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The Supreme Court's *Johnson v. United States* Ruling: A Vagueness Doctrine Revolution?

by David Debold and Rachel E. Mondl

A criminal law violates the constitutional right to due process when the law is "so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement."[1] But when is a criminal statute too vague? Will the statute be saved if it clearly makes at least some conduct unlawful, such as selling sugar for $1,000 a pound when a statute prohibits charging an "unjust or unreasonable rate"?[2] And can courts' difficulties when attempting to interpret the statute in various settings help defendants establish the statute's vagueness?

These were just some of the questions the Supreme Court grappled with in *Johnson v. United States*, 135 S. Ct. 2551 (2015), a decision with significant implications for due-process rights. The question in *Johnson* was whether the so-called residual clause of the Armed Career Criminal Act ("ACCA") was unconstitutionally vague. ACCA significantly increases the minimum and maximum sentences for illegal firearm possession if the defendant has three qualifying prior convictions. The residual clause counts a prior conviction if it was for an offense involving conduct "that presents a serious potential risk of physical injury to another."[3]

Despite the Court's having recently stated—twice—that the residual clause was *not* unduly vague, a majority in *Johnson* struck the clause down as being "hopelessly indeterminate." In doing so, the Court flatly rejected the argument that a statute must be vague in *all* applications to be void for vagueness.

Apart from the direct effect of *Johnson* on ACCA sentences, the decision marks an important step in the Court's vagueness jurisprudence. Also not to be overlooked is Justice Thomas's concurrence, which likened the vagueness doctrine to the much-maligned concept of substantive due process, thus raising questions about the legitimacy of a vagueness doctrine in the first place. In the end, though, the debate over the legitimacy of substantive-due-process rights should have no bearing on the Court's void-for-vagueness precedents, because vague laws offend traditional notions of *procedural* due process—that is, the process by which the government may deprive a person of life, liberty, or property.

The Legal Landscape Before *Johnson v. United States*

To understand the importance of the *Johnson* decision, some background on ACCA's residual clause, as well as judicial interpretations of it, is necessary. ACCA imposes a mandatory minimum 15-year sentence on anyone convicted of possession of a firearm who has three or more prior convictions for either a "violent felony" or "serious drug offense."[4] For felons without three qualifying convictions, the highest sentence is only ten years, with no mandatory minimum.

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ACCA defines "violent felony" to include a felony that "is burglary, arson, or extortion, involves use of explosives, or *otherwise involves conduct that presents a serious potential risk of physical injury to another*."[5] The italicized portion has become known as the "residual clause," while burglary, arson, extortion and felonies involving use of explosives are known as "enumerated offenses."

The residual clause's scope and application bedeviled federal judges for nearly 30 years. Circuit splits flourished, not only over whether the residual clause applied to particular criminal statutes, but over *how* to decide whether a crime satisfied the language of the clause.

The Supreme Court joined the fray in 2007 with *James v. United States*, 550 U.S. 192, holding that Florida's attempted burglary statute was a violent felony. To reach that conclusion, the Court looked to the "ordinary case" of attempted burglary, rather than what occurred when the defendant himself violated that law,[6] and "whether the risk posed by attempted burglary [was] comparable to that posed by its closest analog among the enumerated offenses."[7] The Court concluded that completed and attempted burglary under Florida law posed the same risk of "face-to-face confrontation between the burglar and a third party."[8]

But *James* did little to abate the disagreements over application of the residual clause to other state laws. As a result, the Supreme Court decided a new residual clause case in 2008 (*Begay*),[9] 2009 (*Chambers*),[10] and then 2011 (*Sykes*).[11] Indeed, it looked as though the Court would be hearing a residual clause case just about every year—or "until the cows come home" as Justice Scalia colorfully put it.[12]

Part of the problem was the Court's inability to come up with a coherent and universal standard for deciding whether a crime was a "violent felony" under ACCA's residual clause. While *James* examined the "comparability" of the crime at issue to the statutorily enumerated offenses, the Supreme Court "resort[ed] to a different ad hoc test" in each of *Begay*, *Chambers*, and *Sykes*.[13]

Johnson v. United States

When the Supreme Court took up *Johnson*, it appeared poised to grapple with applying the residual clause to yet another type of felony: Minnesota's offense of unlawful possession of a short-barreled shotgun. After briefing and oral argument, however, the Court directed briefing and argument on a different question: whether the residual clause was unconstitutionally vague. The request was all the more unusual because the majority opinions in *James* and *Sykes* had rejected Justice Scalia's dissenting view that the law must be declared void on that very basis.[14]

The reasoning in those dissents carried the day in *Johnson*. Holding that the residual clause was so vague as to violate the Fifth Amendment's guarantee of due process, the Supreme Court at last brought to an end attempts to divine the clause's full meaning.[15]

The Court explained that "the indeterminacy of the wide-ranging inquiry required by the residual clause"—including "grave uncertainty about how to estimate the risk posed by a crime" and "about how much risk it takes for a crime to qualify as a violent felony"—"denies fair notice to defendants and invites arbitrary enforcement by judges."[16] The Court pointed to its own "repeated attempts and repeated failures" to discern a workable standard, as well as lower courts' "pervasive disagreement about the nature of the inquiry one is supposed to conduct and the kinds of factors one is supposed to consider."[17] For the Court, these experiences "confirm[ed] the residual clause's hopeless indeterminacy."[18]

Importantly, the Supreme Court did not simply hold the residual clause impermissibly vague as applied to Johnson's prior conviction; rather, it concluded that the clause must go in its entirety. The Court acknowledged that some offenses so clearly present "a serious potential risk of physical injury to another" that a defendant committing such crimes would be on notice that the residual clause applies to him. But the Court squarely rejected

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the proposition that a statute must be vague in all applications to be void for vagueness. "[A]lthough statements in some of our opinions could be read to suggest otherwise," the Court observed, "our *holdings* squarely contradict the theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision's grasp."[19]

The Effects of *Johnson* on Vagueness Challenges

Johnson's impact on the sentencing of federal defendants is itself notable.[20] Its more lasting impact, though, may be on how the vagueness doctrine applies in future cases.

Johnson's blanket invalidation of the residual clause despite the existence of clear cases is an important clarification of the Court's vagueness rulings. The Court has often said that unless First Amendment rights were at stake, a facial challenge to a statute on vagueness grounds could succeed only if "the complainant . . . demonstrate[d] that the law is impermissibly vague in all of its applications."[21] Nonetheless, the Court had occasionally "invalidate[d] a criminal statute on its face even when it could conceivably have had some valid application."[22]

Johnson swept away this point of tension. By making clear that the Court need not find a statute vague in all of its applications before striking it down, *Johnson* removed what had often been viewed as an insurmountable barrier to such challenges. Moreover, under the reasoning in *Johnson*, even a defendant whose prior conviction was clearly within the residual clause's scope could have challenged the clause on vagueness grounds. Also, under *Johnson*, a statute can still be struck down as unconstitutionally vague even after the Supreme Court has already upheld its application to defendants in earlier cases, thereby implicitly (or, as with ACCA, even explicitly) rejecting the notion that the statute can never be applied consistent with due process.

Misplaced Concerns in Justice Thomas's Concurrence

Apart from the impact of *Johnson* on future void-for-vagueness statutory challenges, Justice Thomas's "concurrence in the judgment only" raises a provocative question about the constitutional grounding of the void-for-vagueness doctrine. Justice Thomas pointed out that courts did not begin to use the Fifth Amendment's Due Process Clause to invalidate statutes as impermissibly vague until the late Nineteenth Century, around the same time courts began using a doctrine of substantive due process under the Fourteenth Amendment to strike down various state laws.[23] "Since that time," Justice Thomas contended, "the Court's application of its vagueness doctrine has largely mirrored its application of substantive due process."[24] He found this history "unsettling," in part because both due-process doctrines had been used "to invalidate democratically enacted laws."[25]

This concern is misplaced, because the doctrines differ in critical respects. The void-for-vagueness doctrine is part of "procedural due process," which "never has been controversial."[26] Procedural due process guarantees notice and an opportunity to be heard before the government deprives an individual of life, liberty, or property.[27] Vagueness jurisprudence, of course, stems directly from the notice prong, which is a fundamental requirement of the rule of law.[28]

Substantive due process, on the other hand, requires the government to have sufficiently weighty reasons for interfering with fundamental rights.[29] The question in substantive-due-process cases is not whether the government gave notice and an opportunity to be heard before enforcing the law; rather, the question is whether the government has enough of a substantive rationale for interfering with the right at all. As a result of that difference, "the very idea of substantive due process has been contested."[30]

The vagueness doctrine lacks this substantive component. It does not scrutinize whether the government has adequate justification to deprive a person of life, liberty, or property, but rather, whether the government has provided sufficient *notice* that certain conduct will lead to that deprivation. Notice is a classic procedural-due-process element with ancient roots preceding the Constitution.[31]

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Conclusion

More than an opinion on mandatory-minimum sentences, *Johnson* provides a welcome clarification of the law on unconstitutional vagueness. Yet it remains to be seen how far-reaching the decision will be. The majority opinion widens the opportunities for challenges to laws where previous challenges would not have been possible under a vague-in-all-applications regime. Time will tell whether more of those challenges will succeed, or, instead, whether *Johnson* is relegated to "unique" status, its result ordained by the profound and repeated inability of the Supreme Court and courts of appeals to craft a principled, workable standard for applying a peculiar type of statute. One thing is certain: *Johnson* will not be the last word on the vagueness doctrine.

Endnotes

[1] *Johnson v. United States*, 135 S. Ct. 2551, 2556 (2015). The Fifth Amendment provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law."
[2] *See, e.g.*, *United States v. L. Cohen Grocery Co.*, 255 U.S. 81 (1921).
[3] 18 U.S.C. § 924(e)(2)(B).
[4] 18 U.S.C. § 924(e).
[5] *Id.* § 924(e)(2)(B) (emphasis added).
[6] *James*, 550 U.S. at 202 (quoting 18 U.S.C. § 924(e)(2)(B)(ii) (internal quotation mark omitted)).
[7] *Id*. at 203.
[8] *Id.* at 203-07.
[9] *Begay v. United States*, 553 U.S. 137 (2008) (drunk driving).
[10] *Chambers v. United States*, 555 U.S. 122 (2009) (failure to report to prison).
[11] *Sykes v. United States*, 131 S. Ct. 2267 (2011) (vehicular flight from law enforcement).
[12] *Sykes*, 131 S. Ct. at 2287 (Scalia, J., dissenting).
[13] *Johnson*, 135 S. Ct. at 2558.
[14] *Compare James*, 550 U.S. at 210 n.6, *with id.* at 230 (Scalia, J., dissenting); *compare Sykes*, 131 S. Ct. at 2276-77, *with id.* at 2286-88 (Scalia, J., dissenting).
[15] *Johnson*, 135 S. Ct. at 2556-57.
[16] *Id.* at 2557.
[17] *Id.* at 2558-60.
[18] *Ibid.*
[19] *Id.* at 2560-61.
[20] For discussion of some of these effects, *see* Leah M. Litman, *Residual Impact: Resentencing Implications of* Johnson*'s Potential Ruling on ACC's Constitutionality*, 115 Columbia L. Rev. Sidebar 55 (2015); *Johnson v. United States,* No. 13-7120, Families Against Mandatory Minimums (June 29, 2015), http://famm.org/johnson-v-united-states.
[21] *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497 (1982); *see also, e.g.*, *United States v. Mazurie*, 419 U.S. 544, 550 (1975); *United States v. Salerno*, 481 U.S. 739, 745 (1987).
[22] *Kolender v. Lawson*, 461 U.S. 352, 358 n.8 (1983) (citing cases).
[23] *Johnson*, 135 S. Ct. at 2569 (Thomas, J., concurring in the judgment only).
[24] *Id.* at 2570.
[25] *Id.* at 2572.
[26] Erwin Chemerinsky, Constitutional Law Principles & Policies 559 (2011).
[27] *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985).
[28] *See United States v. Williams*, 553 U.S. 285, 304 (2008) ("A conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited.").
[29] *See generally* Erwin Chemerinsky, *Substantive Due Process*, 15 Touro L. Rev. 1501 (1999).
[30] Chemerinsky, *supra* note 26 at 559. For examples of criticisms of the doctrine, *see Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 293-301 (1990) (Scalia, J., concurring); and Thomas B. McAffee, *Overcoming* Lochner *in the Twenty-First Century: Taking Both Rights and Popular Sovereignty Seriously as We Work to Secure Equal Citizenship and Promote the Public Good*, 42 U. Rich. L. Rev. 597, 617 (2008).
[31] Cristina D. Lockwood, *Defining Indefiniteness: Suggesting Revisions to the Void for Vagueness Doctrine*, 8 Cardozo Pub. L. Pol'y & Ethics J. 255, 263-64 & n.22 (Spring 2010) (explaining early cases involving vagueness "did not mention a constitutional basis" and instead were "focused on notice," and noting possible Roman law bases for notice concept); Andrew E. Goldsmith, *The Void-for-Vagueness Doctrine in the Supreme Court, Revisited*, 30 Am. J. Crim. L. 279, 283-84 (Spring 2003) (describing notice rationale for the modern vagueness test).

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