

Oklahoma Law Review

Volume 73 | Number 1

Symposium: Drawing the Line: Modern Sexual Conflicts and the Law

2020

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Recommended Citation

Donald A. Dripps, *Due Process Overbreadth? The Void for Vagueness Doctrine, Fundamental Rights, and the Brewing Storm over Undefined Consent in Sexual Assault Statutes*, 73 OKLA. L. REV. 121 (2020), <https://digitalcommons.law.ou.edu/olr/vol73/iss1/7>

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DUE PROCESS OVERBREADTH? THE VOID FOR VAGUENESS DOCTRINE, FUNDAMENTAL RIGHTS, AND THE BREWING STORM OVER UNDEFINED CONSENT IN SEXUAL ASSAULT STATUTES

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Three seemingly unrelated legal developments are on a collision course. The first is the trend toward defining criminal sexual assault by the absence of the victim's consent rather than by the defendant's use of force.¹ This doctrinal trend reflects the widely shared moral judgment that the essential wrongness underlying rape is the violation of the victim's sexual autonomy.²

The second development is the Supreme Court's recognition of a constitutional right to private sexual relations between consenting adults.³ As with the move toward defining sex crimes by the absence of consent,⁴ this move toward invalidating sex offenses when consent is present reflects the perceived special value of sexual autonomy. Here, however, the widespread moral judgment is that sexual intimacy *with* consent has special value that sets it apart from and ahead of other interpersonal relationships, whether those of business or of platonic friendships. The reform of sexual assault laws reflects the value of negative freedom about sex, while the constitutional right of sexual privacy reflects the value of positive freedom about sex.⁵

The third development is the Supreme Court's robust application of the void-for-vagueness doctrine ("VFVD").⁶ The Court has applied the VFVD for more than a century. The opinions, however, apply the doctrine

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1. *See infra* Part I.

2. *See infra* Part I.

3. *See* United States v. Windsor, 570 U.S. 744, 769 (2013) ("Private, consensual sexual intimacy between two adult persons of the same sex may not be punished by the State, and it can form 'but one element in a personal bond that is more enduring.'" (quoting Lawrence v. Texas, 539 U.S. 558, 567 (2003))); *see also infra* Part II.

4. *See infra* Part I.

5. *See infra* Part II.

6. *See infra* Part III.

sometimes in a minimal form and, sometimes, in a sweeping form that resembles the First Amendment overbreadth doctrine.⁷ In minimal form, the VFVD permits striking down a statute as void only when the statute has no constitutionally permitted applications.⁸ Logically, this view of facial challenges entails a strict standing requirement, i.e., individuals may challenge a law under the VFVD only if they face actual injury and only if they assert their own rights rather than the rights of third parties.

Some cases, however, take a broader view of the VFVD. Under this view, a vague statute is void even when it has a clear core of forbidden conduct.⁹ If the statute's penumbra is wide and indefinite, so as to invite not just unfair surprise but arbitrary enforcement as well, the Court may invalidate the statute completely (thus the "void" in the VFVD). This version of the VFVD resembles the First Amendment overbreadth doctrine. The First Amendment overbreadth doctrine permits an individual prosecuted for expression not protected by the First Amendment to challenge the facial constitutionality of a statute on the ground that the statute might inhibit others from engaging in constitutionally protected speech.¹⁰ The Court has repeatedly said that the First Amendment overbreadth doctrine is "strong medicine" available only to combat the disease of self-censorship.¹¹ Yet, if there is any such thing as the *void* for vagueness doctrine applicable to criminal statutes that restrict conduct as distinct from speech, the VFVD functions as a sort of overbreadth doctrine. If a statute has any constitutionally permissible application, then facial invalidation, rather than simply cutting off the unconstitutional excesses, amounts to a due-process overbreadth doctrine that protects not the expressive, but the behavioral, autonomy of third parties.

7. *See infra* Part III.

8. *See infra* Part III.

9. *See infra* Part III.

10. *See infra* Part III.

11. *See, e.g.*, *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973) ("Application of the overbreadth doctrine in this manner is, manifestly, strong medicine."); *see also, e.g.*, *United States v. Williams*, 553 U.S. 285, 293 (2008) (quoting *L.A. Police Dep't v. United Reporting Pub'g Corp.*, 528 U.S. 32, 39 (1999)).

A criminal statute that punishes sex without “consent” relies on that uncertain term to delineate the border between conduct that is punished by years in prison and registered sex offender status from conduct that the Court has come very close to characterizing as a fundamental right. Few jurisdictions have yet defined a criminal offense in terms of sexual contact absent “consent” without some more specific hallmarks of just what counts as consent. Perhaps future courts will be content to continue using “as applied” to label losing claims of vagueness and “facial challenge” to label successful claims. But a storm is brewing and it may not blow over. This Article describes each of these developments, and closes with some thoughts on how to mediate the challenges presented by their looming collision.

*I. Increasing Respect for (Negative) Sexual Autonomy:
Consent-Based Criminal Statutes*

Into the twentieth century, Anglo-American law defined rape as sexual penetration, by force, and without consent.¹² Peculiar, defense-favorable rules of evidence, together with a global exception for marital rape, accompanied this basic definition.¹³ The American Law Institute’s (ALI) Model Penal Code (MPC), hugely influential and justly celebrated, inspired little change.¹⁴ The MPC was, in this instance, more a restatement of existing law than a blueprint for reform.¹⁵

12. See, e.g., 18 PA. STAT. AND CONS. STAT. ANN. § 3121(a)(1)-(2) (West 2020) (stating that “[a] person commits a felony of the first degree when the person engages in sexual intercourse with a complainant” through “forcible compulsion”); see also *Iowa v. Keturokis*, 276 N.W. 600, 602–03 (Iowa 1937) (providing the then-existing state statutes on rape describing force as a component of the crime); *Dawkins v. Alabama*, 58 Ala. 376, 378 (1877) (“A distinct offense, though punished with like severity, was the carnal knowledge and abuse of a female child under the age of ten years. Force, overcoming the resistance of the woman, if she was not an idiot, or subdued by fraud, or rendered unconscious by the administration of drugs, medicines, intoxicating drinks, or other substances, was an indispensable element of the offense of rape.”).

13. See, e.g., STEPHEN J. SCHULHOFER, UNWANTED SEX 18 (1998) (“To guard against false accusations, courts imposed strict rules of proof that were unique to rape cases.”).

14. The Model Penal Code defines rape as a male having sexual intercourse with a female not his wife when:

- (a) he compels her to submit by force or by threat of imminent death, serious bodily injury, extreme pain or kidnapping, to be inflicted on anyone; or
- (b) he has substantially impaired her power to appraise or control her

Genuine reform began with the abolition of the resistance requirement. With resistance no longer required, the difficult issues that divide informed opinion began to emerge. Is the gist of the crime the use of violence or the violation of autonomy? Is the violation of autonomy itself a kind of violence? Does the defendant need to be at fault with respect to the absence of consent? And, if the gravamen of the crime is violation of autonomy, what pressures other than force are consistent with autonomy and so not criminal?

Wherever one stands on the normative issues, the criminal law has been moving in the direction of punishing nonconsensual sex, though more seriously when the defendant uses what would traditionally be seen as force, but still seriously when that kind of force is absent. As I wrote more than ten years ago: “Despite occasional reaffirmations of a robust force requirement, the trend toward basing liability entirely, or at least primarily, on the absence of consent appears to be strong.”¹⁶ More recent scholarship confirms this tide is still coming in:

We have seen criminal concepts of “force” in some definitions of rape evolve to include nonphysical “intellectual, moral, emotional, or psychological force,” and even to mean merely the force “inherent” in accomplishing sexual penetration and nothing more. Indeed, many states have shed the traditional force requirement so that rape is now sometimes defined as penetration without consent. With force becoming less important

conduct by administering or employing without her knowledge drugs, intoxicants or other means for the purpose of preventing resistance; or

(c) the female is unconscious; or

(d) the female is less than 10 years old.

MODEL PENAL CODE § 213.1(1) (AM. LAW INST. 1962).

15. The MPC also describes a lesser felony of “gross sexual imposition” as “sexual intercourse with a female not his wife” when “he compels her to submit by any threat that would prevent resistance by a woman of ordinary resolution[.]” *Id.* § 213.1(2)(a). The Commentary makes clear that this section applies only to use of force less heinous than that enumerated in § 213.1(a). *See id.* § 213.1 explanatory note (“Section 213.1(2) defines the lesser offense of gross sexual imposition, encompassing as a third degree felony several categories of conduct that were punished as rape at common law.”).

16. Donald Dripps, *After Rape Law: Will the Turn to Consent Normalize the Prosecution of Sexual Assault?*, 41 AKRON L. REV. 957, 969 (2008) (footnote omitted).

in ideas of sexual violence, more legal focus came to be placed on whether the sexual encounter lacked consent.¹⁷

A substantial minority of states no longer require proof of force for felony sexual-assault offenses.¹⁸ To those states we can add the federal jurisdiction, where the criminal code provides that whoever “knowingly engages in sexual contact with another person without that other person’s permission shall be fined under this title, imprisoned not more than two years, or both.”¹⁹

The most thoroughly considered proposal for a consent-based regime is the draft revision of the Model Penal Code.²⁰ While the ALI Council rejected a revised draft in the spring of 2016,²¹ if the ALI ever approves a consent-based MPC provision, it would likely accelerate the trend toward making unforced but nonconsensual sex a crime. But that trend began before the ALI project and there is no reason to believe that the defeat of the proposed draft signals skepticism about focusing on consent. It signals, rather, that the devil’s in the details about how consent is to be defined.

My claim here is a descriptive one about positive law in the United States. I take no position here on why autonomy is valuable,²² or whether laws against sexual assault promote, or ought to promote, values other than autonomy.²³

17. Jacob Gersen & Jeannie Suk, *The Sex Bureaucracy*, 104 CALIF. L. REV. 881, 889 (2016) (footnotes omitted).

18. See MODEL PENAL CODE § 213.1(2) statutory commentary 37 n.87 (AM. LAW INST., Discussion Draft No. 2, 2015) (stating that “15 states [have] no statutory force requirement” and that “[t]hree states have eliminated force requirements through judicial interpretation (New Jersey, Florida and Virginia)”) (citations omitted).

19. 18 U.S.C. § 2244(b) (2018).

20. See MODEL PENAL CODE § 213.1(2) statutory commentary (Discussion Draft No. 2).

21. See Bradford Richardson, *American Law Institute Rejects Affirmative Consent Standard in Defining Sexual Assault*, WASH. TIMES (May 17, 2016), <http://www.washingtontimes.com/news/2016/may/17/american-law-institute-rejects-affirmative-consent/>.

22. See, e.g., Jonathan Witmer-Rich, *It’s Good to Be Autonomous: Prospective Consent, Retrospective Consent, and the Foundation of Consent in the Criminal Law*, 5 CRIM. L. & PHIL. 377, 379–84 (2011) (reviewing Mill’s self-interest theory, Feinberg’s personal sovereignty theory, and Raz’s well-being theory).

23. See, e.g., JOHN GARDNER, *The Wrongness of Rape, in OFFENCES AND DEFENCES* 1, 15 (2007) (“That a rapist objectifies his victim by treating her as a mere repository of use-value is what is basically wrong with rape.”). See generally Russell Christopher, *Unconditional Coercion and Positive Autonomy*, 73 OKLA. L. REV. 159 (2020); Catharine A. MacKinnon, *Rape Redefined*, 10 HARV. L. & POL’Y REV. 431 (2016) (defending an equality-based understanding of rape law); Jed Rubenfeld, *The Riddle of Rape-by-Deception and the*

II. Increasing Respect for (Positive) Sexual Autonomy: Lawrence v. Texas

Lawrence v. Texas famously struck down the Texas same-sex sodomy statute as a violation of substantive due process.²⁴ As the *Lawrence* majority saw the case, it

involve[d] two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. “It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter.” *The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.*²⁵

Neither in this passage nor elsewhere did the *Lawrence* majority describe the right to sex in private among consenting adults as a “fundamental right” subject to abridgment only by policies narrowly tailored to promote a compelling state interest.

The key sentence, however, is exquisitely evasive. The Court does not say that Texas has no legitimate interest at all. It says that Texas has no legitimate interest that can justify its intrusion.²⁶ This equivocal stance gives little insight and might mean that the state has a great interest, but not great enough; or a substantial interest, but not substantial enough; or no interest at all, so that the statute flunks even the rational basis test.

The Supreme Court has the luxury of leaving issues for another day. The lower courts cannot send litigants away by denying certiorari. Understandably, they have given *Lawrence* somewhat different interpretations. Some lower federal courts have characterized *Lawrence*

Myth of Sexual Autonomy, 122 YALE L.J. 1372 (2013) (arguing that “self-possession,” rather than consent, should be the basis of rape law).

24. 539 U.S. 558, 578–79 (2003).

25. *Id.* at 578 (internal citation omitted) (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 847 (1992)) (emphasis added).

26. *Id.*

solely as an exercise in minimal rational basis review.²⁷ Other federal courts have characterized *Lawrence* as recognizing a stronger substantive due process right subject to a more searching review.²⁸ Academic commentary recognized the malleable character of the *Lawrence* opinion, pointing to a variety of plausible readings.²⁹

The more recent landmark decision, *Obergefell v. Hodges*, held that excluding same-sex couples from the long-recognized fundamental right to marry violated both due process and equal protection.³⁰ As Nan Hunter said of *Lawrence*, *Obergefell* is “easy to read, but difficult to pin down.”³¹ *Obergefell*’s focus on marriage suggests that it neither adds nor subtracts from whatever right to unmarried consensual sex was recognized in *Lawrence*.

27. See, e.g., *Lofton v. Sec’y of the Dep’t of Children & Family Servs.*, 358 F.3d 804, 817 (11th Cir. 2004) (“[I]t is a strained and ultimately incorrect reading of *Lawrence* to interpret it to announce a new fundamental right.”); *Williams v. Att’y Gen. of Ala.*, 378 F.3d 1232, 1238 (11th Cir. 2004) (“[W]e decline to extrapolate from *Lawrence* and its *dicta* a right to sexual privacy triggering strict scrutiny. To do so would be to impose a fundamental-rights interpretation on a decision that rested on rational-basis grounds . . .”).

28. See, e.g., *Witt v. Dep’t of the Air Force*, 527 F.3d 806, 816 (9th Cir. 2008) (“We cannot reconcile what the Supreme Court did in *Lawrence* with the minimal protections afforded by traditional rational basis review.”); *id.* at 821–22 (remanding for application of “an intermediate level of scrutiny under substantive due process” to the statute at issue); *Cook v. Gates*, 528 F.3d 42, 56 (1st Cir. 2008) (“*Lawrence* is, in our view, another in this line of Supreme Court authority that identifies a protected liberty interest and then applies a standard of review that lies between strict scrutiny and rational basis.”); *Reliable Consultants, Inc. v. Earle*, 517 F.3d 738, 745 n.32 (5th Cir. 2008) (“*Lawrence* did not categorize the right to sexual privacy as a fundamental right, and we do not purport to do so here. Instead, we simply follow the precise instructions from *Lawrence* and hold that the statute violates the right to sexual privacy, however it is otherwise described.”).

29. See, e.g., Dale Carpenter, *Is Lawrence Libertarian?*, 88 MINN. L. REV. 1140, 1149 (2004) (“*Lawrence* is not broadly libertarian. It is probably not even broadly liberty-affirming in matters sexual, though that is a closer call. The state can probably continue to prohibit prostitution and adult incest, for example, even when these acts result from the fully consensual choices of adults.”); Nan D. Hunter, *Living with Lawrence*, 88 MINN. L. REV. 1103, 1113–23 (2004) (discussing the many interpretations one could make based on the Court’s decision in *Lawrence*); Laurence H. Tribe, Essay, *Lawrence v. Texas: The “Fundamental Right” that Dare not Speak its Name*, 117 HARV. L. REV. 1893, 1917 (2004) (“[T]he strictness of the Court’s standard in *Lawrence*, however articulated, could hardly have been more obvious.”).

30. 135 S. Ct. 2584, 2608 (2015).

31. See Hunter, *supra* note 29, at 1103.

When a school teacher in Texas challenged her conviction for sex with a high school student who was above the state's age of consent, the Texas Court of Appeals curtly rebuffed the defendant's claim to a fundamental right to engage in consensual sex in private.³² Echoing prior Texas decisions, the court characterized *Lawrence* as recognizing consensual sex as "a non-fundamental right using language that applied a rational-basis review."³³ *Obergefell*, the Texas court said, didn't add anything to the right recognized in *Lawrence* because, while the *Obergefell* opinion "discussed marriage as a fundamental right," it "referred to consensual sex, not as a fundamental right, but as an 'intimate association.'"³⁴ The Supreme Court of the United States issued that most inscrutable of rulings, a denial of certiorari.³⁵

The Texas courts' characterization of *Lawrence*, however, runs into the formidable argument that *the holding* in *Lawrence* cannot be squared with rational basis review under such cases as *Williamson v. Lee Optical of Oklahoma*.³⁶ *Williamson* rejected a substantive due process challenge to a state statute that required a prescription from an ophthalmologist or optometrist before an optician could fit old lenses into new frames or replace broken lenses.³⁷ The Court rejected the constitutional challenge to this piece of obvious rent-seeking by the medical profession.³⁸ "The day is gone," said Justice Douglas in *Williamson*, "when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought."³⁹

The law might be "needless" and "wasteful," and not "in every respect logically consistent with its aims," but it was nonetheless "enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it."⁴⁰ Justices who brought that standard of review to the Texas sodomy statute could not

32. *Ramirez v. Texas*, 557 S.W.3d 717, 722 (Tex. App. 2018).

33. *Id.* at 721 (citing *Lawrence v. Texas*, 539 U.S. 558, 578 (2003)).

34. *Id.* at 720 (quoting *Obergefell*, 135 S. Ct. at 2600).

35. *Ramirez v. Texas*, 139 S. Ct. 799 (2019) (denying cert).

36. 348 U.S. 483 (1955).

37. *Id.* at 488, 490–91.

38. *See id.* at 490–91.

39. *Id.* at 488.

40. *Id.* at 487–88.

have struck it down. The *Lawrence* Court's expansive, if evasive, references to "liberty"⁴¹ make quite clear that the majority did not think the issue was some statute "regulatory of business and industrial conditions[.]"⁴²

To say that *Lawrence* left review of laws intruding on private consensual sex in the same category as laws regulating eyeglass repairs may not be demonstrably incorrect. However, the nothing-to-see-here characterization seems at odds with both the holding in *Lawrence* and with the intense controversy attending that landmark. Justice Scalia, for example, read the majority opinion as far more momentous than a technical application of the rational basis test.⁴³

III. Recent Developments: The Void-for-Vagueness Doctrine

Broadly, "the void-for-vagueness doctrine ["VFVD"] requires that a penal statute [first] define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited" and, second, describe the offense "in a manner that does not encourage arbitrary and discriminatory enforcement."⁴⁴ The recent cases generally treat constraining official discretion as more important than fair notice.⁴⁵

The VFVD is well-established, but the Supreme Court has taken two quite different approaches in cases decided under it. The classical model, based on *Marbury v. Madison*,⁴⁶ calls upon the federal courts to follow the Constitution when it conflicts with lesser laws such as penal statutes. When a penal statute covers conduct protected by the Constitution, as well as conduct not protected by the Constitution, the Court's typical response is to

41. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 562, 565, 567, 574 (2003).

42. *Williamson*, 348 U.S. at 488.

43. See *Lawrence*, 539 U.S. at 604 (Scalia, J., dissenting) (stating that the majority "laid waste the foundations of our rational-basis jurisprudence").

44. *Kolender v. Lawson*, 461 U.S. 352, 357 (1983) (citing *Village of Hoffman Estates v. Flipside*, 455 U.S. 489 (1982); *Smith v. Goguen*, 415 U.S. 566 (1974); *Grayned v. City of Rockford*, 408 U.S. 104 (1972); *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972); *Connally v. Gen. Constr. Co.*, 269 U.S. 385 (1926)).

45. See *id.* at 357–58 ("Although the doctrine focuses both on actual notice to citizens and arbitrary enforcement, we have recognized recently that the more important aspect of vagueness doctrine 'is not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement.'") (quoting *Goguen*, 415 U.S. at 574).

46. 5 U.S. (1 Cranch) 137 (1803).

reverse individual convictions based on constitutionally protected conduct, but to leave the statute in force with respect to other cases.⁴⁷

For example, in *McBoyle v. United States*, the defendant appealed his conviction for transporting an airplane across state lines.⁴⁸ The statute enumerated trucks, automobiles, and motorcycles, but also included a residual clause applicable to “any other self-propelled vehicle not designed for running on rails.”⁴⁹ Justice Holmes wrote for the Court that:

When a rule of conduct is laid down in words that evoke in the common mind only the picture of vehicles moving on land, the statute should not be extended to aircraft simply because it may seem to us that a similar policy applies, or upon the speculation that if the legislature had thought of it, very likely broader words would have been used.⁵⁰

The *McBoyle* Court refused to apply the statute at issue to the instant fact, but left the statute in force on facts where it clearly applied. Prosecutions for transporting automobiles in interstate commerce continued apace.⁵¹

McBoyle thus presented a garden-variety issue about the construction of a criminal statute. What if, however, a state court approved judicial enlargement of a statute? The state courts are the final arbiters of state law, but, as the Court held in *Bouie v. City of Columbia*, due process forbids unfair surprise.⁵² In *Bouie*, black sit-in protesters were convicted of criminal trespass for remaining in a segregated diner after receiving notice to leave.⁵³ The Supreme Court held that the convictions violated due process because the statute punished only entry without permission, not the defendants’

47. See, e.g., *Bouie v. City of Columbia*, 378 U.S. 347 (1964) (refusing to enforce convictions based on a new state-court interpretation of the statute after the individuals were arrested); *McBoyle v. United States*, 283 U.S. 25 (1931) (refusing to apply the statute beyond its explicit language).

48. *McBoyle*, 283 U.S. at 25.

49. *Id.* at 26 (quoting the language of the statute).

50. *Id.* at 27 (citing *United States v. Bhagat Singh Thind*, 261 U.S. 204, 209 (1923)).

51. See, e.g., *Lawrence v. United States*, 56 F.2d 555 (7th Cir. 1932) (affirming conviction for violation of the statute).

52. 378 U.S. 347, 362 (1964).

53. *Id.* at 348–49.

conduct—refusing to leave.⁵⁴ Even after this case, however, the statute remained in force.⁵⁵

In cases like *McBoyle* and *Bouie*, defendants assert their own right to be free from conviction, absent ex ante statutory condemnation, and the Court protects their rights by reversing their individual convictions (on statutory grounds in a federal case, and on due process grounds in a state case). In the First Amendment context, the Court permits a wider class of persons to seek the complete nullification of statutes regulating free expression. For example, in *Lovell v. City of Griffin*, a city ordinance made it a crime to distribute “literature” without first obtaining a permit.⁵⁶ The Court held the ordinance “void on its face” so that “it was not necessary for appellant to seek a permit under it.”⁵⁷ The overbreadth doctrine has both a standing and a remedial component, and total invalidation is possible even at the behest of litigants whose conduct was not constitutionally protected.⁵⁸

54. *Id.* at 355, 363 (finding defendants’ conduct “‘not enumerated in the statute’ at the time of their conduct”).

55. *Id.* at 362 (“While such a construction is of course valid for the future, it may not be applied retroactively, any more than a legislative enactment may be, to impose criminal penalties for conduct committed at a time when it was not fairly stated to be criminal.”).

56. 303 U.S. 444, 447 (1938).

57. *Id.* at 452.

58. See, e.g., Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 845 (1970). According to the article,

[T]he doctrine focuses directly on the need for precision in drafting to avoid conflict with first amendment rights. It may condemn a statute which comprehends a range of applications against privileged activity even though the interests it promotes outweigh the infringement of first amendment liberties. Furthermore, the Court has been willing to review the breadth of statutory burdens on expressive activity even in the case of a person whose conduct could constitutionally be burdened.

Id. (footnotes omitted). Scholars have since produced a large body of literature challenging the characterization of overbreadth as reflecting free-speech exceptionalism. See, e.g., Richard H. Fallon, Jr., *Fact and Fiction About Facial Challenges*, 99 CALIF. L. REV. 915, 920 (2011) (“[F]acial challenges constitute the norm, not the anomaly, in constitutional litigation before the Supreme Court in which the validity of statutes and their applications is at issue.”); David H. Gans, *Strategic Facial Challenges*, 85 B.U. L. REV. 1333, 1337 (2005) (“[W]ithout naming it as such, the Court regularly employs this strategic device in a wide range of cases across many constitutional doctrines.”); Toni M. Massaro, *Chilling Rights*, 88 U. COLO. L. REV. 33, 39 (2017) (“[F]acial challenges of laws that are substantially overbroad and may chill constitutionally protected conduct all should receive the same ‘how soon’ and ‘by whom’ treatment that overbroad laws receive in free speech cases. The free speech overbreadth exception should become the general overbreadth rule.”); Henry Paul

The overbreadth cases, however, insist that third-party standing to seek facial invalidation is “strong medicine” limited to First Amendment challenges.⁵⁹ The Court’s resolution of due process-based challenges to vague criminal statutes, however, bears some resemblance to First Amendment overbreadth doctrine. The Court has viewed vague laws that might impinge upon First Amendment rights as especially suspect.⁶⁰ The structure of the VFVD, however, resembles overbreadth analysis even when free expression is not at risk.

For example, in *Papachristou v. City of Jacksonville*, the challenged ordinance provided:

Rogues and vagabonds, or dissolute persons who go about begging, common gamblers, persons who use juggling or

Monaghan, *Overbreadth*, 1981 SUP. CT. REV. 1, 4 (“The litigant’s right to insist on the application of a constitutionally valid rule translates into a requirement of congruence between the boundaries of the statute and the Constitution. This congruence requirement is of central importance not only in the First Amendment context but wherever any standard of review other than the rational basis test is mandated by the applicable substantive constitutional law.”); Kermit Roosevelt III, *Valid Rule Due Process Challenges: Bond v. United States and Erie’s Constitutional Source*, 54 WM. & MARY L. REV. 987, 1021 (2013) (“Valid rule due process challenges are more common than we think. They are not always explicitly articulated, but recognizing that an individual’s basic complaint is government compulsion without legal authorization allows us to identify such challenges.”).

59. *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973). The Court stated:

[F]acial overbreadth adjudication is an exception to our traditional rules of practice and that its function, a limited one at the outset, attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from “pure speech” toward conduct and that conduct—even if expressive—falls within the scope of otherwise valid criminal laws that reflect legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct.

Id. at 615.

60. See Anthony G. Amsterdam, Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 94 (1960) (footnote omitted):

Given these elements—a delegation of power to make particular judgments of value in the application of social coercion to private activity which may lie within the shelter of some specific constitutional guarantee—the ultimate response of the Court will depend upon the nature of the individual freedom menaced, the probability of its violation, the potential deterrent effect of the risks of irregularity and violation upon its exercise, and the practical power of the Court itself to supervise the scheme’s administration. It is evident that the first amendment freedoms receive most solicitous protection from today’s Court.

unlawful games or plays, common drunkards, common night walkers, thieves, pilferers or pickpockets, traders in stolen property, lewd, wanton and lascivious persons, keepers of gambling places, common railers and brawlers, persons wandering or strolling around from place to place without any lawful purpose or object, habitual loafers, disorderly persons, persons neglecting all lawful business and habitually spending their time by frequenting houses of ill fame, gaming houses, or places where alcoholic beverages are sold or served, persons able to work but habitually living upon the earnings of their wives or minor children shall be deemed vagrants and, upon conviction in the Municipal Court shall be punished as provided for Class D offenses.⁶¹

Some sections of the ordinance are extremely open-ended, such as “strolling around . . . without any lawful purpose.”⁶² Yet so long as actors read the ordinance as defining the prohibited persons by their conduct, some parts of it are not vague. A statute that punished “picking pockets” or “juggling in public” would be quite definite. If the Court had followed the *McBoyle-Bouie* model, it would have examined each defendant’s conviction for constitutionality and reversed the unconstitutional ones, leaving the statute in place. Certainly, some of the *Papachristou* defendants were indeed convicted under the purported authority of the ordinance’s global terms. *Papachristou* herself was charged with vagrancy for “prowling by auto,”⁶³ which isn’t even enumerated in the ordinance and could only have been covered by “wandering . . . without any lawful purpose.”⁶⁴

The Court, however, went beyond reversing the convictions before it. Justice Douglas wrote for the Court that “[t]his ordinance is void for vagueness, both in the sense that it ‘fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute,’ and because it encourages arbitrary and erratic arrests and convictions.”⁶⁵ The specific reference to “arrests” makes plain the implication of declaring the ordinance “void.” The ordinance is a nullity

61. 405 U.S. 156, 156 n.1 (1972) (quoting the city ordinance at issue).

62. *Id.* (quoting the city ordinance at issue).

63. *Id.* at 158.

64. *Id.* at 156 n.1.

65. *Id.* at 162 (internal citations omitted) (quoting *United States v. Harriss*, 347 U.S. 612, 617 (1954)) (citing *Thornhill v. Alabama*, 310 U.S. 88 (1940); *Herndon v. Lowry*, 301 U.S. 242 (1937)).

and so cannot justify future arrests, even if those arrested are not charged or are acquitted.

Ten years after *Papachristou*, however, the Court turned back to the classical model. In *Village of Hoffman Estates v. Flipside*, Flipside, a head shop, brought a pre-enforcement challenge to an ordinance which required businesses to obtain a license before selling merchandise “designed or marketed for use with illegal cannabis or drugs.”⁶⁶ Justice Marshall’s opinion for the Court first rejected Flipside’s First Amendment overbreadth argument because the ordinance did not abridge significant free speech rights.⁶⁷

With the First Amendment taken off the table, the Court then applied the *Bouie* template: “A law that does not reach constitutionally protected conduct and therefore satisfies the overbreadth test may nevertheless be challenged on its face as unduly vague, in violation of due process. To succeed, however, the complainant must demonstrate that the law is impermissibly vague in all of its applications.”⁶⁸ The ordinance, as clarified by regulations, clearly applied at least to “roach clips,” which Flipside offered for sale.⁶⁹ The facial challenge therefore failed.⁷⁰

The *Flipside* analysis might have produced a different result in *Papachristou*. There may, perhaps, be a First Amendment right to juggle, but surely there is no such right to pick pockets or commit other types of theft. Indeed, the broader the statute, the *less likely* it is to have no clear applications. The tension between *Flipside* and *Papachristou* became clear in subsequent cases.

In *Kolender v. Lawson*, Lawson brought a declaratory judgment action seeking facial invalidation of a California statute that provided a criminal penalty for anyone

[w]ho loiters or wanders upon the streets or from place to place without apparent reason or business and who refuses to identify himself and to account for his presence when requested by any

66. 455 U.S. 489, 491 (1982) (quoting the ordinance at issue).

67. *Id.* at 496 (“The ordinance is expressly directed at commercial activity promoting or encouraging illegal drug use. If that activity is deemed ‘speech,’ then it is speech proposing an illegal transaction, which a government may regulate or ban entirely.”) (citing *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 563–64 (1980); *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376, 388 (1973)).

68. *Id.* at 497.

69. *Id.* at 502.

70. *Id.* at 504–05.

peace officer to do so, if the surrounding circumstances are such as to indicate to a reasonable man that the public safety demands such identification.⁷¹

Justice White recited the *Flipside* formula and argued that the statute had at least one clear application, i.e., when an officer asks a suspect for identification during a *Terry* stop and the suspect refuses to answer, it is likely “the suspect would know from the statute that a refusal to provide any information at all would constitute a violation.”⁷²

Despite rooting his analysis in *Flipside*, Justice White’s opinion was in dissent.⁷³ The majority, per Justice O’Connor, concluded that the statute was “unconstitutionally vague on its face because it encourage[d] arbitrary enforcement by failing to describe with sufficient particularity what a suspect must do in order to satisfy the statute.”⁷⁴ Responding to Justice White’s invocation of *Flipside*, the majority argued that a criminal statute deserves less judicial deference than a civil law regulation of commercial businesses because criminal laws visit the unfairly surprised with punishment and authorize arbitrary enforcement by police.⁷⁵ The majority, however, did not disavow the similarity between the VFVD and the First Amendment overbreadth doctrine. On the contrary, the majority stated that “we [the Supreme Court] have traditionally viewed vagueness and overbreadth as logically related and similar doctrines.”⁷⁶

The next major clash between minimal and sweeping versions of the VFVD occurred in *City of Chicago v. Morales*.⁷⁷ Defendants convicted under Chicago’s Anti-Gang Loitering Ordinance challenged the ordinance as void for vagueness.⁷⁸ The ordinance was complex. It directed police officers who observed two or more persons, one of whom the officer

71. 461 U.S. 352, 353 & n.1 (1983).

72. *Id.* at 371–72 (White, J., dissenting).

73. *Id.* at 369 (White, J., dissenting).

74. *Id.* at 361.

75. *Id.* at 358 n.8 (“[W]here a statute imposes criminal penalties, the standard of certainty is higher. This concern has, at times, led us to invalidate a criminal statute on its face even when it could conceivably have had some valid application.”) (internal citation omitted); *id.* (“No authority cited by the dissent supports its argument about facial challenges in the arbitrary enforcement context.”).

76. *Id.*

77. 527 U.S. 41 (1999). By way of full disclosure, in this case the author filed a brief on behalf of the National Association of Criminal Defense Attorneys as *amicus curiae*, on behalf of respondents.

78. *Id.* at 45–46.

“reasonably believe[d] to be a criminal street gang member,” to order the group to disperse.⁷⁹ The ordinance made failure to comply with an order to disperse a crime.⁸⁰ It defined “loitering” as to “remain in any one place with no apparent purpose.”⁸¹

The Illinois Supreme Court struck the ordinance down in a unanimous opinion that did not address the facial/as-applied distinction.⁸² The state court held that the ordinance violated the VFVD because of the ambiguity of the definitions in the ordinance, specifically that of loitering.⁸³ The court also held the ordinance to be “an arbitrary restriction on personal liberties” and so a violation of substantive due process.⁸⁴

On appeal to the Supreme Court, Justice Stevens, joined by Justice Souter and Justice Ginsburg, delivered a plurality opinion that followed the sweeping approach of *Papachristou* and *Lawson*.⁸⁵ Without identifying any individual party before the Court as to whom the application of the ordinance had been vague, Justice Stevens concluded “that the vagueness of this enactment makes a facial challenge appropriate.”⁸⁶ Justice Stevens distinguished the ordinance in *Flipside* as a law that “simply regulates business behavior and contains a scienter requirement,”⁸⁷ in contrast to the Chicago ordinance that “is a criminal law that contains no *mens rea* requirement” and “infringes on constitutionally protected rights. When vagueness permeates the text of such a law, it is subject to facial attack.”⁸⁸

Justice Scalia’s dissent⁸⁹ defended the minimal view of the VFVD. In his view, “a facial attack, since it requires unconstitutionality in all circumstances, necessarily presumes that the litigant presently before the court would be able to sustain an as-applied challenge.”⁹⁰ *Kolender v. Lawson*, said Justice Scalia, “seems to have confused the standard for First

79. *Id.* at 47 n.2 (quoting the ordinance at issue).

80. *Id.* at 48 (quoting the ordinance at issue).

81. *Id.* 47 n.2 (quoting the ordinance at issue).

82. *Id.* at 50–51.

83. *Id.*

84. *Id.* at 50 (quoting *City of Chicago v. Morales*, 687 N.E.2d 53, 59 (1997)).

85. Justice Stevens provided the Court’s opinion. *Id.* at 44. Justices O’Connor, Kennedy, Souter, Ginsburg, and Breyer joined Parts I, II, and V. *Id.* Justices Souter and Ginsburg joined Parts III and VI. *Id.*

86. *Id.* at 55.

87. *Id.* (quoting *Village of Hoffman Estates v. Flipside*, 455 U.S. 489, 499 (1982)).

88. *Id.* (internal citations omitted) (footnote omitted).

89. *Id.* at 73–98 (Scalia, J., dissenting).

90. *Id.* at 78 n.1 (Scalia, J., dissenting) (citing *Flipside*, 455 U.S. at 495).

Amendment overbreadth challenges with the standard governing facial challenges on all other grounds.”⁹¹

Justice O’Connor, author of *Lawson*, concurred separately⁹² but did not join the discussion of facial challenges in Part III of the *Morales* plurality opinion.⁹³ Justice Kennedy also concurred,⁹⁴ without joining Part III or otherwise sharing a view on the facial challenge issue.⁹⁵ Justice Breyer joined Justice O’Connor’s opinion,⁹⁶ but also wrote separately to address the facial challenge issue.⁹⁷ As framed by Justice Breyer, the constitutional right at stake was the right to be free from arrest in the arbitrary discretion of the police.⁹⁸ So viewed, “[t]he ordinance is unconstitutional, not because a policeman applied this discretion wisely or poorly in a particular case, but rather because the policeman enjoys too much discretion in *every* case.”⁹⁹ But if that is true, it would seem to follow that every law that fails the arbitrary-enforcement prong of the VFVD is liable to facial challenge.

The various opinions in *Morales* failed to resolve the tension between the minimal view applied in *Flipside* and the sweeping view applied in *Papachristou* and *Lawson*. Justice Scalia, together with Chief Justice Rehnquist, joined Justice Thomas’s dissenting opinion.¹⁰⁰ Justice Thomas challenged the plurality’s vagueness analysis without speaking to the facial challenge issue.¹⁰¹ Thomas and Rehnquist did not join Justice Scalia’s opinion that placed primary emphasis on the facial challenge doctrine.¹⁰²

Even the three votes for a broad application of the VFVD were qualified by a procedural nicety. The Illinois Supreme Court had held the ordinance void on its face.¹⁰³ Even if it were inappropriate for a federal court to test the statute facially in the first place, things might be different when the state court reached the issue first:

91. *Id.* at 79 n.2 (Scalia, J., dissenting).

92. *Id.* at 64–69 (O’Connor, J., concurring in part and concurring in the judgment).

93. *See supra* note 85 and accompanying text.

94. *Morales*, 527 U.S. at 69–70 (Kennedy, J., concurring in part and concurring in the judgment).

95. *See supra* note 85 and accompanying text.

96. *Morales*, 527 U.S. at 44.

97. *Id.* at 70–73 (Breyer, J., concurring in part and concurring in the judgment).

98. *Id.* at 71 (Breyer, J., concurring in part and concurring in the judgment).

99. *Id.* (Breyer, J., concurring in part and concurring in the judgment).

100. *Id.* at 98–115 (Thomas, J., dissenting); *see also id.* at 44.

101. *See id.* at 106–15 (Thomas, J., dissenting).

102. *Id.* at 44.

103. *Id.* at 52.

When asserting a facial challenge, a party seeks to vindicate not only his own rights, but those of others who may also be adversely impacted by the statute in question. In this sense, the threshold for facial challenges is a species of third party (*jus tertii*) standing, which we have recognized as a prudential doctrine and not one mandated by Article III of the Constitution. When a state court has reached the merits of a constitutional claim, “invoking prudential limitations on [the respondent’s] assertion of *jus tertii* would serve no functional purpose.”¹⁰⁴

In *Morales*, then, dicta in a plurality opinion took the wide view of *Papachristou* and *Lawson*; Justice Breyer took the wide view provided the law failed the second prong of the test for vagueness; Justice Scalia objected to any facial challenge to any law that had at least one constitutional application; and four other justices declined the opportunity to join any of these opinions.

A solid majority of the justices took the broader view in *Skilling v. United States*.¹⁰⁵ Defendant Skilling challenged his conviction for conspiracy to violate the “honest services” statute.¹⁰⁶ Skilling argued that the “honest services” statute was void for vagueness.¹⁰⁷ Justice Ginsburg’s majority opinion held that the statute, construed to apply only to bribes and kickbacks, was not void for vagueness.¹⁰⁸ The majority clearly premised this interpretation of the statute on the Court’s duty to save acts of Congress from invalidation.¹⁰⁹ In other words, *Skilling* limited the statute to bribes and kickbacks because any broader reading of the statute would have made it void for vagueness, *even in cases of bribes and kickbacks*.

104. *Id.* at 55–56 n.22 (internal citation omitted) (quoting *City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 243 (1983)) (citing *Sec’y of State of Md. v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 955 (1984)). For discussion of the distinctive problem of facial challenges to state, as opposed to federal, laws, see Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, 283–87 (1994).

105. 561 U.S. 358 (2010).

106. *Id.* at 367; *see also* 18 U.S.C. § 1346 (2018) (“For the purposes of this chapter, the term ‘scheme or artifice to defraud’ includes a scheme or artifice to deprive another of the intangible right of honest services.”).

107. *Skilling*, 561 U.S. at 376–77, 399.

108. *Id.* at 411 (“Holding that honest-services fraud does not encompass conduct more wide ranging than the paradigmatic cases of bribes and kickbacks, we resist the Government’s less constrained construction absent Congress’ clear instruction otherwise.”).

109. *See id.* at 402–04.

Justice Scalia maintained the position he had taken in *Morales*. Here, however, he found that the statute was so vague as to have no clear applications whatsoever.¹¹⁰ Nevertheless, he remained skeptical about facial invalidation as a remedy.¹¹¹ Given that *Skilling* had not sought facial invalidation, but only reversal of his own conviction, Justice Scalia would have left future defendants to raise as-applied challenges.¹¹² The *Skilling* case itself would be a precedent, but not a ruling voiding the statute. Given Justice Scalia's conclusion that the statute had *no* application that was not unconstitutionally vague, those as-applied challenges would all succeed. If Justice Scalia's opinion had been for the majority, prosecutors would likely have given up on honest-services prosecutions, which seems to be functionally equivalent to facial invalidation.

Only Justices Thomas and Kennedy joined Scalia's opinion in *Skilling*.¹¹³ Justice Kennedy did not join Part III of Scalia's dissent—the portion of the opinion disclaiming facial invalidation as a remedy.¹¹⁴ Despite its ultimate holding, the *Skilling* majority's embrace of the broad view of the VFVD might be characterized as dicta. The Court held that the statute was not unconstitutionally vague, albeit based on a construction of the statute predicated on the broad version of the VFVD.¹¹⁵

Five years later, however, in *Johnson v. United States*,¹¹⁶ the Court held a statute—the residual clause of the Armed Career Criminal Act (ACCA)¹¹⁷—facially invalid under the VFVD.¹¹⁸ Samuel James Johnson, a white supremacist suspected by the government of plotting terrorism, pleaded guilty to a federal charge of being a felon in possession of a firearm.¹¹⁹ Standing alone, the firearms charge carried a maximum sentence of ten years.¹²⁰ The government, however, asked the district court to sentence Johnson under the ACCA, a statute providing a mandatory

110. *Id.* at 424 (Scalia, J., concurring in part and concurring in the judgment) (noting that Scalia believes that § 1346 has “no ‘ascertainable standard’ for the conduct it condemns”) (quoting *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 89 (1921)).

111. *Id.* at 424–25 (Scalia, J., concurring in part and concurring in the judgment).

112. *See id.* (Scalia, J., concurring in part and concurring in the judgment).

113. *Id.* at 415 (Scalia, J., concurring in part and concurring in the judgment).

114. *Id.* (Scalia, J., concurring in part and concurring in the judgment).

115. *See id.* at 411–13.

116. 135 S. Ct. 2551 (2015).

117. 18 U.S.C. § 924(e)(2)(B)(ii) (2018), *cited in Johnson*, 135 S. Ct. at 2564.

118. *Johnson*, 135 S. Ct. at 2560–62.

119. *Id.* at 2556.

120. *Id.* at 2555.

minimum term of fifteen years and a maximum of life when, *inter alia*, the defendant has a record including three or more violent felonies.¹²¹

In addition to forcible crimes, such as attempted murder or robbery, the act enumerates some specific serious crimes, such as burglary, as violent felonies.¹²² At the end of this list Congress added a residual clause including any crime that “otherwise involves conduct that presents a serious potential risk of physical injury to another.”¹²³ Johnson’s record included three violent felonies if his state conviction for possessing a sawed-off shotgun qualified under the residual clause.¹²⁴ Justice Scalia’s majority opinion, joined by five other justices,¹²⁵ overruled precedent by holding the residual clause void for vagueness.¹²⁶

The Court noted that the doctrine condemns “a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement.”¹²⁷ The vagueness doctrine “appl[ies] not only to statutes defining elements of crimes, but also to statutes fixing sentences.”¹²⁸ Given the attenuated interest prospective criminals have in calculating the precise downside of their planned offenses,¹²⁹ the discretion prong seems to be doing more work than the fair notice prong. Yet here, unlike *Papachristou*, *Lawson*, and *Morales*, the discretionary decisions were those of prosecutors rather than police on patrol.

Despite the contextual differences between prosecutorial charging decisions influencing sentences (rather than arrest or conviction) and police patrol decisions, the *Johnson* Court applied the *Papachristou-Lawson*

121. *Id.* at 2556; *see also* 18 U.S.C. § 924(c)(5)(A)-(B).

122. 18 U.S.C. § 924(e)(2)(B).

123. *Id.* § 924(e)(2)(B)(ii).

124. *Johnson*, 135 S. Ct. at 2556.

125. *Id.* at 2555.

126. *Id.* at 2563.

127. *Id.* at 2556 (emphasis added) (citing *Kolender v. Lawson*, 461 U.S. 352, 357–58 (1983)).

128. *Id.* at 2557 (citing *United States v. Batchelder*, 442 U.S. 114, 123 (1979)).

129. *See id.* at 2577 (Alito, J., dissenting) (“The fair notice concerns that inform our vagueness doctrine are aimed at ensuring that a ‘person of ordinary intelligence [has] a reasonable opportunity to know what is prohibited, so that he may act accordingly.’ The fear is that vague laws will ‘trap the innocent.’ These concerns have less force when it comes to sentencing provisions, which come into play only after the defendant has been found guilty of the crime in question.”) (internal citations omitted) (quoting *Village of Hoffman Estates v. Flipside*, 455 U.S. 489, 498 (1982)).

model.¹³⁰ In a remarkable *volte-face* from his caustic dissent in *Morales*, Justice Scalia wrote the following:

In all events, although statements in some of our opinions could be read to suggest otherwise, 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. For instance, we have deemed a law prohibiting grocers from charging an “unjust or unreasonable rate” void for vagueness—even though charging someone a thousand dollars for a pound of sugar would surely be unjust and unreasonable. We have similarly deemed void for vagueness a law prohibiting people on sidewalks from “conduct[ing] themselves in a manner annoying to persons passing by”—even though spitting in someone’s face would surely be annoying. These decisions refute any suggestion that the existence of *some* obviously risky crimes establishes the residual clause’s constitutionality.¹³¹

The majority quite clearly imported the overbreadth doctrine’s remedial component—facial invalidation—just as it had in *Papachristou* and *Lawson*.

The majority also seemed to apply the overbreadth doctrine’s standing component. Not only did *Johnson* invalidate the residual clause on its face, it did so without first determining whether the clause was vague as applied to Johnson’s prior conviction for possessing a sawed-off shotgun.¹³²

130. *See id.* at 2560–61.

131. *Id.* at 2560–61 (internal citations omitted) (citing *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 89 (1921); *Coates v. Cincinnati*, 402 U.S. 611 (1971)).

132. *Id.* at 2563. Justice Thomas rejected the majority’s analysis, but concurred because he found the residual clause did not apply to the sawed-off shotgun conviction. *See id.* at 2563 (Thomas, J., concurring in the judgment) (“[R]ather than use the Fifth Amendment’s Due Process Clause to nullify an Act of Congress, I would resolve this case on more ordinary grounds. Under conventional principles of interpretation and our precedents, the offense of unlawfully possessing a short-barreled shotgun does not constitute a ‘violent felony’ under the residual clause of the Armed Career Criminal Act (ACCA).”). Justice Alito rejected the majority’s vagueness analysis but concluded that Johnson’s prior offense was, as a statutory matter, a “crime of violence” and therefore dissented. *Id.* at 2582 (Alito, J., dissenting) (“Because I would not strike down ACCA’s residual clause, it is necessary for me to address whether Johnson’s conviction for possessing a sawed-off shotgun qualifies as a violent felony. Under either the categorical approach or a conduct-specific inquiry, it does.”).

In *Morales*, Justice Scalia's dissent took the premise to be that the remedy of facial invalidation was only available when the statute had no clear applications, and the conclusion followed that the individual defendant must be one to whom the law did not clearly apply.¹³³ His majority opinion in *Johnson* simply reversed the syllogism. "It seems to us that the dissent's [Justice Alito's] supposed requirement of vagueness in all applications is not a requirement at all, but a tautology: If we hold a statute to be vague, it is vague in all its applications (and never mind the reality)."¹³⁴ This certainly seems to adopt the broad view of the VFVD, especially since—unlike *Morales*, where the Supreme Court reviewed a state court's decision to strike the statute on its face—*Johnson* was a federal prosecution.

Only two justices adhered to the view that the VFVD condemns only laws that have no cases of clear application. Justice Thomas, concurring, repeated the position he took in his *Morales* dissent.¹³⁵ Justice Alito, dissenting, chastised the majority for "hold[ing] that vagueness bars the use of the residual clause in other cases in which its applicability can hardly be questioned."¹³⁶ Justice Thomas and Justice Alito did not agree with the majority's approach to facial challenges under the VFVD, but they accurately described it.

*Sessions v. Dimaya*¹³⁷ relied on *Johnson* to invalidate similar "crime of violence" language in the Immigration and Nationality Act (INA).¹³⁸ Dimaya had been twice convicted of burglary.¹³⁹ Justice Thomas in dissent argued that, because the residual clause in the INA was not vague as to burglary, Dimaya could not bring a facial challenge under the VFVD.¹⁴⁰

133. See *supra* notes 89–91 and accompanying text.

134. *Johnson*, 135 S. Ct. at 2561.

135. *Id.* at 2573 (Thomas, J., concurring in the judgment) ("[I]f there is an unmistakable core that a reasonable person would know is forbidden by the law, the enactment is not unconstitutional on its face.") (quoting *City of Chicago v. Morales*, 527 U.S. 41, 112 (1999) (Thomas, J., dissenting)).

136. *Id.* at 2581 (Alito, J., dissenting).

137. 138 S. Ct. 1204 (2018).

138. 18 U.S.C. § 16(b) (2018).

139. *Dimaya*, 138 S. Ct. at 1211.

140. *Id.* at 1250 (Thomas, J., dissenting) ("If the vagueness doctrine has any basis in the original meaning of the Due Process Clause, it must be limited to case-by-case challenges to particular applications of a statute. . . . This Court's precedents likewise recognize that, outside the First Amendment context, a challenger must prove that the statute is vague as

Thomas highlighted that while *Johnson* preliminarily rejected “that a facial challenge requires a statute to be vague ‘in all applications,’” the case did not determine if a statute must definitely “be vague as applied to the person challenging it.”¹⁴¹ Instead his dissent noted that the Court did not need to address that point “because the Court concluded that ACCA’s residual clause was vague as applied to the crime at issue there: unlawful possession of a short-barreled shotgun.”¹⁴²

The majority in *Dimaya* rebuffed this attempt to resuscitate Justice Scalia’s dissent in *Morales*. It is by no means clear, according to the *Dimaya* majority, that burglary is a crime of violence.¹⁴³ “[S]till more fundamentally, *Johnson* made clear that our decisions ‘squarely contradict the theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision’s grasp.’”¹⁴⁴

The VFVD is here to stay. In *Johnson*, Justice Thomas filed a separate opinion condemning the doctrine as a roving commission for activist judges to overrule elected legislatures on questions of policy.¹⁴⁵ The rest of the justices in *Johnson* largely ignored this radical but formidable critique. In *Dimaya*, Justice Gorsuch, a newly appointed justice with an originalist orientation similar to Justice Thomas’s, took issue with Justice Thomas’s stance. Gorsuch defended the VFVD as a necessary implication of due process, with deep roots in early practice as well as the Constitution’s text and structure.¹⁴⁶

applied to him.”). Justice Kennedy and Justice Alito joined this portion of Justice Thomas’s dissent. *Id.* at 1234 (Thomas, J., dissenting).

141. *Id.* at 1250 (Thomas, J., dissenting) (quoting *Johnson v. United States*, 135 S. Ct. 2551, 2561 (2015)).

142. *Id.* (Thomas, J., dissenting) (citing *Johnson*, 135 S. Ct. at 2560).

143. *See id.* at 1214–15 n.3. This discussion is in Part III of Justice Kagan’s opinion, a Part joined by Justices Ginsburg, Breyer, Sotomayor, and Gorsuch. *Id.* at 1210.

144. *Id.* (quoting *Johnson*, 135 S. Ct. at 2561).

145. *See Johnson*, 135 S. Ct. at 2570 (Thomas, J., concurring in the judgment) (“Since that time, the Court’s application of its vagueness doctrine has largely mirrored its application of substantive due process.”).

146. *Dimaya*, 138 S. Ct. at 1223–28 (Gorsuch, J., concurring in part and concurring in the judgment). Justice Gorsuch wrote the majority opinion in *United States v. Davis*, 139 S. Ct. 2319 (2019). *Davis* dealt with a VFVD challenge to 18 U.S.C. § 924(c)(3)(b), which provided a mandatory minimum sentence for defendants who use, carry, or possess a firearm in connection with a felony “that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.” The majority relied on *Johnson* to hold § 924(c)(3)(b) void for vagueness. The dissent argued, *inter alia*, that the constitutional avoidance canon called for construing the

So, for the foreseeable future, the Court will continue to scrutinize statutes under the two prongs of the VFVD. *Johnson* and *Dimaya* reaffirmed the VFVD despite Justice Thomas's foundational challenge. These decisions not only preserved but also "revitalized" the doctrine,¹⁴⁷ by settling the confusion in *Morales* in favor of the right of defendants (civil or criminal) to bring facial challenges against laws that have some clear applications.

IV. Vagueness Challenges to Consent-Based Sexual Assault Statutes

A. The Brewing Storm

The Colorado courts have consistently rejected vagueness challenges to a section of the state's sexual assault statute that makes it a crime to commit sex acts on a victim when defendant "actor causes submission of the victim by means of sufficient consequence reasonably calculated to cause submission against the victim's will[.]"¹⁴⁸ The Colorado Supreme Court rejected a VFVD challenge to this statute as early as the 1981 decision in *Colorado v. Smith*.¹⁴⁹

Smith predated *Lawrence* and *Johnson* by decades. *Smith* applied the narrow, as-applied version of the VFVD.¹⁵⁰ "Moreover," said the *Smith* court, "[it is not] unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross

statute to save it. *See Davis*, 139 S. Ct. at 2349–53 (Kavanaugh, J., dissenting). The avoidance-canon argument would have gone far toward reinstating the classical view—the view rejected by both *Johnson* and *Dimaya*. *See id.* at 2333 (majority opinion) ("Respect for due process and the separation of powers suggests a court may not, in order to save Congress the trouble of having to write a new law, construe a criminal statute to penalize conduct it does not clearly proscribe."). Notably, Chief Justice Roberts joined the dissent but refused to endorse this part of the dissenting opinion. That position is consistent with the Chief Justice's vote for the majority in *Johnson*. This suggests that only Justices Kavanaugh, Alito, and Thomas continue to support the classical approach.

147. *Islas-Veloz v. Whitaker*, 914 F.3d 1249, 1252 (9th Cir. 2019) (W. Fletcher, J., concurring).

148. The current version of this provision is COLO. REV. STAT. § 18-3-402(1)(a) (2019).

149. 638 P.2d 1, 7 (Colo. 1981) (en banc).

150. *See id.* at 5–6 ("The defendants cite several hypothetical examples to demonstrate their claim that the scope of the statute is unclear. However, they do not contend that any of the defendants here is charged on the basis of such conduct. 'Disputes concerning the application of a criminal statute to marginal cases can be more meaningfully resolved according to the rules of strict construction of the statutory terms within the context of the specific facts of the case.'") (quoting *Colorado v. Garcia*, 541 P.2d 687, 689 (Colo. 1975)).

the line.”¹⁵¹ Since *Smith, Johnson* rejected the strict-construction, as-applied approach to the VFVD, and *Lawrence* gave fresh constitutional protection to with-consent conduct.¹⁵²

The Colorado statute, moreover, includes an implicit mens rea requirement.¹⁵³ The defendant’s “means” must not only cause the victim to submit against the victim’s will, but the means must also be “reasonably calculated” to cause submission against the will.¹⁵⁴ A defendant cannot be guilty unless a reasonable person would know that the means used were likely to be coercive. The *Smith* court took this language to require not just negligence but subjective awareness that coercion was likely.¹⁵⁵ This at least reduces fair notice concerns. Not all sex-without-consent statutes, however, require mens rea beyond the general intent to perform the sex act.

B. Vagueness Challenges to Sex-Without-Consent Statutes After Lawrence and Johnson

Recent statutes deleting all traces of the force element found in traditional rape statutes have taken various forms.¹⁵⁶ Some criminalize sex without consent, without including a statutory definition of consent.¹⁵⁷ The statutes that undertake to define consent say either that expressed refusal is (at least one species of) nonconsent,¹⁵⁸ while others say nonconsent is the absence of affirmative permission.¹⁵⁹ Finally, some statutes criminalize sex

151. *Id.* at 6 (quoting *Colorado v. Blue*, 544 P.2d 385, 388 (Colo. 1975) (en banc)).

152. *Smith* also relied on the long-standing role of consent in the law of rape to fend off the vagueness challenge. *See id.* at 4 n.5 (“Finally, the statute must be read with reference to the traditional crimes which are its forerunners. Common law rape and its statutory counterparts have historically made the lack of consent to sexual penetration essential to the offense.”). To say that a statute making consent exculpatory is a statute condemning forced sex, however, is not the same as saying that a statute condemning sex without consent is constitutional.

153. *See* COLO. REV. STAT. § 18-3-402(1)(a) (2019).

154. *Id.*

155. *See Smith*, 638 P.2d at 5 n.7 (“[T]he phrase ‘of sufficient consequence reasonably calculated’ clearly implies that the actor must be aware that his or her conduct is sufficient in character and degree to be likely to cause nonconsensual submission.”).

156. For a survey of state consent statutes, see *Consent Laws*, RAINN, <https://apps.rainn.org/policy/compare/consent-laws.cfm> (last updated Mar. 2020).

157. *See, e.g.*, 18 PA. STAT. AND CONS. STAT. ANN. § 3124.1 (West 2019).

158. *See, e.g.*, NEB. REV. STAT. ANN. § 28-318(8)(b) (West 2019) (“The victim need only resist, either verbally or physically, so as to make the victim’s refusal to consent genuine and real and so as to reasonably make known to the actor the victim’s refusal to consent[.]”).

159. *See, e.g.*, 18 U.S.C. § 2244(b) (2018) (punishing “sexual contact with another

in particular contexts where the risk of coercion is so great that consent is not allowed as a defense.¹⁶⁰

This Part considers how a vagueness challenge to a no-consent-sufficient, consent-undefined statute might play out. The Pennsylvania statute, treated as a lesser-included offense of forcible-compulsion rape in the well-known *Berkowitz* case, is a prominent example. As modified by the legislature after *Berkowitz* to increase the severity of the penalty, the statute now reads as follows:

Except as provided in section 3121 (relating to rape) or 3123 (relating to involuntary deviate sexual intercourse), a person commits a felony of the second degree when that person engages in sexual intercourse or deviate sexual intercourse with a complainant without the complainant's consent.¹⁶¹

The Pennsylvania penal code includes a section defining terms for sexual offenses but does not include a definition of “consent.”¹⁶² Pennsylvania defines attempts according to the MPC’s “substantial step” test.¹⁶³

Now, suppose a defendant, charged under this statute, moves to dismiss the charge before trial because the statute is, on its face, void for vagueness. *Johnson* and *Dimaya* now allow a defendant, even if guilty as charged, to challenge the law under the VFVD.¹⁶⁴ Even if anything is left of the *Flipside* formula, all the factors used by Justice Stevens in *Morales* to distinguish *Flipside* are present here.¹⁶⁵

Specifically, under *Flipside*, the defendant faces a felony charge, not an administrative proceeding for violating a business regulation. The statute does not include a mens rea requirement beyond the general intent to commit the sex act.¹⁶⁶ The Pennsylvania code does allow a reasonable-mistake-of-age defense when the victim was, in fact, over fourteen years old.¹⁶⁷ There is no similar provision respecting mistakes about consent, and

person without that other person’s permission”).

160. See, e.g., MO. ANN. STAT. § 566.145 (West 2019) (stating that consent is not a defense when a person has sex with a prisoner or offender).

161. 18 PA. STAT. AND CONS. STAT. ANN. § 3124.1.

162. See *id.* § 3101. There is no definition of consent in the code’s introductory definitions sections either. See *id.* § 103.

163. See *id.* § 901.

164. See *supra* Part III.

165. See *supra* notes 85–88 and accompanying text.

166. See 18 PA. STAT. AND CONS. STAT. ANN. § 3124.1.

167. *Id.* § 3102.

the Pennsylvania courts have refused to instruct on mistake in sexual assault cases under the code's general mistake provision.¹⁶⁸ After *Lawrence*, the statute impinges on constitutionally protected activity, although just how strongly protected this activity is remains an open question. If Justice Stevens was right that the broad version of the VFVD applies when the statute impinges on the right to use the sidewalks, then surely it follows from *Lawrence* that the broad version applies to a statute with potential application to consensual sex indoors.

To succeed on the merits, a defendant needs to establish at least one of the VFVD's two prongs: lack of notice or invitation to arbitrary enforcement.¹⁶⁹ We will begin with the fair warning requirement. Consent is notoriously hard to define.¹⁷⁰ Some other jurisdictions, and a cacophonous academic literature, have attempted clarification without coming close to consensus.¹⁷¹ The Pennsylvania statute eschews even the attempt, leaving citizens to do their best with their preanalytic intuitions about the term.¹⁷²

Whether consent has been given—either expressly or impliedly by conduct—typically presents more factual than legal uncertainty. Major areas of legal uncertainty include what the scope of consent, if given, may be, and what inducements other than force or threat of force make assent or acquiescence different from consent as used in the statute. The literature abounds with examples, many of them anything but purely hypothetical.¹⁷³

168. Section 304(1) provides that ignorance or mistake “for which there is reasonable explanation or excuse, is a defense if: (1) the ignorance or mistake negatives the intent, knowledge, belief, recklessness, or negligence required to establish a material element of the offense[.]” *Id.* § 304(1). The commonwealth’s courts have held that this provision does not require a reasonable-mistake defense in sexual assault cases. *See, e.g., Pennsylvania v. Williams*, 439 A.2d 765, 99–100 (Pa. Super. Ct. 1982). For the most recent resume of the decisions, see the non-precedential decision in *Pennsylvania v. Hairston*, No. 1108 WDA 2013, 2015 WL 6550727, at *19 (Pa. Super. Ct. Sept. 17, 2015) (“[P]ursuant to the above precedent, a ‘mistake of fact’ jury instruction is not appropriate in sexual assault cases.”).

169. *See supra* Part III.

170. *See, e.g.,* Richard H.S. Tur, *Two Theories of Criminal Law*, 56 SMU L. REV. 797, 807 (2003) (“[C]onsent is a context-dependent notion that may be difficult to define exhaustively.”). Others have expressed the same quizzicality in stronger language. *See, e.g.,* Aya Gruber, *Consent Confusion*, 38 CARDOZO L. REV. 415, 421 (2016) (“Consent is a philosophical, psychological, and legal quagmire, the escape from which I do not attempt here.”).

171. *See infra* Section V.A.

172. *See supra* note 157 and accompanying text.

173. *See, e.g.,* ALAN WERTHEIMER, CONSENT TO SEXUAL RELATIONS 144–62 (2003)

Scope of consent has a temporal as well as a behavioral dimension. If victim rebuffs defendant, defendant returns and tries again, and victim relents after repeated iterations, is this consent? If defendant moves from one stage of foreplay, or one type of penetration, to another, does defendant act at peril of misinterpreting victim's (a) state of mind, (b) words, and/or (c) actions?

Fraud ordinarily taints consent,¹⁷⁴ and this seems easy enough when defendant knowingly misrepresents defendant's sexual health status. What, however, if victim asks about STDs, and defendant honestly, but incorrectly, reports that defendant is negative for HIV, HPV, or chlamydia? Or what about when defendant and victim meet online, with defendant falsely claiming to be unmarried and victim falsely claiming to be twenty-nine years old? The crime of attempted sexual assault portends further problems. Even if defendant and victim never meet, their representations may qualify as attempts under the expansive view of the MPC.¹⁷⁵

Improper inducements other than force are another problem. Suppose defendant is victim's supervisor at work, victim deserves a good annual review, and defendant represents that unless victim has sex with defendant, defendant will turn in a negative review. Perhaps, instead, victim deserves a negative review, and defendant represents that they will turn in a positive one provided victim has sex with defendant. Note that even if victim immediately reports these suggestions to either higher management or law enforcement, defendant is potentially guilty of an attempt to violate section 3124.1.¹⁷⁶

A large body of literature addresses whether cases like these are cases of consent or of no consent.¹⁷⁷ It seems dubious indeed that the VFVD's person of ordinary intelligence would *know* the meaning of section 3124.1 in these (quite common) situations. If that hypothetical person can only guess how the courts might come out, then the statute fails the fair notice prong.

(presenting multiple problematic hypotheticals, many based on reported cases).

174. See *Legal Role of Consent*, RAINN, <https://www.rainn.org/articles/legal-role-consent> (last visited May 26, 2020).

175. See MODEL PENAL CODE § 5.01(2)(b) (AM. LAW INST. 2020) (providing that jury may find that enticing victim to meet defendant was a "substantial step" corroborating defendant's criminal purpose).

176. See 18 PA. STAT. AND CONS. STAT. ANN. § 3124.1 (West 2019).

177. See generally THE ETHICS OF CONSENT: THEORY AND PRACTICE (Franklin G. Miller & Alan Wertheimer eds., 2010); WERTHEIMER, *supra* note 173; PETER WESTEN, THE LOGIC OF CONSENT (2004).

The arbitrary enforcement prong applies, paradigmatically, to police on proactive patrol as in *Papachristou*, *Lawson* and *Morales*.¹⁷⁸ *Johnson* makes clear that the discretion prong is not limited to police on patrol, but extends to prosecutors making charging decisions.¹⁷⁹ It also applies, the Court has said, to the risk that judges will be arbitrary in permitting some cases to go forward but not others, and that juries may be arbitrary in convicting and acquitting defendants who engaged in morally indistinguishable conduct.¹⁸⁰

In the real world, criminal justice actors are far more likely to reject meritorious rape prosecutions than to press the envelope of statutory liability. The VFVD, however, condemns the existence of arbitrary discretion, in whatever way that discretion may be exercised (or come to be exercised). That is just what it means to void a statute on its face.

Lawrence adds another reason to follow *Johnson* in the context of consent-to-sex cases. If courts revert to the *McBoyle-Flipside* as-applied approach, they would have to decide whether the statute's definition of consent was at least as broad as the constitutional test under *Lawrence*. The canon of constitutional avoidance would have special force for any court asked to give a clear constitutional definition of consent.

Of course, the Supreme Court might backtrack on *Johnson* or on *Lawrence* or both. Legislatures might give up on defining crimes solely in terms of sex without consent. The storm, as I said, might blow over. But it behooves us to think about how to weather the storm if all three developments remain as forecasted.

V. Observing Legality in Consent-Based Regimes

A. Defining "Consent," Specific Filters, and Mens Rea: Lessons from California

The most obvious response to vagueness concerns with consent-based statutes is to define consent. The academic literature identifies two principal definitions, one attitudinal and the other performative.¹⁸¹ Attitudinal

178. See *supra* Part III.

179. See *supra* notes 129–30 and accompanying text.

180. See, e.g., *Sessions v. Dimaya*, 138 S. Ct. 1204, 1212 (2018) (“[T]he doctrine guards against arbitrary or discriminatory law enforcement by insisting that a statute provide standards to govern the actions of police officers, prosecutors, juries, and judges.”).

181. See, e.g., WESTEN, *supra* note 177, at 139.

accounts understand consent as a mental state of volitional acquiescence.¹⁸² Performative accounts understand consent as some sign or token of attitudinal consent.¹⁸³ On an attitudinal account, words and acts are *evidence* of consent, but not consent. Performative accounts, on the other hand, are over-inclusive and under-inclusive of attitudinal consent, but they may capture common intuitions of wrongful imposition better than a pure attitudinal account.¹⁸⁴ Both approaches have distinguished defenders.¹⁸⁵

The law takes consent into account because consent is normatively transformative. It converts that which would otherwise be a wrong into something that is not wrong (or not as wrong). Whether understood attitudinally or performatively, consent matters normatively only when it is not wrongfully induced. The robbery victim consents to surrendering money because the victim quite sincerely prefers her life to her money, and she communicates this consent by handing over her wallet. But both her attitude and her token of it are coerced by the gunman. So not only does the law need to define what consent *is*, the law also needs to define the inducements that nullify the normative force of consent when given.

How should lawmakers approach the task of capturing, in reasonably clear legal language, the emerging consensus characterizing absence of consent as the gravamen of rape? California's approach illustrates both the basic challenge and some possible responses. The legislature attempted to define consent but backstopped a problematic definition by exclusions from the definition, retaining the force requirement, and provided a limited mistake-of-fact defense.

Penal Code section 261.6 defines consent as "positive cooperation in act or attitude pursuant to an exercise of free will. The person must act freely and voluntarily and have knowledge of the nature of the act or transaction involved."¹⁸⁶ The same section further provides that "[a] current or previous dating or marital relationship shall not be sufficient to constitute

182. *Id.* at 6.

183. *Id.*

184. Whether a performative definition of consent performs this function better than a robust mens rea requirement re the absence of attitudinal consent is a fair question. *See id.* at 160.

185. For defenses of attitudinal theories, see Larry Alexander, *The Moral Magic of Consent (II)*, 2 LEGAL THEORY 165 (1996); Kimberly Kessler Ferzan, *Consent, Culpability, and the Law of Rape*, 13 OHIO ST. J. CRIM. L. 397 (2016); Heidi M. Hurd, *The Moral Magic of Consent*, 2 LEGAL THEORY 121 (1996). For defenses of performative theories, see JOEL FEINBERG, HARM TO SELF 173–76 (1986); WERTHEIMER, *supra* note 173, at 146–47.

186. CAL. PENAL CODE § 261.6 (West 2019).

consent.”¹⁸⁷ Another section of the statute provides that the victim’s request that the perpetrator use a condom “without additional evidence of consent, is not sufficient to constitute consent.”¹⁸⁸

The definition initially adopts, in the disjunctive, attitudinal and performative accounts (the “act or attitude” language), but then subsumes the performative into the attitudinal by making “an exercise of free will” a requirement of “consent.” Normative concerns are acknowledged, but not clarified, by the “freely and voluntarily” language. The standard jury instructions repeat, but make no attempt to explain, the statutory language.¹⁸⁹

This valiant attempt fails utterly. Consent is “positive cooperation” but passivity might be “positive cooperation” in attitude. Positive cooperation even by act must be chosen by “free will” understood as “acting freely and voluntarily.” The abstract definition adds nothing to, and subtracts nothing from, a jury’s preanalytic notions of “consent.” Were this language, standing alone, to define liability for a serious crime, it would be a conspicuous invitation to challenge under the VFVD.

The language, however, does not stand alone. First, the statutes specifically exclude, as conclusive proof of consent, a prior relationship or a victim’s request that the defendant use a condom.¹⁹⁰ By themselves, these rifle-shot exclusions don’t much clarify the scope of “consent,” but they illustrate the sort of items that might be put on a much longer list of exclusions. We will return to this possibility shortly.

Second, and more consequentially, California retains an expanded version of the traditional force requirement. Rape includes sex “accomplished against a person’s will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another.”¹⁹¹ The offense, however, also includes sex with unconscious or otherwise helpless victims.¹⁹² Similarly equated with force is “threatening to use the authority of a public official to incarcerate, arrest, or deport the victim or another, and the victim has a reasonable belief that the perpetrator is a public official.”¹⁹³

187. *Id.*

188. *Id.* § 261.7.

189. *See* 1 JUDICIAL COUNCIL OF CAL., CRIMINAL JURY INSTRUCTIONS No. 1000 (2020).

190. *See* CAL. PENAL CODE §§ 261.6, 261.7.

191. *Id.* § 261(a)(2).

192. *Id.* § 261(a)(3), (4).

193. *Id.* § 261(a)(7).

Third, California exculpates defendants who reasonably, but mistakenly, believed the victim consented.¹⁹⁴ Exculpation is limited. The instruction is only appropriate when substantial evidence points to “equivocal conduct” by the victim that precedes the defendant’s use of force or threats.¹⁹⁵ Even when it applies, the defense has an objective component, i.e., the defendant’s mistake must be reasonable as well as sincere.¹⁹⁶

To be sure, when consent is clearly absent, the California courts will uphold convictions on proof of outrageous conduct that causes reasonable fear of force without an explicit threat.¹⁹⁷ Nonetheless, California law defines the crime as forced sex and then filters those cases according to the presence or absence of (vaguely defined) consent. A vague escape hatch from a clear but sweepingly overbroad definition of the offense doesn’t address the fair-warning and anti-discretion concerns behind the VFVD. It would not change the result in *Papachristou* if the statute provided that “use of the public streets is a misdemeanor” and then provided a defense for “whoever has apparent lawful business.”

The situation here, however, is different. The only innocent conduct at risk of prosecution is forcible but consensual sex—sadoomasochism (“SM”)—that the vagueness of the consent definition leaves under-protected. Even if the statutory definition of consent is under-protective of the constitutional rights at stake, the mistake defense protects against unfair surprise. Persons inclined to such behavior can (and often do) take care to memorialize the existence and scope of consent.¹⁹⁸

194. *See* California v. Mayberry, 542 P.2d 1337, 1344–47 (Cal. 1975) (en banc).

195. California v. Williams, 841 P.2d 961, 965 (Cal. 1992) (en banc).

196. *Id.* (“[R]egardless of how strongly a defendant may subjectively believe a person has consented to sexual intercourse, that belief must be formed under circumstances society will tolerate as reasonable in order for the defendant to have adduced substantial evidence giving rise to a *Mayberry* instruction.”).

197. *See* California v. Iniguez, 872 P.2d 1183, 1188–89 (Cal. 1994) (en banc) (“Sudden, unconsented-to groping, disrobing, and ensuing sexual intercourse while one appears to lie sleeping is an appalling and intolerable invasion of one’s personal autonomy that, in and of itself, would reasonably cause one to react with fear.”).

198. In their online glossary, the National Coalition for Sexual Freedom defines “contract” as “[a] written agreement between the dominant & submissive, agreed to after negotiation by the dominant and the sub, outlining the structure, guidelines, rules and boundaries of the relationship. It is not legally binding.” *Glossary*, NAT’L COALITION FOR SEXUAL FREEDOM, <https://secureservercdn.net/198.71.233.68/9xj.1d5.myftpupload.com/wp-content/uploads/2019/12/BDSM-Glossary.pdf> (last visited Aug. 8, 2020). Precise empirical data on how many such documents are uttered is unavailable.

If this statutory mix inhibited genuinely consensual activity, it is not consensual activity of the sort the *Lawrence* Court had in mind. Plenty of criminal conduct can be incorporated into consensual sex, parallel to the role that criminal conduct may play in religious ceremonies.¹⁹⁹ There is, most obviously, no “we-only-used-it-for-sex defense” to drug charges. Like outlawing drug use even during sex, outlawing violence even during sex is very different than outlawing sex.

From the standpoint of enforcement discretion, an overbroad prohibition on forcible sex covers very few cases. Precise statistics are, of course, unavailable, but SM behavior is not the norm. Law enforcement in these unusual cases is reactive rather than proactive. Police and prosecutors become aware of potential violations when victims come forward. To succeed in prosecuting invidiously selected rough-sex enthusiasts, prosecutors would need to persuade judges and juries to reject both meritorious consent claims and reasonable-mistake claims. So, even setting aside the historical pedigree of the forcible compulsion formula, limiting rape prosecutions to the no-consent cases where a defendant uses force easily passes the *Johnson-Dimaya* overbreadth test.

California also criminalizes some unforced, nonconsensual sexual contact. The general sexual battery provision provides that whoever:

touches an intimate part of another person, if the touching is against the will of the person touched, and is for the specific purpose of sexual arousal, sexual gratification, or sexual abuse, is guilty of misdemeanor sexual battery, punishable by a fine not exceeding two thousand dollars (\$2,000), or by imprisonment in

199. See, e.g., Craig Sloane, Slideshow: The Perfect Storm: Gay Men, Crystal Meth and Sex, https://www.naadac.org/assets/2416/craig_sloane_-_naadac_handouts.pdf (last visited Aug. 6, 2020) (“My experience is that the beginning part of shooting crystal into my veins is the phenomenal horniness that is just so delicious. It’s like nothing I’ve ever experienced.”) (quoting a recovering methamphetamine addict). In *Employment Division v. Smith*, the Court rejected a Free Exercise challenge to denial of unemployment benefits to individuals who lost their jobs for using peyote in *bona fide* religious observances. 494 U.S. 872, 890 (1990). Because Oregon law at the time made possession of peyote a crime when committed for any purpose, the law did not abridge free exercise of religion. See *id.* So even if *Lawrence* gave the erotic side of life the same constitutional protection as life’s spiritual side, the constitutional right to sexual autonomy creates no defense to prosecutions for laws of general applicability banning possession of drugs, child pornography, or any other contraband.

a county jail not exceeding six months, or by both that fine and imprisonment.²⁰⁰

The offense is subject to the same definition of consent, and the same reasonable mistake defense, as the forcible rape offense.²⁰¹

By contrast to the forcible rape statute, this statute does pose risks that the VFVD aims to minimize. The sexual battery law has many clear applications, e.g., when a defendant gropes a complete stranger on a crowded subway car. By contrast, even when two adults have engaged in consensual intercourse in the past, it can be legally quite uncertain whether on another occasion the first intimate touching is with or without consent.

By statute, A's intimate contact must follow B's "positive cooperation in act or attitude."²⁰² If A's guess is wrong, A has committed a crime that cannot be uncommitted by scrupulously desisting. If A's guess is right, what follows is precisely the sort of private physical intimacy the *Lawrence* Court had in mind. Perhaps the reasonable mistake defense is enough to satisfy the VFVD's fair-warning prong. The reported cases typically involve workplace harassment or convictions returned on the sexual battery charge as a lesser-included offense of forcible or statutory rape charges. The statute, however, is not confined to these circumstances. Social mores and official discretion may be doing the work the VFVD's discretion prong commits to the legislature.

California law teaches some generalizable lessons. First, attempts to define "consent" in purely attitudinal terms are unlikely to succeed. Second, statutes can specifically include and exclude some recurring types of cases from the scope of consent. Third, a mistake defense goes some distance toward ameliorating the tension between less-than-certain definitions of consent and the VFVD. Taking these lessons into consideration, future drafters can more clearly articulate future pure-consent statutes.

200. CAL. PENAL CODE § 243.4(e)(1) (West 2019).

201. See *California v. Andrews*, 184 Cal. Rptr. 3d 183, 194–95 (Ct. App. 2015).

202. CAL. PENAL CODE § 261.6. In prosecutions for sexual battery, the instructions on consent track the language of California Penal Code § 261.6. See *California v. Noppe*, No. E036678, 2005 WL 2864351, at *6–7 (Ct. App. Nov. 1, 2005).

B. Navigating the Storm: Principles for Maximum Clarity in Consent-Based Sexual Assault Law

1. Performative Consent

One response to concerns about the vagueness of consent is to define the term, for legal purposes, solely by the evidentiary tokens of consent. The two main approaches are categorized as “affirmative consent” statutes and “no-means-no” statutes. The federal sexual abuse statute, referenced earlier, is an example of an affirmative consent statute.²⁰³ The offense is defined as “knowingly engag[ing]” “in sexual contact with another person without that other person’s permission[.]”²⁰⁴ “Permission,” however, can be implied as well as expressed.

Less inclusive, but also less vague, is a no-means-no formula, such as Nebraska’s. There, “without consent” means:

(a)(i) The victim was compelled to submit due to the use of force or threat of force or coercion, or (ii) the victim expressed a lack of consent through words, or (iii) the victim expressed a lack of consent through conduct, or (iv) the consent, if any was actually given, was the result of the actor’s deception as to the identity of the actor or the nature or purpose of the act on the part of the actor;

(b) The victim need only resist, either verbally or physically, so as to make the victim’s refusal to consent genuine and real and so as to reasonably make known to the actor the victim’s refusal to consent; and

(c) A victim need not resist verbally or physically where it would be useless or futile to do so[.]²⁰⁵

The Nebraska statute goes so far down the road of fair warning as to retain a vestigial form of the resistance requirement.

I say vestigial because in any case of non-consent expressed by words or “expressed by conduct” the victim will have “resist[ed], either verbally or physically.”²⁰⁶ Whatever the merits of that throwback, while the federal “without permission” language covers more conduct than the Nebraska

203. 18 U.S.C. § 2244 (2018).

204. *Id.* § 2244(b).

205. NEB. REV. STAT. § 28-318(8) (2019).

206. *See id.*

expressed-lack-of-consent language, nothing covered by Nebraska's no-means-no language would be legal under the affirmative permission language.

If that is so, it makes sense to say it. Global definitions of consent may be vague, but the definitions can be made clear in particular cases by specific filters. The federal statute, for example, could be amended to provide that "permission is not present immediately following lack of consent expressed through words or conduct."

Performative definitions of consent will consider some sexual acts as crimes where attitudinal consent may nevertheless be present.²⁰⁷ It seems unlikely that such cases would provoke colorable reports to the authorities. The line between different versions of performative definitions is intensely controversial. Any jurisdiction that elects the affirmative consent approach would be well-advised to include a specific no-means-no term. The benefits of clarity outweigh any benefits of theoretical purity.

The point is more general. The more specific filters the legislation includes, both in specific inclusions and specific exclusions, the more consonant it will be with the VFVD and the legal virtues behind it. Retaining a traditional forcible compulsion offense, as an aggravated version of the more general without-consent offense, is a no-brainer. Other filters, however, make good sense, even if their precise borders may excite political controversy.

2. *Filtering Wrongful Inducements*

Any full treatment of wrongful inducements that invalidate consent is beyond the scope of this Article. It can, however, illustrate the role of legal filters even by considering only one species of wrongful inducement, i.e., deception. Consent obtained by fraud seems to be obtained without consent, even in cases when both parties have deceived the other. Given how many people lie for the sake of sex,²⁰⁸ treating fraud as vitiating consent in those cases seems in dire tension with both prongs of the VFVD. Neither the

207. See, e.g., Ferzan, *supra* note 185, at 405 ("[A]ssume that a man is awakened by the woman he had intercourse with the night before performing oral sex on him. When he wakes up he thinks, 'this is the best alarm clock ever.' He proceeds to do nothing to indicate his acceptance of this act.").

208. See, e.g., Monica Anderson et al., *The Virtues and Downsides of Online Dating*, PEW RES. CTR. (Feb. 6, 2020), <https://www.pewresearch.org/internet/2020/02/06/the-virtues-and-downsides-of-online-dating/> ("Roughly seven-in-ten online daters believe it is very common for those who use these platforms to lie to try to appear more desirable.").

denizens of online dating sites nor public officials have any clear idea of where the line between white lies, puffery, and caveat emptor on one side, and criminally sinister deception on the other, should be drawn.²⁰⁹

That line ought to be drawn by legislatures, and the VFVD just might force legislatures to draw it. Imagine an amendment to the federal statute providing that: “‘Permission’ does not include apparent permission obtained by knowingly false representations about the risk that sexual contact with the defendant may infect the defendant’s partners with any sexually-transmitted disease.” This might be subsection (a) of a long list, ending with (d), (g), (x), or (z). The list might also include affirmative disclosure obligations, not just negative prohibitions on types of affirmative misrepresentations.

The corresponding negative filter is simpler. “‘Permission’ includes permission obtained by knowing or unknowing misrepresentations other than those herein specified.” Thus far, legislatures have shown reluctance to apply even tort sanctions to dating misrepresentations.²¹⁰ Legislatures moving to criminalize sexual fraud should filter any general prohibition by singling out specific types of deception that call for criminal sanctions.

Legislative dialogue on such filters may be uncomfortable. It is nonetheless necessary. Without it, unfiltered “consent” statutes potentially reach far more conduct than anyone expects to be prosecuted. That sets up a *Johnson-Dimaya* challenge to any unfiltered consent statute, on its face. A defendant who admits the victim said “no” could have the statute struck down, root and branch, precisely because the statute leaves the real work of lawmaking to be done by prosecutors and juries.

3. *Mens Rea*

Not all jurisdictions allow a defense even for reasonable mistakes. For example, the Supreme Judicial Court of Massachusetts rejected the defense in *Massachusetts v. Lopez*.²¹¹ The *Lopez* court acknowledged that most states now provide a mistake defense, but joined the company of a

209. On the difficulty of line-drawing with respect to consent to sex induced by false statements, see STEPHEN J. SCHULHOFER, UNWANTED SEX 152–59 (1998); WERTHEIMER, *supra* note 185, at 193–214.

210. See Irina D. Manta, *Tinder Lies*, 54 WAKE FOREST L. REV. 207, 237 (2019) (“Most attempts in the late twentieth and early twenty-first century to target sexual fraud, whether in the criminal or tort arena, have found little acceptance in legislatures.”).

211. 745 N.E.2d 961, 969 (Mass. 2001).

significant minority.²¹² As *Lopez* recognized, a robust force requirement made reasonable mistakes about consent improbable, if not indeed actually impossible, reducing the necessity of finding such a defense.²¹³

Times have changed. The scope of liability has grown, and with it, the case for the criminal law's principled insistence on subjective awareness of wrongdoing. It seems quite clear that *scienter* requirements help to fend off challenges under the VFVD.²¹⁴ If legislatures decide, as many of them have, to make sex without consent a felony offense, they ought, in fairness, to make the absence of consent something other than a strict liability circumstance element. If they choose to drop the force requirement, adopt no other filters, and rely on the tradition of strict liability carried down from days when the force and resistance requirements made liability anything but strict, they are inviting a distinctly nontrivial challenge under the VFVD.

Conclusion

Quite aside from constitutional doctrine, criminal statutes ought to respect the legal virtues—fair warning, constraint of discretion, and neutral determinations of wrongfulness *ex ante*. There is much to be said for defining the central sex offense as the violation of autonomy. My thesis here has held that we can do this with less offense to the legal virtues than may widely be supposed. Indeed, if the Supreme Court takes the latest version of the void-for-vagueness doctrine seriously, this is not just the best way, but perhaps the only way, toward a legitimate and functional law of sexual assault premised on autonomy.

212. *Id.* at 968–69.

213. *Id.* at 966 (“Other jurisdictions have held that a mistake of fact instruction is necessary to prevent injustice. New Jersey, for instance, does not require the force necessary for rape to be anything more than what is needed to accomplish penetration. Thus, an instruction as to a defendant’s honest and reasonable belief as to consent is available in New Jersey to mitigate the undesirable and unforeseen consequences that may flow from this construction.”) (internal citation omitted).

214. *See, e.g., Posters ‘N’ Things, Ltd. v. United States*, 511 U.S. 513, 526 (1994) (“[T]he *scienter* requirement that we have inferred in [the instant statute] assists in avoiding any *vagueness* problem.”) (emphasis added).