*, 140 Ky. 124, 130 S.W. 990, 993 (1910).

32. 255 U.S. 81, 41 Sup. Ct. 298, 65 L. Ed. 516, 14 A.L.R. 1045 (1921).

33. *McBoyle v. United States*, 283 U.S. 25, 27, 51 Sup. Ct. 340, 75 L. Ed. 816 (1931).

nature of his enterprise. The criminal law should be designed to apprise individuals of what they can legally do. It should not be the basis of a barter proposition under which the individual may trade to society five or ten years of his life (if he is apprehended and convicted) in return for the right to commit larceny or assault.

There is, however, a sounder and more basic ground for requiring criminal statutes to be definite, and that is to protect individuals from the possibility of arbitrary exertion of the power to punish for a wrong of which the individual could not be aware—*i.e.*, for conduct which the individual in good faith believes is proper.

There are two factors which may operate to save a statute otherwise too indefinite. One is that terms of the common law will have their common law meaning read into the words of the statute; the other is that if a statute is directed toward a particular group or occupation, the meaning of the phraseology to that class will govern and, if it is sufficiently definite to guide their conduct, the statute will not fall for indefiniteness.

Thus, a statute declaring the grazing of sheep on "any range usually occupied by any cattle grower" to be a misdemeanor successfully withstood the challenge of being so indefinite as to violate due process. The court felt the statute was directed to "men familiar with range conditions," and members of this group who wanted to obey the law could easily determine what was prohibited by it.<sup>34</sup>

The specification of common law terminology as an adequate guide raises some question as to the soundness of the reason supporting the rule requiring definiteness. As a practical matter, few laymen would be completely warned of the nature of the prohibited conduct by relying solely upon common law terms. Yet terminology in this form is sufficiently specific even in those jurisdictions having no common law of crimes. The practical results of this phase of the question are logical, however. An individual should no more be excused from complying with a statute on the ground that it furnished him no adequate notice because the language employed common law terms of art than he should be on the ground that the statutory compilation was unavailable or inadequately indexed. To allow such lack of information on the part of a defendant to defeat the operation of the statute as to him would be equivalent to abandoning the principle that ignorance of the law is not an excuse. The crucial question is whether the defendant could have determined that the statute banned his proposed activity. And in answering this question, regard must be had for the resources he can be expected to have at his disposal. If he is doubtful as to his actions and his attorney cannot tell that the statute closest to his activity means to forbid it, then the statute should be said to be too indefinite to serve its primary purpose and should therefore be inoperative.

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34. *Omaechevarria v. Idaho*, 246 U.S. 343, 38 Sup. Ct. 323, 62 L. Ed. 763 (1918).