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**STUCK IN A MOMENT (OF SILENCE):  
THE SEVENTH CIRCUIT’S MISAPPLICATION OF  
THE VOID FOR VAGUENESS DOCTRINE TO THE  
ILLINOIS SILENT REFLECTION AND STUDENT  
PRAYER ACT**

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Cite as: Mary Ellen Vales, *Stuck in a Moment (of Silence): The Seventh Circuit’s Misapplication of the Void for Vagueness Doctrine to the Illinois Silent Reflection and Student Prayer Act*, 6 SEVENTH CIRCUIT REV. 429 (2011), at <http://www.kentlaw.edu/7cr/v6-2/vales.pdf>.

INTRODUCTION

In a widely publicized case in 2010, the Court of Appeals for the Seventh Circuit upheld the constitutionality of the Illinois Silent Reflection and Student Prayer Act.<sup>1</sup> In doing so, the court reversed the United States District Court for the Northern District of Illinois’ determination that the statute mandating a daily “period of silence” for reflection or prayer in the Illinois public school system conflicted with the Constitution.<sup>2</sup> The lower court had, in fact, found the Act to be unconstitutional on two separate grounds: first, the statute’s lack of a secular purpose violated the Establishment Clause of the First

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<sup>1</sup> See *Sherman ex rel. Sherman v. Koch (Sherman II)*, 623 F.3d 501 (7th Cir. 2010).

<sup>2</sup> *Id.* at 504.

Amendment;<sup>3</sup> and second, the Act violated the Due Process Clause of the Fourteenth Amendment as a result of its vague language.<sup>4</sup>

The Seventh Circuit's review of the case went to great lengths to explain the constitutionality of the statute under the Establishment Clause.<sup>5</sup> Its analysis of the void for vagueness issue, however, gave short shrift as to how the statute provided the clarity needed to pass constitutional muster.<sup>6</sup> Indeed, the court's scant analysis failed to mention certain key rules for construing the statutory language of the Act. Even the lone dissenting voice made no mention of the void for vagueness issue in her opinion, taking issue only with the constitutionality of the statute under the Establishment Clause.<sup>7</sup> Although the statute abounds with vagueness—as illustrated by its failure to define a “brief period” and its lack of a mechanism for enforcement<sup>8</sup>—the Seventh Circuit never adequately addressed how the statute withstood the void for vagueness challenge.<sup>9</sup>

This Comment will explore the history of moment of silence legislation in the United States; recount the details of the Illinois legislation and the litigation that followed it; and examine the void for vagueness doctrine and its application to the Illinois Silent Reflection and Student Prayer Act. Applying the void for vagueness doctrine to the Act will reveal the neglect in the Seventh Circuit's reasoning and ultimately demonstrate how the Act remains void for vagueness under the Due Process Clause of the Fourteenth Amendment. Finally, this Comment will assess the broader problems raised by the misapplication of the void for vagueness doctrine to pieces of legislation.

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<sup>3</sup> *Sherman ex rel. Sherman v. Twp. High Sch. Dist. 214 (Sherman I)*, 594 F. Supp. 2d 981, 990 (N.D. Ill. 2009), *rev'd*, *Sherman II*, 623 F.3d 501.

<sup>4</sup> *Sherman I*, 594 F. Supp. at 992.

<sup>5</sup> *Sherman II*, 623 F.3d at 507–19.

<sup>6</sup> *Id.* at 519–20.

<sup>7</sup> *Id.* at 520 (Williams, J., dissenting).

<sup>8</sup> See Illinois Silent Reflection and Student Prayer Act, 105 Ill. Comp. Stat. 20/1 (2007).

<sup>9</sup> *Sherman II*, 623 F.3d at 519–20.

## I. BACKGROUND: MOMENT OF SILENCE LEGISLATION GENERALLY

While prayer in public schools may seem wholly inappropriate for the modern day, state-mandated prayer continues to exist today—cleverly disguised as a “moment” or “period” of silence. In fact, at least thirty-two states have introduced “moment of silence” legislation into the public school systems.<sup>10</sup> Though the Supreme Court has dealt with several school prayer cases over the years,<sup>11</sup> it has only once ruled on a statute requiring a moment of silence in public schools in the 1985 case of *Wallace v. Jaffree*.<sup>12</sup> *Wallace* involved an Alabama statute that read:

At the commencement of the first class of each day in all grades in all public schools the teacher in charge of the room in which each class is held may announce that a period of silence not to exceed one minute in duration shall be observed for meditation or voluntary prayer, and during any such period no other activities shall be engaged in.<sup>13</sup>

The Court examined whether the statute violated the Establishment Clause by applying the *Lemon* test, which requires that “[f]irst, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive

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<sup>10</sup> *States with Moment of Silence Statutes*, NATIONAL CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/magazine/momentofsilence.htm> (last visited Feb. 20, 2011).

<sup>11</sup> *See, e.g.*, *Engel v. Vitale*, 370 U.S. 421, 425 (1962) (finding unconstitutional legislation requiring students to recite a state-composed prayer each day in part because the governmental establishment of prayer “was one of the reasons which caused many of our early colonists to leave England and seek religious freedom in America.”)

<sup>12</sup> 472 U.S. 38 (1985).

<sup>13</sup> *Id.* at 40 n.2.

government entanglement with religion.”<sup>14</sup> Unable to determine whether the statutory text disclosed a secular purpose, the Court sought guidance from the legislative history.<sup>15</sup>

The Court’s examination revealed that the Alabama legislature made little effort to hide the sectarian purpose of the statute.<sup>16</sup> For example, in 1982, the legislature added a provision allowing teachers to lead their students in the prayer with the following statement, “Almighty God, you alone are our God.”<sup>17</sup> Further, the leading sponsor of the legislation, Senator Donald Holmes, declared at an evidentiary hearing that the Alabama statute was a “step in the right direction” for the “effort to return voluntary prayer to our public schools.”<sup>18</sup> Furthermore, Senator Holmes later testified that he had “no other [secular] purpose in mind” for the statute.<sup>19</sup> As a result, the Court stopped its analysis after the first prong of the *Lemon* test, finding that the statute clearly lacked a secular purpose.<sup>20</sup>

In her concurrence, however, Justice O’Connor indicated her general acceptance toward moment of silence statutes and implied that these statutes could pass constitutional muster in other cases.<sup>21</sup> Justice O’Connor wrote:

First, a moment of silence is not inherently religious. Silence, unlike prayer or Bible reading, need not be associated with a religious exercise. Second, a pupil who participates in a moment of silence need not compromise his or her beliefs. During a moment of silence, a student who objects to prayer

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<sup>14</sup> *Id.* at 55–56 (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971) (citations and internal quotation marks omitted) (establishing a test to determine whether a statute violates the Establishment Clause of the First Amendment to the Constitution).

<sup>15</sup> *Id.* at 56.

<sup>16</sup> *Id.* at 56–57.

<sup>17</sup> *Id.* at 40 n.3.

<sup>18</sup> *Id.* at 43.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 56.

<sup>21</sup> *Id.* at 73 (O’Connor, J., concurring).

is left to his or her own thoughts, and is not compelled to listen to the prayers or thoughts of others.<sup>22</sup>

While the Supreme Court has only confronted one moment of silence case, the circuit courts have faced the issue on multiple occasions and have expressed widely varying treatments of moment of silence legislation.<sup>23</sup> For example, in the same year that the Supreme Court struck down the Alabama statute in *Wallace v. Jaffree*, the Third Circuit similarly invalidated a New Jersey moment of silence statute on constitutional grounds.<sup>24</sup> The statute, which simply made school prayer optional, stated that:

Principals and teachers in each public elementary and secondary school of each school district in this State shall permit students to observe a 1 minute period of silence to be used solely at the discretion of the individual student, before opening exercises of each school day for quiet and private contemplation or introspection.<sup>25</sup>

While the Third Circuit found that the statute neither fostered “excessive government entanglement with religion,” nor advanced or prohibited religion, the statute nonetheless failed the *Lemon* test based on its lack of a secular purpose.<sup>26</sup> Although the state insisted that that the statute “provide[d] a transition from nonschool life to school life,” the Third Circuit remained unconvinced.<sup>27</sup> Instead, the court looked at the legislative history of the statute, finding a record of attempts to encourage prayer in the schools. The court adopted the district court’s

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<sup>22</sup> *Id.* at 72 (O’Connor, J., concurring).

<sup>23</sup> Christine Rienstra Kiracofe, *Pretending Not to Pray?: A Historical Overview of Moment of Silence Legislation and Why Illinois’ Statute Clearly Violated the Lemon Test*, 241 ED. L. REP. 1, 1 (2009).

<sup>24</sup> *May v. Cooperman*, 780 F.2d 240 (3d Cir. 1985).

<sup>25</sup> *Id.* at 241.

<sup>26</sup> *Id.* at 253 .

<sup>27</sup> *Id.* at 251.

finding that the purpose was religious because it “requir[ed] school districts to accommodate those students desiring the opportunity to engage in prayer at some point during the school day.”<sup>28</sup>

Several years later, the Fifth Circuit invalidated a moment of silence type statute in *Doe v. School Board of Ouachita Parish*.<sup>29</sup> This case involved an amendment to a Louisiana statute, which provided that:

Each parish and city school board in the state shall permit the proper school authorities of each school within its jurisdiction to allow an opportunity, at the start of each school day, for those students and teachers desiring to do so to observe a brief time in prayer or meditation.<sup>30</sup>

Taking a cue from the Supreme Court’s analysis in *Wallace*, the court looked to the legislative intent behind the statute.<sup>31</sup> Upon doing so, it found that the bill’s sponsors basically conceded that the statute was “an instrument to allow verbal prayer in schools.”<sup>32</sup> As a result, the Louisiana statute failed to exhibit a secular purpose, and the statute failed the first prong of the *Lemon* test.<sup>33</sup> The Fifth Circuit’s invalidation of the Louisiana statute thus formed the first invalidation of a moment of silence statute since 1985.<sup>34</sup>

While just one moment of silence statute was found unconstitutional in the past twenty-five years, several have managed to pass constitutional muster.<sup>35</sup> For instance, in 1997, the Eleventh

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<sup>28</sup> *Id.* at 252.

<sup>29</sup> 274 F.3d 289, 295 (5th Cir. 2001).

<sup>30</sup> *Id.* at 291.

<sup>31</sup> *Id.* at 293–94.

<sup>32</sup> *Id.* at 294.

<sup>33</sup> *Id.* at 295.

<sup>34</sup> Kiracofe, *supra* note 23, at 10.

<sup>35</sup> *See, e.g.*, *Bown v. Gwinnett Cnty. Sch. Dist.*, 112 F.3d 1464 (11th Cir. 1997); *Brown v. Gilmore*, 258 F.3d 265 (4th Cir. 2001); *Croft v. Perry*, 562 F.3d 735 (5th Cir. 2009).

Circuit upheld a Georgia statute that mandated daily prayer in schools.<sup>36</sup> The Act provided in pertinent part that:

(a) In each public school classroom, the teacher in charge shall, at the opening of school upon every school day, conduct a brief period of quiet reflection for not more than 60 seconds with the participation of all the pupils therein assembled.

(b) The moment of quiet reflection authorized by subsection (a) of this code section is not intended to be and shall not be conducted as a religious service or exercise but shall be considered as an opportunity for a moment of silent reflection on the anticipated activities of the day.<sup>37</sup>

Upon analyzing the statute, the Eleventh Circuit found that it passed all three prongs of the *Lemon* test.<sup>38</sup> Following the Supreme Court's example from *Wallace*, the court first looked at the legislative history to discern whether the statute possessed a secular purpose.<sup>39</sup> Although the court uncovered legislative support for the bill as an effort to "reinstigate school prayer," it ultimately accepted the given secular purpose of the statute, which was to "provide students with an opportunity for a brief period of quiet reflection before beginning the day's activities."<sup>40</sup> The Court reasoned that the religiously-oriented legislative history was not inconsistent with the secular purpose of the statute because other legislators did not possess this same religious desire for the statute.<sup>41</sup>

In 2001, the Fourth Circuit in *Brown v. Gilmore* upheld a moment of silence statute from Virginia.<sup>42</sup> The statute required that:

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<sup>36</sup> *Gwinnett Cnty. Sch. Dist.*, 112 F.3d at 1466.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 1474.

<sup>39</sup> *Id.* at 1469.

<sup>40</sup> *Id.* at 1471–72.

<sup>41</sup> *Id.*

<sup>42</sup> 258 F.3d 265 (4th Cir. 2001).

In order that the right of every pupil to the free exercise of religion be guaranteed within the schools and that the freedom of each individual pupil be subject to the least possible pressure from the Commonwealth either to engage in, or to refrain from, religious observance on school grounds, the school board of each school division shall establish the daily observance of one minute of silence in each classroom of the division.

During such one-minute period of silence, the teacher responsible for each classroom shall take care that all pupils remain seated and silent and make no distracting display to the end that each pupil may, in the exercise of his or her individual choice, meditate, pray, or engage in any other silent activity which does not interfere with, distract, or impede other pupils in the like exercise of individual choice.<sup>43</sup>

Similar to the *Bown* court, the Fourth Circuit began by looking to the legislative intent during its application of the *Lemon* test.<sup>44</sup> Just as in *Bown*, the Court of Appeals uncovered some religious comments about the purpose of the statute. For instance, Senator Warren Barry “hope[d] that encouraging regular introspection by students would somehow lessen the urges of students to resort to violence,” explaining that “[t]his country was based on belief in God, and maybe we need to look at that again.”<sup>45</sup> Nonetheless, the court pointed out that *Wallace* did not require an “exclusively secular” purpose to satisfy the first prong of the *Lemon* test.<sup>46</sup> Rather, the Supreme Court’s decision in *Wallace* demonstrated that “even though a statute may have a religious purpose, it may still satisfy the *Lemon* test if it also has a ‘clearly

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<sup>43</sup> *Id.* at 271 n.1.

<sup>44</sup> *Id.* at 275.

<sup>45</sup> *Id.* at 271.

<sup>46</sup> *Id.* at 276.

secular purpose.’”<sup>47</sup> The Court of Appeals further pointed to the “clearly secular purpose” of the Act at hand, reasoning that it provided religious accommodation.<sup>48</sup> The court bolstered its finding by pointing to the Virginia superintendent of schools’ comment that the moment of quiet is “a good classroom management tool” that “works as a good transition, enabling students to pause, settle down, compose themselves, and focus on the day ahead.”<sup>49</sup>

In a more recent example, the Fifth Circuit weighed in on a moment of silence statute in the case of *Croft v. Perry*.<sup>50</sup> The court reviewed an amendment to a Texas school prayer statute, which changed prayer from permissive to mandatory. The statute provided, in pertinent part, that:

The board of trustees of each school district shall provide for the observance of one minute of silence at each school in the district following the recitation of the pledges of allegiance to the United States and Texas flags. . . . During the one-minute period, each student may, as the student chooses, reflect, pray, meditate, or engage in any other silent activity that is not likely to interfere with or distract another student. Each teacher or other school employee in charge of students during that period shall ensure that each of those students remain silent and does not act in a manner that is likely to interfere with or distract another student.<sup>51</sup>

Once again, this court looked to the legislative history of the Act in applying the *Lemon* test.<sup>52</sup> The court ultimately found that the Act passed the first prong of the test, agreeing with Governor Rick Perry that the statute possessed the secular purposes of fostering thoughtful

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<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 277.

<sup>50</sup> 562 F.3d 735 (5th Cir. 2009).

<sup>51</sup> *Id.* at 739 (emphasis omitted).

<sup>52</sup> *Id.* at 748.

contemplation and promoting patriotism by conducting the moment after the recitation of the pledge of allegiance.<sup>53</sup>

Recognizing that another possible motivation behind the statute rested with the legislature's desire to reinstitute school prayer, the Court stressed that the objectives behind a statute need not be wholly secular.<sup>54</sup> Similar to the *Brown* court's reasoning, the Court of Appeals emphasized the possibility that a statute can possess both a secular purpose and a religious motive.<sup>55</sup>

Thus, the circuit courts have reached varying outcomes on the matter of moment of silence statutes. While all of the courts seem to look at the legislative intent to decipher the purpose of the statute, it seems that each court either emphasizes or dismisses religious statements in order to reach their desired result—either striking down or upholding moment of silence legislation based on their own viewpoints.

## II. ILLINOIS MOMENT OF SILENCE LEGISLATION

Moment of silence legislation has existed for more than forty years in the state of Illinois.<sup>56</sup> During this time, however, the legislation experienced several key changes, the most significant of which was the shift from optional to mandatory adherence in the public schools. In 1969, Illinois first enacted the statute that provided Illinois public schools with the option to observe a “period of silence.”<sup>57</sup> The original statute provided that:

In each public school classroom, the teacher in charge may observe a brief period of silence with the participation of all the pupils therein assembled at the opening of every school day. This period shall not be conducted as a religious exercise

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<sup>53</sup> *Id.* at 750; Kiracofe, *supra* note 23, at 11.

<sup>54</sup> *Croft*, 562 F.3d at 742.

<sup>55</sup> *Id.* at 742–43.

<sup>56</sup> *Sherman II*, 623 F.3d 501, 504 (7th Cir. 2010).

<sup>57</sup> *Id.*

but shall be an opportunity for silent prayer or for silent reflection on the anticipated activities of the day.<sup>58</sup>

In 1990, as part of the Act that called for short titles of Illinois statutes, the Illinois legislature entitled the statute “the Silent Reflection Act.”<sup>59</sup> Aside from the title change, however, the Act remained unchanged until 2002.<sup>60</sup>

In 2002, the Illinois legislature amended the statute to include Section 5, which clarified students’ right to religious freedom.<sup>61</sup> Effective in 2003, this addition made clear the student’s right to silently pray in a non-disruptive way, as well as the right to be free from religious pressure from the State either to engage in or refrain from religious activity.<sup>62</sup> Section 5 provided in full that:

In order that the right of every student to the free exercise of religion is guaranteed within the public schools and that each student has the freedom to not be subject to pressure from the State either to engage in or to refrain from religious observation on public school grounds, students in the public schools may voluntarily engage in individually initiated, non-disruptive prayer that, consistent with the Free Exercise and Establishment Clauses of the United States and Illinois Constitutions, is not sponsored, promoted, or endorsed in any manner by the school or any school employee.<sup>63</sup>

Aside from the adoption of Section 5, the Illinois legislature also changed the title of the Act from “the Silent Reflection Act” to “the Silent Reflection and Student Prayer Act.”<sup>64</sup> While no legislative

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<sup>58</sup> *Id.* at 504–05.

<sup>59</sup> *Id.* at 505.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* (citation omitted).

<sup>64</sup> *Id.*

history indicates why exactly the title changed, the ACLU pointed out in a memorandum that this change closely resembled the unconstitutional “moment of silence” statute in *Wallace v. Jaffree*.<sup>65</sup> In that case, Alabama amended the language of a statute from “meditation” to “meditation or voluntary prayer.”<sup>66</sup> Observing that this change in language was either made “to convey a message of state endorsement and promotion of prayer” or “for no purpose,” the Court easily concluded that “[t]he addition of ‘or voluntary prayer’ indicate[d] that the State intended to characterize prayer as a favored practice.”<sup>67</sup>

In spite of the name change and the addition of Section 5, the Act stayed substantively the same until 2007. In 2007, the Illinois legislature amended the statute to change the once optional period of silence to a mandatory period of silence, through the deliberate change of wording in the statute from “may” to “shall.”<sup>68</sup> Section 1 of the Act became:

In each public school classroom the teacher in charge shall observe a brief period of silence with the participation of all the pupils therein assembled at the opening of every school day. This period shall be an opportunity for silent prayer or for silent reflection on the anticipated activities of the day.”<sup>69</sup>

The Senate sponsor of the bill, Senator Lightford, explained that the change would “create uniformity across the State in all of our schools” so that all students would receive the same opportunity for silent reflection or prayer.<sup>70</sup> Though she offered this secular purpose

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<sup>65</sup> Memorandum of Amicus Curiae the ACLU of Illinois in Support Of Plaintiff’s Motion for Summary Judgment, *Sherman I*, 594 F. Supp. 2d 981, (N.D. Ill. 2009) (No. 07 C 6048), 2008 WL 5973406.

<sup>66</sup> *Wallace v. Jaffree*, 472 U.S. 38, 58 (1985).

<sup>67</sup> *Id.* at 60.

<sup>68</sup> 105 Ill. Comp. Stat. 20/1 (2007).

<sup>69</sup> *Id.*

<sup>70</sup> S. Proceedings, 95<sup>th</sup> Ill. Gen. Assem., March 21, 2007, at 86.

for the statute, Lightford revealed other intentions for the act when she told a journalist that, “Here in the General Assembly we open every day with a prayer and Pledge of Allegiance. I don’t get a choice about that. I don’t see why students should have a choice.”<sup>71</sup>

The House debate over the new amendments to Illinois’ moment of silence legislation reflected mixed emotions. The House sponsor, Representative Will Davis, viewed the statute as “nothing more than what [the teacher] . . . would already do in the morning to try to get the young people settled down so that they can begin their day.”<sup>72</sup> Conversely, another representative believed that “[t]he only reason [she] can see for requiring this silent moment is to encourage prayer in the public schools,” pointing to the comments of Senator Lightford to the press as further support of this idea.<sup>73</sup>

Despite the disagreement during the House debate, the bill amending the statute ultimately passed in 2007.<sup>74</sup> After the passage, however, the now infamous Governor Blagojevich vetoed the amendment after observing the religious motivations behind the statute.<sup>75</sup> Evidently, the Governor worried that changing the statute could raise constitutional questions.<sup>76</sup> The Illinois legislature, nonetheless, overrode Governor Blagojevich’s veto, and on October 11, 2007, the amendment went into effect—thus mandating a period of silence in all Illinois public schools.<sup>77</sup>

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<sup>71</sup> Eric Zorn, *Mandatory Silence Sends Loud Message*, CHI. TRIB., Mar. 27, 2007; see Memorandum of Amicus Curiae the ACLU of Illinois in Support Of Plaintiff’s Motion for Summary Judgment, *Sherman I*, 594 F. Supp. 2d 981, (N.D. Ill. 2009) (No. 07 C 6048), 2008 WL 5973406.

<sup>72</sup> H.R. Proceedings, 95th Ill. Gen. Assem., May 31, 2007, at 67.

<sup>73</sup> *Id.* at 64 (statement of Rep. Currie).

<sup>74</sup> 105 Ill. Comp. Stat. 20/1 (2007).

<sup>75</sup> Governor’s Message to 95th Ill. Gen. Assem. on S.B. 1463, Aug. 28, 2007.

<sup>76</sup> *Id.*

<sup>77</sup> 105 Ill. Comp. Stat. 20/1 (2007).

### III. THE DEVELOPMENT OF *SHERMAN V. KOCH*

On October 26, 2007, approximately two weeks after the amendment took effect, Dawn S. Sherman, through her father, Robert I. Sherman,<sup>78</sup> filed suit against her high school, District 214, alleging that the statute violated her civil rights under 42 U.S.C. § 1983.<sup>79</sup> Sherman sought declaratory and injunctive relief under 42 U.S.C. § 1983, launching an attack on Section 1 of the Silent Reflection and Student Prayer Act for being facially invalid under the First Amendment to the United States Constitution.<sup>80</sup>

Shortly after filing suit, Sherman amended her complaint, refiled it as a class action complaint against Township High School District 214 and Dr. Christopher Koch in his role as State Superintendent of Education.<sup>81</sup> As a class action, Sherman sought to enjoin the statute's application in any school.<sup>82</sup> Sherman attacked Section 1 as facially invalid for two reasons: first, Sherman asserted that the statute was facially invalid under the First Amendment for effecting an establishment of religion; and second, Sherman alleged that the statute was facially invalid under the Fourteenth Amendment for being unconstitutionally vague, thus in violation of due process.<sup>83</sup>

On November 14, 2007, the Northern District of Illinois denied a motion to dismiss filed by Dr. Koch.<sup>84</sup> The court rejected Dr. Koch's argument that he was not a proper defendant in the case due to his role

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<sup>78</sup>Robert I. Sherman is a well-known atheist and has filed countless lawsuits regarding the separation of church and state. Here, he used his daughter to gain standing. See ROB SHERMAN, <http://www.robsherman.com> (last visited May 2, 2011).

<sup>79</sup>*Sherman II*, 623 F.3d at 505.

<sup>80</sup>*Id.*

<sup>81</sup>*Id.* at 504.

<sup>82</sup>*Id.* at 505–506.

<sup>83</sup>*Id.* at 505.

<sup>84</sup>*Sherman ex rel. Sherman v. Twp. High Sch. Dist. 214*, 624 F. Supp. 2d 907, 913 (N.D. Ill. 2007).

as state superintendent.<sup>85</sup> The court explained that Dr. Koch “is entrusted “[t]o supervise all the public schools in the state,”<sup>86</sup> and, as such, “presumably these powers would include the authority to compel school districts to comply with state laws such as the statute in question.”<sup>87</sup>

At this time, Sherman also sought a preliminary injunction to stop the implementation and enforcement of the Act, which the Northern District of Illinois granted.<sup>88</sup> The court reasoned that without an injunction, the plaintiff and her fellow students would “suffer irreparable harm in the possible violation of their Establishment and Free Exercise Clause rights.”<sup>89</sup> The court further explained that the potential harm to students “greatly outweigh[ed] any harm to Illinois schools . . . because teachers and school districts would merely resume their activities as conducted before the statute took effect in October.”<sup>90</sup> Additionally, the court indicated that the preliminary injunction also served the interest of the public.<sup>91</sup>

In its initial assessment of Sherman’s argument that the Act was void for vagueness, the court held that Sherman had “established a likelihood” that she would be successful in her argument that the Act was unconstitutionally vague.<sup>92</sup> The court noted that

[T]he statute provides no direction whatever as to: how the period of silence should be implemented (*e.g.* whether the purpose of the period of silence should be explained to the pupils); what time of day the period of silence should occur (does the “opening” of the school day mean as soon as the pupils enter the classroom, after the pledge of allegiance, or

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<sup>85</sup> *Id.*

<sup>86</sup> *Id.* (citation omitted).

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 910–13.

<sup>89</sup> *Id.* at 913.

<sup>90</sup> *Id.* at 913.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 912.

some other time before the beginning of class?); how long the period of silence should last (two seconds; two minutes?); and whether pupils are permitted to move about the room during the period of silence or whether they must stand at or sit in their seats.<sup>93</sup>

Additionally, the court noted that the statutory language of “quiet” and “silence” were each highly subjective in nature.<sup>94</sup>

Moreover, the district court emphasized that the statute lacked any enforcement mechanism for noncompliance.<sup>95</sup> Specifically, the court found that the statute neglected to outline penalties for students who do not comply with the period of silence in the classroom and for school districts that fail to implement and enforce the statute.<sup>96</sup> While admitting that possible constitutional applications of the Act existed, the court highlighted the “potential chilling effect on First Amendment Rights” that could occur in the absence of the injunction.<sup>97</sup>

Following the grant of the preliminary injunction, the district court granted leave to the ACLU of Illinois to appear as *amici curiae* on behalf of Sherman, and also granted leave to the Alliance Defense Fund to appear as *amici curiae* on behalf of defendants Koch and District 214.<sup>98</sup> Thereafter, Sherman filed a motion to certify bilateral classes for plaintiff and defendants, and the Alliance Defense Fund, joined by the defendants, filed a motion to dismiss the amended complaint due to lack of Article III standing.<sup>99</sup> On March 28, 2008, the district court granted the plaintiff’s motion for class certification and

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<sup>93</sup> *Id.* at 911.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 911–912.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 912.

<sup>98</sup> *Sherman ex rel. Sherman v. Twp. High Sch. Dist. 214 (Sherman III)*, 540 F. Supp. 2d 985, 989 (N.D. Ill. 2008).

<sup>99</sup> *Id.*

denied the Alliance Defense Fund and the defendants' motion to dismiss.<sup>100</sup>

In response to the defendants' motion to dismiss, the court upheld Sherman's standing as proper, explaining that, "the Act is directed specifically at plaintiff and her fellow pupils" because they are the individuals that "must consider using the mandatory moment of silence" either for prayer or silent reflection.<sup>101</sup> In this manner, Sherman suffered a "direct and personal" injury from the mandatory moment of silence, and therefore possessed standing to bring the action.<sup>102</sup> Moreover, the court pointed to a history of case precedent affirming that "public school students like plaintiff have been accorded standing to challenge statutes like the Act, that allegedly violate the Establishment Clause."<sup>103</sup>

Upon its granting of Sherman's motion for bilateral class certification, the court certified a class of defendants made up of "all public school districts in the State of Illinois, all of which are required to implement the daily 'period of silence' mandated by 105 ILCS 20/1" and represented by District 214.<sup>104</sup> Most significantly, the court found that the defendant class satisfied the requirement of typicality and that the named defendants would "fairly and adequately represent the class."<sup>105</sup> Despite variations in the factual circumstances among the schools in the state, the court found that all schools in the state faced the task of implementation—thus, satisfying the class

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<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 990.

<sup>103</sup> *Id.* at 989–90. *See, e.g.,* Lee v. Weisman, 505 U.S. 577 (1992); Sherman *ex rel.* Sherman v. Cmty. Consol. Sch. Dist. 21 of Wheeling Twp., 980 F.2d 437 (7th Cir.1992).

<sup>104</sup> *Sherman III*, 540 F. Supp. 2d at 990.

<sup>105</sup> Both parties agreed that a defendant class composed of all Illinois public school districts satisfied two out of the four requirements for class certification: numerosity and commonality. *Id.* Defendant Superintendent Koch took issue only with the elements of typicality and adequateness of representation. *Id.*

certification requirement of typicality.<sup>106</sup> With regard to adequacy of representation, the court found that Koch and District 214 satisfied the requirement because of their vigor with regard to the case.<sup>107</sup>

The court also held that the plaintiff's class certification satisfied both the typicality and representation requirements.<sup>108</sup> In terms of typicality, the court found that regardless of how each student viewed the Act, "all class members have an interest in being subject only to laws that pass constitutional muster."<sup>109</sup> Further, in terms of adequacy of representation, the court held that the plaintiff's vigor demonstrated her ability to serve as class representative.<sup>110</sup> Following class certification in March of 2008, on January 21, 2009, the district court found in favor of the plaintiffs, holding that the Illinois Silent Reflection and Student Prayer Act violated the Constitution.<sup>111</sup> Specifically, the court found that the Act violated both the Establishment Clause and the Due Process Clause.

The court explained that the Act violated the Establishment Clause by failing to satisfy the requirements of the *Lemon* test.<sup>112</sup> Specifically, the Act failed the first prong of the test due to its lack of a "clear secular purpose."<sup>113</sup> The court held that any attempt by the Act to define a secular purpose was merely a sham, as demonstrated most clearly through the legislative history of the Act.<sup>114</sup> In addition, the

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<sup>106</sup> In support of its finding regarding typicality, the court pointed to *Brown v. Kelly*, 244 F.R.D. 222, 230 (S.D.N.Y. 2007) ("[I]f such factual distinctions could preclude findings of commonality and typicality under Rule 23(a), they would be the death knell for class actions challenging the systemic enforcement of an unconstitutional statute."). *Id.* at 992.

<sup>107</sup> *Id.* at 992–93.

<sup>108</sup> *Id.* at 993.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Sherman I*, 594 F. Supp. 2d 981, 993 (N.D. Ill. 2009).

<sup>112</sup> *Id.* at 990.

<sup>113</sup> *Id.* at 989.

<sup>114</sup> *Id.* at 987.

court also explained that the Act failed the second prong of the *Lemon* test because its primary effect was to advance religion.<sup>115</sup>

The court also held that the statute's lack of clarity rendered it void for vagueness under the Due Process Clause of the Fourteenth Amendment.<sup>116</sup> Here, the court reflected back to its prior ruling, reiterating its determination that the statute "provide[d] no direction as to how the 'period' of silence should be implemented, how long the period should last, and whether pupils would be permitted to pay in a manner that was either audible or requirement movement."<sup>117</sup>

The court rejected the defendants' argument that any deficiencies in clarity were merely "de minimus" or "immaterial."<sup>118</sup> The court further rejected the defendants' claim that the statute's lack of clarity actually provided teachers with necessary discretion in the classroom.<sup>119</sup> The defendants argued that the Act called for a liberal construction so that teachers could enforce the Act without having to discuss the purposes of it.<sup>120</sup> The court rejected the defendants' broad construction of the statutory language, pointing to the principle that compliance with the Establishment Clause takes precedence over the general principle of affording deference to statutes in the schools.<sup>121</sup>

The court favored a narrow construction of the act because of the unique relationship between students and the public school system.<sup>122</sup> Citing to the Supreme Court's decision in *Edwards v. Aguillard*, the court explained that "[s]tudents in such institutions are impressionable and their attendance is involuntary, and the State exerts great authority and coercive power as a result of mandatory attendance requirements, student's emulation of teachers as role modes [sic], and the children's

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<sup>115</sup> *Id.* at 990.

<sup>116</sup> *Id.* at 992.

<sup>117</sup> *Id.* at 990.

<sup>118</sup> *Id.* at 990–91.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 991.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 991–92.

susceptibility to peer pressure.”<sup>123</sup> The court reasoned that it had an obligation to maintain the trust among families and public schools, such that the “classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family.”<sup>124</sup> In order to maintain this trust, such an act must be construed narrowly, so as not to infringe upon the constitutional rights of impressionable, young children.<sup>125</sup> By relying upon this method of interpretation, the court found that the Act was, indeed, void for vagueness.<sup>126</sup>

#### IV. THE SEVENTH CIRCUIT’S REVIEW OF *SHERMAN V. KOCH*

On October 15, 2010, the Seventh Circuit reversed and remanded the district court’s ruling.<sup>127</sup> Specifically, the court held that Section 1 of the Silent Reflection and Student Prayer Act did not “have the principal or primary effect of promoting religion,” nor was it unconstitutionally vague.<sup>128</sup> In its opinion, authored by Judge Daniel Manion, the court of appeals held that the Act passed the *Lemon* test and, indeed, spent most of its analysis addressing this issue.<sup>129</sup> While thoroughly explaining the Establishment Clause issue, the court gave short shrift to the Due Process Clause issue.<sup>130</sup>

With regard to the void for vagueness issue, the court found that the Act possessed sufficient clarity to pass constitutional muster.<sup>131</sup> The court began its analysis by citing to the rule that “[t]he void for

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<sup>123</sup> *Id.* at 991 (citing *Edwards v. Aguillard*, 482 U.S. 578, 583–84 (1987)).

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 992.

<sup>127</sup> *Sherman II*, 623 F.3d 501 (7th Cir. 2010).

<sup>128</sup> *Id.* at 504.

<sup>129</sup> *See id.* at 507–19.

<sup>130</sup> The court devoted pages 507–519 of its analysis to the issue of the constitutionality of the statute under the Establishment Clause, while devoting just one page, 519–520, to the issue of the constitutionality of the statute according to the void for vagueness doctrine. *See id.* at 507–520.

<sup>131</sup> *Id.* at 520.

vagueness doctrine rests on the basic principle of due process that a law is unconstitutional if its prohibitions are not clearly defined.”<sup>132</sup> From there, the court directed its rule statement toward a more liberal construction of the statute, citing that “[t]he Due Process Clause . . . does not demand perfect clarity and precise guidance.”<sup>133</sup> The court further noted that “a statute is only unconstitutionally vague if it fails to define the offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and it fails to establish standards to permit enforcement in a nonarbitrary, nondiscriminatory manner.”<sup>134</sup>

The court also indicated that the civil nature of the statute warranted a higher tolerance for vagueness.<sup>135</sup> Citing the Supreme Court’s decision in *Village of Hoffman Estates v. Flipside*, the court explained that “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.”<sup>136</sup> A statute that is civil in nature is allowed more vagueness than a criminal statute where “the consequences of imprecision are more severe.”<sup>137</sup> The court also emphasized that the Act tolerated more vagueness because of the general rule that legislation affecting schools should allow for teacher discretion.<sup>138</sup> Similarly, the court noted that “school disciplinary rules need not be as detailed as a criminal code.”<sup>139</sup> Finally, the court stressed that, “in a facial vagueness challenge the question is whether the statute is vague in all its operations.”<sup>140</sup>

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<sup>132</sup> *Id.* at 519 (quoting *Karlin v. Foust*, 188 F.3d 446, 458 (7th Cir. 1999)).

<sup>133</sup> *Id.* (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989) (internal quotation marks omitted)).

<sup>134</sup> *Id.* (quoting *Fuller ex rel. Fuller v. Decatur Pub. Sch. Bd. of Educ. Sch. Dist. 61*, 251 F.3d 662, 666 (7th Cir. 2001) (internal quotation marks omitted)).

<sup>135</sup> *Id.* at 520.

<sup>136</sup> *Id.* at 519–520 (quoting *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982)).

<sup>137</sup> *Id.* at 520 (quoting *Karlin*, 188 F.3d at 458).

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 520 (quoting *Fuller*, 251 F.3d at 667).

<sup>140</sup> *Id.* (quoting *Fuller*, 251 F.3d at 667).

After establishing its tendency toward a broad construction, the court applied the rules regarding vagueness to the statute. While conceding that “Section 1 does not define the length of the period of silence,”<sup>141</sup> the court quickly followed this concession by noting that Section 1 “is not unconstitutionally vague in all its applications, as demonstrated by District 214’s proposed implementation of the statute.”<sup>142</sup> District 214 planned to implement the Act by announcing each morning throughout its schools that it would “have a brief period of silence,” which would be followed fifteen seconds later by the Pledge of Allegiance.<sup>143</sup> After explaining District 214’s planned implementation, the court noted that, “[a] student of ordinary intelligence would clearly understand that he is to remain silent for the fifteen seconds between the announcement and the beginning of the Pledge.”<sup>144</sup> The court supported its interpretation by reemphasizing the school setting of the legislation, explaining that “the Constitution does not mandate a cornucopia of additional details or a statement of the punishment students will face should they disregard their teacher’s direction.”<sup>145</sup> As a result, the court determined that Sherman “cannot complain of the vagueness of the law in every situation and her Due Process challenge fails.”<sup>146</sup>

Although Judge Ann Williams filed a dissenting opinion in the court of appeals decision, her dissent made no mention of whether the statute was void for vagueness.<sup>147</sup> Instead, Judge Williams argued only that the statute violated the Establishment Clause because it encouraged prayer in public schools and, as a result, failed the *Lemon* test.<sup>148</sup>

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<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *See id.* at 520–25 (Williams, J., dissenting).

<sup>148</sup> *Id.* at 520 (Williams, J., dissenting).

## V. WHAT EXACTLY IS THE VOID FOR VAGUENESS DOCTRINE?

A statute that is void for vagueness is unconstitutional because it violates due process of law.<sup>149</sup> Due process requires fairness in the legal system and that notice and the opportunity for a fair trial are provided to all.<sup>150</sup> Historically, a statute that is void for vagueness is one which fails to provide notice: it is one “which either forbids or requires the doing of an act in terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application.”<sup>151</sup>

The void for vagueness doctrine is perhaps best summarized in the words of Justice Frankfurter, who famously stated that “indefiniteness is not a quantitative concept. It is not even a technical concept of definite components. It is itself an indefinite concept.”<sup>152</sup> This indefinite doctrine lacks a uniform definition and is often described in a roundabout manner. Consequently, courts apply the doctrine in widely varying ways.<sup>153</sup>

The history of the void for vagueness doctrine, however, sheds some light into the rationale behind this ambiguous concept. Though absent from the debates of the Constitutional Convention, the concept of void for vagueness existed in the United States as early as the nineteenth century, when it was referred to by the Supreme Court in the 1891 case of *United States v. Brewer*.<sup>154</sup> Though the doctrine did not yet have constitutional force, the court laid the groundwork for the void for vagueness doctrine by explaining that “[l]aws which create

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<sup>149</sup> *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926).

<sup>150</sup> BLACK’S LAW DICTIONARY (9th ed. 2009).

<sup>151</sup> *Connally*, 269 U.S. at 391.

<sup>152</sup> *Winters v. New York*, 333 U.S. 507, 524 (1948) (Frankfurter, J., dissenting) (internal quotation marks omitted).

<sup>153</sup> See Cristina D. Lockwood, *Defining Indefiniteness: Suggested Revisions to the Void for Vagueness Doctrine*, 8 CARDOZO PUB. L. POL’Y & ETHICS J. 255, 261 (2010) (explaining that “the required certainty that shields a law from a court determination that it is unconstitutionally vague is uncertain itself.”).

<sup>154</sup> See *id.* at 264.

crime ought to be so explicit that all men subject to their penalties may know what acts it is their duty to avoid.”<sup>155</sup>

Though it is difficult to identify exactly when the void for vagueness doctrine gained constitutional backing, *Nash v. United States*<sup>156</sup> may have been one of the first cases to link the doctrine to the constitutional requirements of due process.<sup>157</sup> In finding that the *Nash* statute possessed sufficient clarity, Justice Holmes noted that there was “no constitutional difficulty in the way of enforcing the criminal part of the act.”<sup>158</sup> In other words, since the statute was not too vague, it complied with the Due Process requirement in the Constitution. Moreover, the Court’s 1921 decision in *United States v. L. Cohen Grocery* further tied the doctrine to the constitution when it invalidated a vague economic regulation, explaining that it was “void for repugnancy to the Constitution.”<sup>159</sup> In 1926, the Court in *Connally* explicitly defined the doctrine in constitutional terms, explaining that “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 [the Fourteenth Amendment’s due process clause].”<sup>160</sup>

In the early twentieth century, litigants often used the void for vagueness doctrine to attack economic regulations.<sup>161</sup> For example, in *Connally*, the Court invalidated an Oklahoma wage statute because of its uncertain wording.<sup>162</sup> Specifically, the Court took issue with the statute’s use of the phrase “current rate of wages,” because it “[did] not denote a specific or definite sum, but minimum, maximum, and

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<sup>155</sup> *United States v. Brewer*, 139 U.S. 278, 288 (1891).

<sup>156</sup> 229 U.S. 373 (1913).

<sup>157</sup> *Lockwood*, *supra* note 152, at 268 (tracing constitutional origins of the Void for Vagueness Doctrine).

<sup>158</sup> *Nash*, 229 U.S. at 378.

<sup>159</sup> *Lockwood*, *supra* note 152, at 264–65 (*quoting* *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 92–93 (1921)).

<sup>160</sup> *Id.* at 268–69 (*quoting* *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926)).

<sup>161</sup> *See id.* at 266.

<sup>162</sup> *Connally*, 269 U.S. at 395.

intermediate amounts, indeterminately, varying from time to time and dependent upon the class and kind of work done, the efficiency of the workmen.”<sup>163</sup> The Court also found the statute’s use of the word “locality” particularly problematic, questioning: “Who can say, with any degree of accuracy, what areas constitute the locality where a given piece of work is being done?”<sup>164</sup>

Further supporting its position, the Court in *Connally* pointed to the case of *United States v. Capital Traction Co.*, a 1910 case out of the Court of Appeals of the District of Columbia.<sup>165</sup> In *Capital Traction*, the Court of Appeals held void for uncertainty a statute requiring railways to service passengers “without crowding,” because the statute failed to define the meaning of “crowding.”<sup>166</sup>

In cases involving penal statutes, where a violator of the statute could be incarcerated or subject to costly fines, courts have especially stressed the importance of clarity in language.<sup>167</sup> In the case of *Lanzetta v. New Jersey*, the Supreme Court invalidated a New Jersey statute that stated:

Any person not engaged in any lawful occupation, known to be a member of any gang consisting of two or more persons, who has been convicted at least three times of being a disorderly person, or who has been convicted of any crime, in this or in any other State, is declared to be a gangster. Every violation is punishable by fine not exceeding \$10,000 or imprisonment not exceeding 20 years, or both.<sup>168</sup>

In its analysis, the Court pronounced that, “[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of

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<sup>163</sup> *Id.* at 393.

<sup>164</sup> *Id.* at 394.

<sup>165</sup> *Id.* at 392 (*citing* *United States v. Capital Traction Co.*, 34 App. D.C. 592 (1910)).

<sup>166</sup> *Id.*

<sup>167</sup> *See, e.g.*, *Lanzetta v. New Jersey*, 306 U.S. 451 (1939).

<sup>168</sup> *Id.* at 452 (citations and internal quotation marks omitted).

penal statutes. All are entitled to be informed as to what the State commands or forbids.”<sup>169</sup> The Court found that the statute’s vague definition of “gang” as “consisting of two or more persons” failed to clearly inform people of the statute’s prohibitions.<sup>170</sup> For a statute with penalties as steep as a fine of up to \$10,000 or imprisonment of up to 20 years, such an unclear definition could not be constitutionally tolerated.<sup>171</sup>

Though the void for vagueness doctrine lacks a uniform definition, two important principles of the doctrine have continually resurfaced over time to guide its application: (1) the importance of fair notice; and (2) the need to prevent arbitrary enforcement.<sup>172</sup> Fair notice is often defined in terms of the “common” man and his understanding of a law; that is, if the common man cannot understand the law upon reading it, then the law might be unconstitutional for vagueness.<sup>173</sup> As early as 1875, the Court in *United States v. Reese* warned that, “[p]enal statutes ought not to be expressed in language so uncertain. If the legislature undertakes to define by statute a new offence, and provide for its punishment, it should express its will in language that need not deceive the common mind.”<sup>174</sup>

The Court’s precedent demonstrates that the important policy concerns behind the void for vagueness doctrine may sometimes necessarily produce unjust results. For instance, in *Reese*, although a Kentucky electoral official prevented an African-American from voting in an election, the Court did not enforce a penalty against the official because the wording of the anti-discrimination statute lacked clarity in creating this new offense.<sup>175</sup> Even though in the *Reese* case,

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<sup>169</sup> *Id.* at 453.

<sup>170</sup> *Id.* at 457–58.

<sup>171</sup> *Id.* at 453–58.

<sup>172</sup> *See, e.g.,* Grayned v. City of Rockford, 408 U.S. 104, 108 (explaining that “[v]ague laws may trap the innocent by not providing fair warning,” and adding that, “if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them.”)

<sup>173</sup> *Id.* at 108.

<sup>174</sup> *United States v. Reese*, 92 U.S. 214, 220 (1939).

<sup>175</sup> *Id.* at 221–222.

the doctrine may have reached an unjust conclusion, the court supported its reasoning with the idea that statutes must use clear and understandable language, such that the ordinary person will be put on notice of what the statute prohibits or requires.<sup>176</sup> As recently as 2008, the Court reiterated this principle in *United States v. Williams*, noting that a statute fails for vagueness when it does not “provide a person of ordinary intelligence fair notice of what is prohibited.”<sup>177</sup>

The prevention of arbitrary enforcement of law forms the second important principle to the void for vagueness doctrine.<sup>178</sup> This principle gained favor in the 1970s, when it was highlighted in the case of *Papachristou v. City of Jacksonville*.<sup>179</sup> In this case, the Supreme Court held void for vagueness a vagrancy law, which prohibited “persons wandering or strolling around from place to place without any lawful purpose or object.”<sup>180</sup> Not only did the statute fail to give fair notice, the Court also found that the statute could prompt “harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure.”<sup>181</sup> In other words, law enforcement could pick and choose when to enforce the law, potentially targeting disliked or marginalized groups.

Later that year, the Court expanded upon this principle of the void for vagueness doctrine when it explained in the case of *Grayned v. City of Rockford* that, “if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them.”<sup>182</sup> Such explicit standards allow for a uniform application of a statute, thus preventing officials from enforcing the law in a discretionary and potentially unjust manner. Specifically, the

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<sup>176</sup> *Id.*

<sup>177</sup> 553 U.S. 285, 286 (2008).

<sup>178</sup> *Grayned*, 408 U.S. at 108–09.

<sup>179</sup> *Lockwood*, *supra* note 152, at 272.

<sup>180</sup> *Lockwood*, *supra* note 152, at 272 (*quoting* *Papachristou v. City of Jacksonville*, 405 U.S. 156 n.1 (1972)).

<sup>181</sup> *Papachristou*, 405 U.S. at 170 (*citing* *Thornhill v. Alabama*, 310 U.S. 88, 97–98 (1940)).

<sup>182</sup> *Grayned*, 408 U.S. at 108; *see* *Lockwood*, *supra* note 152, at 273.

Court in *Grayned* held that the following statute was not void for vagueness because it provided sufficient guidelines for enforcement:

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 does not prohibit the peaceful picketing of any school involved in a labor dispute.<sup>183</sup>

In support of its conclusion that the statute possessed sufficient certainty, the Court explained that the standards furnished by the statute prevented against “subjective or discriminatory enforcement,” such that “‘undesirables’ or their annoying conduct may not be punished” in a discriminatory fashion.<sup>184</sup> Specifically, the court outlined that any potential vagueness in the statute “[was] 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 ‘willfully’ done.”<sup>185</sup> Though the police retained some discretionary power, the court found that the guidelines in the statute overpowered the possibility of discriminatory enforcement by the police.<sup>186</sup>

Though courts apply the doctrine according to its rationale, courts also apply the doctrine according to what it does not require of statutes: exactness. In the case of *Nash*, Justice Holmes famously highlighted the idea that statutes need not be perfectly clear, explaining that “[t]he law is full of instances where a man’s fate

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<sup>183</sup> *Grayned*, 408 U.S. at 107 (citations and internal quotation marks omitted).

<sup>184</sup> *Id.* at 113–14.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.* at 114.

depends on his estimating rightly.”<sup>187</sup> Indeed, courts often reject void for vagueness challenges on the basis that mathematical certainty is not required of statutes.<sup>188</sup> No set definition, however, exists as to how much specificity a statute must possess.<sup>189</sup> As a result, courts are guided by this vague outer limit of the doctrine, generally finding that some vagueness is tolerated in statutes.<sup>190</sup>

In statute writing, mathematical specificity must yield to practical considerations such as efficiency in drafting and flexibility in application.<sup>191</sup> In *Boyce Motor Co.*, the Supreme Court articulated that “no more than a reasonable degree of certainty can be demanded” in a statute, explaining that “most statutes must deal with untold and unforeseen variations in factual situations, and the practical necessities of discharging the business of government inevitably limit the specificity with which legislators can spell out prohibitions.”<sup>192</sup> In other words, mathematical certainty cannot be required due to the practical limitations of the English language, in that words themselves possess their own limitations in their ability to describe.<sup>193</sup> Moreover there are practical limitations of writing a statute that must be flexible enough to deal with situations that the legislature may not have considered at the time of enactment.<sup>194</sup>

The Supreme Court in *United States Civil Service Commission v. National Association of Letter Carriers AFL-CIO* affirmed this principle, stressing that “there are limitations in the English language with respect to being both specific and manageably brief . . . they are set out in terms that the ordinary person exercising ordinary common

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<sup>187</sup> *Nash v. United States*, 229 U.S. 373, 377 (1924).

<sup>188</sup> *See Lockwood, supra* note 152, at 270–71 (*citing Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337, 340 (1952)).

<sup>189</sup> *See id.*

<sup>190</sup> *See id.*

<sup>191</sup> *Boyce*, 342 U.S. at 340.

<sup>192</sup> *Id.*

<sup>193</sup> *See id.*

<sup>194</sup> *See id.*

sense can sufficiently understand and comply with.”<sup>195</sup> Thus, statutes must use language that is brief enough to be followed and understood by ordinary people, and for the sake of clarity, the language may fall short of mathematical precision.

Thus, it is a well-established principle that statutes are allowed some vagueness and need not be perfectly precise. In applying the void for vagueness doctrine, therefore, courts are guided by this idea and are thus prone to tolerating some vagueness in a statute’s language. The closest definition provided for the requisite level of specificity has been that of a “reasonable degree of certainty.”<sup>196</sup> This definition, however, fails to provide a meaningful benchmark for the level of vagueness to be tolerated. As a result of this nebulous definition, courts have often applied the doctrine in widely varying ways, which has led to inconsistency in the judicial system.

While there is no uniform definition of the level of vagueness required for a statute to be void, several rules have developed over time that guide the courts in applying the doctrine. These rules allot differing levels of vagueness in statutes based upon the kind or type of statute at hand, as “[t]he 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.”<sup>197</sup>

One rule provides that civil statutes often demand less clarity than criminal statutes.<sup>198</sup> In particular, civil statutes affecting economic regulations typically require less certainty in terms.<sup>199</sup> As noted by the Court in *Village of Hoffman Estates*, “Economic regulation is subject to a less strict vagueness test because its subject matter is often more narrow, and because businesses, which face economic demands to plan

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<sup>195</sup> See Lockwood, *supra* note 152, at 271 (quoting U.S. Civil Serv. Comm’n v. Nat’l Ass’n of Letter Carriers, AFL-CIO, 413 U.S. 548, 578–79 (1973)).

<sup>196</sup> See Lockwood, *supra* note 152, at 272 (citing *Boyce*, 342 U.S. at 340). The author implies that the best approximation that the Court has provided regarding the necessary specificity is simply “a reasonable degree of certainty.” See *Id.*

<sup>197</sup> *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982).

<sup>198</sup> *Id.* at 498–499.

<sup>199</sup> *Id.* at 498.

behavior carefully, can be expected to consult relevant legislation in advance of action.”<sup>200</sup> Conversely, criminal statutes generally necessitate greater clarity than civil cases because the consequences are generally greater in criminal cases.<sup>201</sup> For example, a scienter requirement in a criminal statute is an example of the level of specificity required by a criminal statutes, as the intent is clearly defined in such a provision and therefore mitigates any potential vagueness.<sup>202</sup>

The requirement that criminal statutes possess greater clarity works together with the fair notice rationale behind the void for vagueness doctrine. Courts examining criminal statutes seem to place a great deal of emphasis on this fair notice requirement—even more so than in civil statutes.<sup>203</sup> The 1945 case of *Screws v. United States* proclaimed the import of fair notice in criminal statutes, noting that “[t]he constitutional requirement that a criminal statute be definite serves a high function. It gives a person acting with reference to the statute fair warning that his conduct is within its prohibition.”<sup>204</sup> Therefore, when dealing with a criminal statute, more specificity is likely required because the ordinary person must have fair notice of the criminal penalties that may be imposed upon him or her. The stakes in a criminal case are far greater than those in a civil case, and as a result, more specificity is required in order to provide adequate notice.

Another rule mandates that more specificity is required in a statute that threatens constitutionally protected rights.<sup>205</sup> The court in *Okpalobi* noted this principle, stating, “A vague law is especially problematic . . . when, as here, the uncertainty induced by the statute

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<sup>200</sup> *Id.*

<sup>201</sup> *See, e.g.,* Karlin v. Foust, 188 F.3d 446, 458 (7th Cir. 1999) (noting that the Constitution tolerates a lesser degree of vagueness in enactments “with criminal rather than civil penalties because the consequences of imprecision are more severe.”) (internal quotation marks omitted).

<sup>202</sup> *Village of Hoffman Estates*, 405 U.S. at 499.

<sup>203</sup> *See, e.g.,* Screws v. United States, 325 U.S. 91, 103–04 (1945).

<sup>204</sup> *Id.*

<sup>205</sup> *Village of Hoffman Estates*, 405 U.S. at 499.

threatens to inhibit the exercise of constitutionally protected rights.”<sup>206</sup> Further, this rule arguably takes precedence over the civil versus criminal distinction, as the Court noted in *Hoffman Estates* that “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.”<sup>207</sup> Moreover, within the realm of constitutionally protected rights, First Amendment rights seem to be the most fiercely guarded against indefiniteness.<sup>208</sup> The Court observed in *Hoffman Estates* that “[i]f for example, the law interferes with the right of free speech or of association, a more stringent vagueness test should apply.”<sup>209</sup> Therefore, a strict standard of vagueness is applicable to the Illinois Silent Reflection and Student Prayer Act, given that it calls into question the rights provided in the Establishment Clause of the First Amendment.

Another rule specifically applicable to the case of *Sherman v. Koch* is the idea that courts generally tolerate more vagueness in statutes affecting state school systems.<sup>210</sup> By allowing more vagueness in school laws, teachers are able to exercise discretion and implement the laws in ways that meet the individualized needs of the school or classroom.<sup>211</sup> Indeed, the Seventh Circuit Court of Appeals pointed out that “[g]iven the school’s need to be able to impose disciplinary sanctions for a wide range of unanticipated conduct disruptive of the educational process, the school disciplinary rules need not be as detailed as a criminal code.”<sup>212</sup>

Conflicting with this idea of tolerance, however, is the fact that the Supreme Court has mandated that courts be “particularly vigilant

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<sup>206</sup> 190 F.3d 337, 358 (5th Cir. 1999) (quoting *Colautti v. Franklin*, 439 U.S. 379, 391 (1979) (internal quotations omitted)).

<sup>207</sup> *Village of Hoffman Estates*, 405 U.S. at 499.

<sup>208</sup> *See, e.g., id.*

<sup>209</sup> *Id.*

<sup>210</sup> *See, e.g., Sherman I*, 594 F. Supp. 2d 981, 991 (N.D. Ill. 2009).

<sup>211</sup> *See, e.g., Fuller ex rel. Fuller v. Decatur Pub. Sch. Bd. of Educ. Sch. Dist. 61*, 251 F.3d 662, 667 (7th Cir. 2001).

<sup>212</sup> *Id.* at 667 (quoting *Bethel Sch. Dist. No. 403 v. Fraser ex rel. Fraser*, 478 U.S. 675, 686 (1986)).

to monitoring compliance with the Establishment Clause in public elementary and secondary schools.”<sup>213</sup> The Supreme Court has made clear that because students in primary and second education are “impressionable and their attendance is involuntary,” statutes with a potential effect on the Establishment Clause must be watched closely.<sup>214</sup>

Moment of silence legislation is therefore subject to somewhat conflicting standards of review with regard to being void for vagueness. On the one hand, the legislation is civil and therefore less clarity is required than in a criminal statute imposing criminal penalties. On the other hand, the legislation arguably threatens First Amendment rights pursuant to the Establishment Clause. In regards to the case of *Sherman v. Koch*, while legislation affecting public schools is generally accorded deference, the Supreme Court requires a heightened review for school legislation that potential infringes upon the Establishment Clause.

#### VI. APPLICATION OF THE VOID FOR VAGUENESS DOCTRINE TO THE ILLINOIS SILENT REFLECTION AND STUDENT PRAYER ACT

In applying the void for vagueness doctrine to the Illinois Silent Reflection and Student Prayer Act, it is helpful to first assess the statute in light of the doctrine’s rationale. Does the statute promote the two key principles behind the void for vagueness doctrine, such that it provides fair notice and protects against arbitrary enforcement? First, does the statute provide fair warning such that an ordinary man will know what is mandated by the statute?<sup>215</sup> As noted above, the Illinois Silent Reflection and Student Prayer Act, provides in pertinent part that:

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<sup>213</sup> *Edwards v. Aguillard*, 482 U.S. 578, 584 (1987).

<sup>214</sup> *See, e.g., Sherman I*, 594 F. Supp. 2d at 991.

<sup>215</sup> *See, e.g., United States v. Reese*, 92 U.S. 214, 220 (1939) (emphasizing fair notice such that “[e]very man should be able to know with certainty when he is committing a crime”

In each public school classroom the teacher in charge **shall** observe a brief period of silence with the participation of all the pupils therein assembled at the opening of every school day. This period shall be an opportunity for silent prayer or for silent reflection on the anticipated activities of the day.<sup>216</sup>

First looking to the language of a “brief period,” would an ordinary man understand the meaning of this phrase? Aside from labeling it as “brief,” the statute neither defines the time period nor imposes a time limit on it. Indeed, the Seventh Circuit admitted that, “Section 1 does not define the length of the period of silence.”<sup>217</sup> Without explaining why, however, the Seventh Circuit concluded that “[a] student of ordinary intelligence would clearly understand that he is to remain silent for the fifteen seconds between the announcement and the beginning of the Pledge.”<sup>218</sup>

But, what is the meaning of a “brief period?” Is it fifteen seconds, one minute, five minutes? Within the school context, the word “period” often refers to the length of a class. In this case, could the phrase “brief period” be interpreted by an ordinary person to mean thirty minutes? While the Illinois legislature declined to place a maximum time limit on the “brief period,” a survey of other moment of silence legislation indicates that a time limit is commonly used to define the moment.<sup>219</sup> Specifically, state legislatures have commonly required a one-minute time limit in similar moment of silence statutes.<sup>220</sup> While not determinative, the time limit imposed on other moment of silence legislation is indicative of the idea that this time limit helps define the moment for the ordinary person. Why would so

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<sup>216</sup> 105 Ill. Comp. Stat. 20/1 (2007) (emphasis added).

<sup>217</sup> *Sherman II*, 623 F.3d 501, 520 (7th Cir. 2010).

<sup>218</sup> *Id.*

<sup>219</sup> *See, e.g.,* *Wallace v. Jaffree*, 472 U.S. 38, 40 (1985); *Croft v. Perry*, 562 F.3d 735, 738 (5th Cir. 2009); *Brown v. Gilmore*, 258 F.3d 265, 270 (4th Cir. 2001); *Bown v. Gwinnett Cnty. Sch. Dist.*, 112 F.3d 1464, 1466 (11th Cir. 1997); *May v. Cooperman*, 780 F.2d 240, 241 (3rd Cir. 1985).

<sup>220</sup> *See, e.g.,* *Wallace*, 472 U.S. at 40; *Croft*, 562 F.3d at 738; *Gilmore*, 258 F.3d at 270; *Gwinnett Cnty. Sch. Dist.*, 112 F.3d at 1466; *May*, 780 F.2d at 241.

many states include this guidance if the ordinary person already knew how long the moment should be?

Section 1 of the Act also neglects to provide a mechanism for enforcement of the statute. The lack of an enforcement mechanism raises serious questions about the implementation of the Act. For example, what consequences apply to the teacher who implements the statute incorrectly? Or, what happens to a student who does not comply with the two choices of either silently praying or reflecting upon the day's activities? The lack of an enforcement mechanism leaves the ordinary person in the dark as to the consequences of non-compliance.

The other central principle behind the void for vagueness doctrine is the prevention of the arbitrary enforcement of laws.<sup>221</sup> By writing statutes with clear and specific language, the legislature can prevent the possibility that a specific statute is applied in an unfair or discriminatory manner.<sup>222</sup> The Illinois Silent Reflection and Student Prayer Act, however, possesses scant guidance with regard to its implementation. The district court noted this very fact, commenting that the Act “provide[d] no direction as to how the ‘period’ of silence should be implemented, how long the period should last, and whether pupils would be permitted to pray in a manner that was either audible or required movement.”<sup>223</sup>

Therefore, the Act's failure to define a “brief period” not only neglects to provide adequate notice; its lack of guidelines could also lead to the arbitrary enforcement of the law. Unlike the carefully defined standards expressed in the statute involved in *Grayned*,<sup>224</sup> the Illinois statute does not delineate any course of conduct that would clearly indicate that a person violated the Act. The only guidance provided is that the teacher lead the students at the opening of the day and that students either silently reflect or pray. If a teacher or school

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<sup>221</sup> See, e.g., *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972).

<sup>222</sup> *Id.* at 108.

<sup>223</sup> *Sherman I*, 594 F. Supp. 2d 981, 990 (N.D. Ill. 2009).

<sup>224</sup> See, e.g., *Grayned*, 408 U.S. at 110–113 (concluding that the statutory standards provide a sufficient explanation as to what behavior is proscribed).

incorrectly implements the statute, the enforcement against such misconduct would be entirely discretionary and arbitrary, as no penalties or enforcement mechanisms are given in the statute. Just as in the *Papachristou* case, concerns are raised by the amount of discretionary power granted by this statute—discretion resting both with the teachers that implement the statute, as well as with whatever powers that might enforce the statute.

In this situation, the arbitrary enforcement of the law could lead to grave consequences, including the threatening of students' constitutionally protected rights. With the help of guidelines in a moment of silence statute, the teachers and schools implementing the statute will be prevented from enforcing the law in a discretionary manner that could infringe upon constitutional rights. The Illinois Silent Reflection and Student Prayer Act, however, fails to provide such guidelines, thus providing wide discretionary power to teachers and potentially yielding arbitrary and even illegal implementation of the statute.

Some schools may choose not to enforce the statute (as many Chicago schools have done), or some schools might implement the period for longer lengths of time than others. A teacher could, for example, bring a religious object, such as a rosary, into the classroom for use during the moment of silence, or make off-hand comments to students regarding religion. In a more serious case, a teacher could potentially indoctrinate students in his or her own beliefs by providing religious materials to the students or leading them in prayer. In any case, the introduction of the teacher's religious beliefs is unconstitutional, regardless of the magnitude of the violation. Furthermore, the lack of an enforcement clause in the statute could potentially allow for teachers to violate the statute without repercussion.

In terms of an enforcement mechanism, however, most moment of silence statutes do not possess a clear delineation of penalties.<sup>225</sup> The lack of an enforcement clause, however, seems to be less damning

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<sup>225</sup> See, e.g., *Wallace*, 472 U.S. at 40; *Croft*, 562 F.3d at 738; *Gilmore*, 258 F.3d at 270; *Gwinnett Cnty. Sch. Dist.*, 112 F.3d at 1467; *May*, 780 F.2d at 243.

when schools and teachers receive guidelines regarding the moment of silence, such as a time limit for the period.<sup>226</sup> When teachers know the confines of the moment of silence, there is arguably less need for an enforcement clause because their compliance will be greater.

Overall, it is difficult to find that the statute promotes the principles behind the void for vagueness doctrine. The lack of a time limit, the absence of guidelines as to how the teacher shall implement the statute, as well as the lack of an enforcement clause, neither provides fair notice to those who will potentially violate the statute, nor provides for a uniform implementation of the statute. Based upon the rationale of the void for vagueness doctrine, the Illinois statute shows itself to be in position to fail for vagueness because it threatens both of the principles that the doctrine espouses.

How much vagueness should be tolerated in the Illinois Silent Reflection and Student Prayer Act? To answer this question, it is essential to ask whether the statute provides “a reasonable degree of certainty.”<sup>227</sup> As noted above, while a statute need not be mathematically precise, a statute must be expressed in certain enough terms that an ordinary person can understand the applicable statutory terms.<sup>228</sup> The Seventh Circuit held that the statute possessed sufficient certainty.<sup>229</sup> The reasons explored above, however, demonstrate that an ordinary student could fail to understand the exact requirements of the Illinois statute.<sup>230</sup>

Admittedly, due to practical limitations of the English language, statutes cannot always be written with the utmost precision.<sup>231</sup> Furthermore, legislators writing statutes may find it more efficient to

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<sup>226</sup> See, e.g., *Wallace*, 472 U.S. at 40; *Croft*, 562 F.3d at 738; *Gilmore*, 258 F.3d at 270; *Gwinnett Cnty. Sch. Dist.*, 112 F.3d at 1466; *May*, 780 F.2d at 241.

<sup>227</sup> See *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337, 340 (1952); see also *Lockwood*, *supra* note 152, at 270–71.

<sup>228</sup> *Lockwood*, *supra* note 152, at 271.

<sup>229</sup> *Sherman II*, 623 F.3d 501, 520 (7th Cir. 2010).

<sup>230</sup> See *id.*

<sup>231</sup> See *Boyce*, 342 U.S. at 340.

write with more vagueness, so that statutes can be implemented flexibly.<sup>232</sup>

Another efficiency argument for vagueness is that legislators also do not have endless amounts of time to draft statutes with the greatest exactitude. The lack of guidelines in the Illinois Silent Reflection and Student Prayer Act afford a flexible implementation of the statute that can accommodate unique circumstances, such as individual schools' schedules or procedures. On the other hand, if other moment of silence statutes can provide these helpful guidelines, is the deficiency in the statute truly a result of the practical limitations of the English language or efficiency in drafting?

For further guidance as to how much vagueness will be permitted in the statute, it is helpful to apply the various rules of construction of the void for vagueness doctrine to it. The nature of the enactment may dictate whether the statute indeed possesses enough certainty.<sup>233</sup>

Turning first to the civil versus criminal dichotomy, the statute falls into the civil category and, therefore, requires less certainty in its wording than a criminal statute.<sup>234</sup> However, it is interesting in this case that the Illinois Silent Reflection and Student Prayer Act actually does not provide any course of action for noncompliance. Consequences would not approximate those stemming from a criminal statute. Therefore, the Illinois statute need not possess the same amount of clarity as a criminal statute. Accordingly, as fair notice is more integral to criminal statutes, the importance of fair notice is lessened. Thus, in terms of the civil versus criminal distinction, it would seem that the amount of vagueness in the Illinois statute may be tolerable.

The level of specificity that should be required in the Illinois Silent Reflection and Student Prayer Act, however, changes drastically in light of the rule that statutes threatening constitutional rights require

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<sup>232</sup> *See id.*

<sup>233</sup> *See Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498–99 (1982) (explaining that criminal statutes require a higher degree of specificity than civil statutes).

<sup>234</sup> *See, e.g., Karlin v. Foust*, 188 F.3d 446, 458 (7th Cir. 1999).

the utmost clarity. As the Supreme Court explained, these types of statutes are held to a higher standard of clarity than criminal statutes.<sup>235</sup> Under this rationale, the vague language of the Illinois statute falls short of the requisite specificity because it potentially threatens students' First Amendment rights under the Establishment Clause. Additionally, the magnitude of this threat depends almost entirely on a teacher's implementation of the Act. As explored above, if a teacher implements the statute by incorporating his or her own beliefs, then the students' freedom from the establishment of religion in public institutions would be violated.

Indeed, the threat is real with the Illinois statute because little is provided in terms of implementation, leaving discretion with the teachers and schools. The lack of an enforcement clause further threatens constitutional rights: If these rights are violated, there is no matter of recourse outlined in the statute for stopping such an unlawful implementation.<sup>236</sup> In light of the rule requiring a greater degree of specificity for statutes threatening constitutional rights, it is evident that the Illinois statute does not provide sufficient clarity to address the potential constitutional violations implicated by the vague statutory language.

In applying the void for vagueness doctrine to the Illinois Silent Reflection and Student Prayer Act, it is important to also apply the rules that are applicable to the interpretation of school legislation. As emphasized by the Seventh Circuit, statutes affecting schools must allow discretion to schools so that teachers can implement statutes in ways that best suit their students and schools.<sup>237</sup> In this sense, the Illinois statute passes the test, as it certainly provides teachers with broad discretion to implement the statute in the manners that they see fit. However, it is important to consider that statutes affecting schools

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<sup>235</sup> See *Village of Hoffman Estates*, 455 U.S. at 499 (declaring that the most stringent test should apply to statutes that potentially infringe upon constitutionally protected rights).

<sup>236</sup> See 105 Ill. Comp. Stat. 20/1 (2007).

<sup>237</sup> *Sherman II*, 623 F.3d 501, 520 (7th Cir. 2010).

must also be held to a heightened standard of specificity when constitutional rights are being called into question.<sup>238</sup>

Statutes potentially threatening constitutional rights of students must be held to an even stricter standard because studies have demonstrated that school children are particularly impressionable and vulnerable to various influences in the school environment.<sup>239</sup> At this age, children are likely to emulate the actions of their teachers. Moreover, children are especially vulnerable because their attendance at public school is mandatory. Given this combination of factors, it is important to ensure that the constitutional rights of schoolchildren receive greater protection, as children may often lack the ability to recognize a violation of their constitutional rights—much less defend against such violations.<sup>240</sup>

The problem here is simple: When children are required to attend school, and a teacher implements the moment of silence in a manner that promotes her own ideological beliefs, students may feel compelled or pressured to follow the same beliefs of the teacher. With its lack of guidelines, the Illinois Silent Reflection and Student Prayer Act lends itself to this situation. As a result, the statute fails for vagueness.

Although school legislation should give discretion to teachers, it must provide stricter guidelines when the constitutionally protected rights of children are called into question. Given that First Amendment Establishment Clause rights are indeed called into question, the statute fails to provide enough guidance to pass constitutional muster.

## CONCLUSION

An in depth analysis of the Illinois Silent Reflection and Student Prayer Act indicates that there are arguments on either side of why or why not the Act possesses sufficient clarity. Upon reviewing all of the

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<sup>238</sup> See, e.g., *Edwards v. Aguillard*, 482 U.S. 578, 584 (1987) (statute implicating freedom of religion).

<sup>239</sup> *Sherman I*, 594 F. Supp. 2d 981, 991 (N.D. Ill. 2009).

<sup>240</sup> See *id.*

opposing factors in tandem, however, it is ultimately clear that the reasons pointing to a finding of unconstitutionality outweigh the others, thus failing the statute for vagueness. While it is troubling to see that the Seventh Circuit did not reach this conclusion, it is even more disturbing to see how very little analysis the Seventh Circuit engaged in to decide the issue. While the Seventh Circuit provided a thorough analysis of the Establishment Clause issue raised by the statute, I leave for another day a more complete discussion of the court's reasoning behind this issue.

With regard to the void for vagueness challenge, however, rather than providing a thorough analysis, the Seventh Circuit skewed its reasoning by conveniently highlighting factors that leaned in favor of a finding of constitutionality.<sup>241</sup> The court's analysis neglected to focus on certain factors that overwhelmingly pointed in favor of a finding of constitutional infirmity, namely that the statute arguably fails to provide fair notice, leads to arbitrary enforcement, and calls into question constitutional rights—specifically, the First Amendment rights—of children in public schools.

The Seventh Circuit's misapplication of the doctrine, however, may in part be contributed to by the vagueness of the void for vagueness doctrine itself. Case law fails to clearly delineate the rules and nuances of the doctrine, and as a result, courts are left to pick and choose parts of the doctrine. Unfortunately, it is only after applying all of the considerations and nuances of the doctrine that a proper conclusion to a void for vagueness challenge may be reached.

This cursory type of application has led to widely varying applications of the doctrine among the courts.<sup>242</sup> The wide spectrum of application, furthermore, indicates a larger problem, in that courts likely utilize the doctrine to help them reach a predetermined result. Far from being confused about the doctrine, courts seem to use the doctrine in such varying manners because it serves as “an available

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<sup>241</sup> *Sherman II*, 623 F.3d at 519–520.

<sup>242</sup> See Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. Pa. L. Rev. 67, 72–73 (1960) (internal quotation marks omitted) (noting the “number of evident disharmonies within the body of cases that talk ‘vagueness’”).

instrument in the service of other more determinative judicially felt needs and pressures.”<sup>243</sup> Therefore, depending on how the doctrine suits its needs, a court might dismiss the void for vagueness doctrine as a “makeweight” argument, or it might uphold it as the *ratio decidendi*.<sup>244</sup>

Indeed, decisions applying the void for vagueness doctrine have been characterized by their “almost habitual lack of informed reasoning.”<sup>245</sup> For example:

It is common in the cases which sustain a statute against the charge of vagueness to say merely that it is as definite as a statute sustained in some earlier case—an argument which, in view of the fact that the earlier case expresses no criterion of definiteness, is singularly unilluminating. Other cases state only their conclusion—that the statute is too uncertain (or not too uncertain)—and cite in support earlier decisions, not dealing with statutes of similar wording or even of similar sphere of operation, but rather laying down the broadly phrased, black letter, polar doctrines.<sup>246</sup>

Finally, what motivated the Seventh Circuit’s incomplete analysis? After providing such a thorough analysis of why the Act did not violate the Establishment Clause, the court then brushed over the void for vagueness issue.<sup>247</sup> Seemingly determined to find that no First Amendment violation occurred, the court quickly concluded that the statute passed constitutional muster in all respects.<sup>248</sup> While the inner

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<sup>243</sup> *Id.* at 74–75.

<sup>244</sup> *Id.* at 72. The Ratio Decidendi is “[t]he principle or rule of law on which a court’s decision is founded.” BLACK’S LAW DICTIONARY (9th ed. 2009).

<sup>245</sup> *Void-for-Vagueness*, *supra* note 241, at 70.

<sup>246</sup> *Id.* at 71.

<sup>247</sup> The court devoted pages 507–519 of its analysis to the issue of the constitutionality of the statute under the Establishment Clause, while devoting just one page, 519–520, to the issue of the constitutionality of the statute according to the void for vagueness doctrine. *See Sherman II*, 623 F.3d 501, 507–520 (7th Cir. 2010).

<sup>248</sup> *See id.* at 519–520.

thoughts and motivations of the court may not be known, upon looking at the hurried and unbalanced analysis of the void for vagueness issue, it would seem that the court set itself on coming to a finding of constitutionality. Whether the court's religious beliefs or conservatism dictated this result is not known, but the issue can surely be called into question.

The void for vagueness doctrine as it stands now is in need of a uniform definition. The lack of uniformity in its definition will continue to allow the doctrine to be a tool used for reaching judicially predetermined outcomes.<sup>249</sup> This not only discredits the doctrine, but also can lead to the reaching of unfair and constitutionally incorrect outcomes. An incomplete analysis of this doctrine, therefore, has serious consequences. Indeed, in the case of *Sherman v. Koch*, the consequence can be seen as the violation of the constitutional rights of students across the state of Illinois.

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<sup>249</sup> See *Void-for-Vagueness*, *supra* note 241, at 75.