Analyzing the Void-for-Vagueness Doctrine as Applied to Statutory Defenses: Lessons from Iowa's Stand-Your-Ground Law

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ABSTRACT: In State v. Wilson*, an Iowa district court found that a provision in Iowa's recently enacted stand-your-ground law, Iowa Code section 704.13, was unconstitutionally vague. This decision constituted an unusual application of the void-for-vagueness doctrine because courts seldom consider vagueness challenges to statutory defenses and rarely, if ever, strike them down under such challenges. On appeal, the Iowa Supreme Court did not explicitly address the district court's unusual holding that Iowa Code section 704.13 was void for vagueness. As a result,* Wilson *raises the following question: Is the void-for-vagueness doctrine an appropriate remedy for ambiguous statutory defenses? To answer this question, this Note examines traditional rationales underlying the void-for-vagueness doctrine. It also explores the potential expansion of the void-for-vagueness doctrine in the U.S. Supreme Court's recent decisions. Ultimately, this Note concludes that the void-for-vagueness doctrine is not an appropriate remedy for ambiguous statutory defenses.*

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I. INTRODUCTION

In April of 2017, the Iowa General Assembly passed[1] and then-Governor Terry Branstad signed into law[2] an expansive statutory scheme to enhance individuals' gun rights.[3] Prior to this legislation, individuals could use reasonable force in defense of oneself,[4] a third party,[5] or property;[6] however, they had a duty to retreat before using such force, except in limited circumstances.[7] "[T]he legislation narrowed the 'duty to retreat'" by enacting a stand-your-ground law.[8] This law included a statutory defense,[9] codified in

1. Kristine Phillips, *Iowa's Most Expansive Gun Rights Bill Ever Is Now Law*, WASH. POST (Apr. 18, 2017, 8:07 AM), https://www.washingtonpost.com/news/post-nation/wp/2017/04/12/iowa-lawmakers-passed-the-states-most-expansive-gun-rights-bill-ever/?noredirect=on&utm_term=.615fc8928d53 [https://perma.cc/YZZ9-HPRA] (reporting that House File 517, the Iowa bill containing the gun-rights legislation, "passed the state Senate 33 to 17 and the House, 57 to 36").

2. *Iowa: Governor Branstad Expands the Second Amendment Rights of Gun Owners Across Iowa*, NRA INST. FOR LEGIS. ACTION (Apr. 13, 2017), https://www.nraila.org/articles/20170413/iowa-governor-branstad-expands-the-second-amendment-rights-of-gun-owners-across-iowa [https://perma.cc/3PCN-4P3A] (reporting that Governor Branstad signed House File 517 into law on April 13, 2017).

3. Phillips, *supra* note 1 (reporting "that many say [House File 517] is the most comprehensive and broadest piece of legislation on gun rights [Iowa] has ever seen").

4. IOWA CODE § 704.3 (2016).

5. *Id.* § 704.5.

6. *Id.* § 704.4.

7. *Id.* § 704.1.

8. State v. Wilson, No. 18-0564, slip op. at 10 (Iowa Apr. 10, 2020) (providing an overview of the 2017 gun-rights legislation).

9. *See id.* at 5 (noting that the defendant in *Wilson* raised Iowa Code section 704.13 as a defense); Jessica Travis & Jeffrey James, *Know the Ground You're Standing on: Analyzing Stand Your*

Iowa Code section 704.13, that granted individuals immunity from criminal or civil liability when they used reasonable and justifiable force to protect "oneself, another person, or property."[10] This legislation became effective on July 1, 2017.[11]

In *State v. Wilson*, the Iowa courts interpreted section 704.13 for one of the first times.[12] On August 27, 2017, an altercation between two gangs in Iowa City's pedestrian mall culminated in Lamar Wilson shooting three individuals, with one victim dying and two suffering injuries.[13] Iowa charged Wilson with murder, attempted murder, intimidation with a deadly weapon, and criminal gang participation.[14] Prior to trial, Wilson filed a motion to dismiss, arguing that he was entitled to a pretrial determination of immunity under section 704.13.[15] However, the district court deferred its decision on the motion until after trial.[16] At trial, a jury found Wilson guilty of voluntary manslaughter, assault with intent to cause serious injury, and intimidation with a dangerous weapon.[17] Following trial, the district court reviewed summaries of evidence and depositions submitted by the parties and held that Wilson was not entitled to immunity under section 704.13.[18]

The district court denied Wilson immunity under Iowa Code section 704.13 on two bases. First, the district court found that Wilson's actions did not fall within the scope of section 704.13 because, based on the evidence, he

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Ground and Self-Defense in Florida's Legal System, 20 BARRY L. REV. 89, 98 (2014) (noting that stand-your-ground laws are "used as a defense in criminal proceedings"); *see also Defense*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "defense" generally to mean "[a] defendant's stated reason why the plaintiff or prosecutor has no valid case").

10. IOWA CODE § 704.13 (2018) ("A person who is justified in using reasonable force against an aggressor in defense of oneself, another person, or property pursuant to section 704.4 is immune from criminal or civil liability for all damages incurred by the aggressor pursuant to the application of reasonable force.").

11. Appellant's Brief & Argument & Request for Oral Argument at 35, State v. Wilson, No. 18-0564, slip op. (Iowa Apr. 10, 2020) [hereinafter Appellant's Brief], *available at* https://www.iowacourts.gov/courtcases/7655/briefs/1898/embedBrief [https://perma.cc/7QAU-AHDX].

12. When the Iowa district court decided *Wilson*, only one defendant, Kevin Staley, had been granted immunity under Iowa Code section 704.13. Will Greenberg, *Johnson County Judge Seeks Clarity on 'Stand Your Ground' Law After Ped Mall Shooting*, IOWA CITY PRESS-CITIZEN (Apr. 2, 2018, 1:01 PM), https://www.press-citizen.com/story/news/2018/04/02/iowa-stand-your-ground-law-ped-mall-shooting-lamar-wilson-judge-seeks-clarity/467637002 [https://perma.cc/U2QJ-C3B9].

13. *Wilson*, slip op. at 2 (Iowa Apr. 10, 2020); Stephen Gruber-Miller & Andy Davis, *Trial of Iowa City Ped Mall Shooting Suspect Lamar Wilson Begins This Week*, DES MOINES REG., https://www.desmoinesregister.com/story/news/crime-and-courts/2018/01/21/trial-iowa-city-ped-mall-shooting-suspect-lamar-wilson-begins-week/1040270001 [https://perma.cc/TC28-CUP3] (last updated Jan. 22, 2018, 6:30 AM).

14. *Wilson*, slip op. at 5 (Iowa Apr. 10, 2020).

15. *Id.*; Appellant's Brief, *supra* note 11, at 18–19.

16. *Wilson*, slip op. at 6 (Iowa Apr. 10, 2020); Appellant's Brief, *supra* note 11, at 19.

17. *Wilson*, slip op. at 7 (Iowa Apr. 10, 2020).

18. *Id.*; State v. Wilson, No. FECR116476, slip op. at 6–8 (Iowa Dist. Ct. Mar. 27, 2018).

failed to use reasonable or justifiable force during the shootings.[19] Second, the district court found, *sua sponte*, that section 704.13 was unenforceable under the void-for-vagueness doctrine.[20] The Iowa district court provided multiple reasons for ruling that section 704.13 was unconstitutionally vague, focusing on deficiencies in section 704.13's procedural requirements.[21] Specifically, the district court found that section 704.13 did not indicate whether courts must determine immunity pretrial (as opposed to during trial) or whether defendants are immune from prosecution (as opposed to liability).[22] The district court found that these factors, along with other procedural defects,[23] supported its decision that section 704.13 was unconstitutionally vague.[24]

The Iowa district court's decision to strike down section 704.13 under the void-for-vagueness doctrine was unusual. "Vagueness doctrine has primarily been used as a tool for defendants to challenge their convictions or arrests."[25] As a result, in the criminal law context, courts usually entertain vagueness challenges to statutes that proscribe conduct or define penalties,[26] not statutes that provide defendants with defenses to alleged wrongdoings like section 704.13.[27] In the infrequent cases where courts consider vagueness challenges to defenses,[28] defendants generally bring the challenges,[29] arguing that invalidating the defense grants them some favorable consequence.[30] But,

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19. *Wilson*, slip op. at 6 (Iowa Dist. Ct. Mar. 27, 2018).

20. *Id.* at 6–8. Neither Wilson nor the State brought the vagueness challenge. State v. Wilson, No. FECR116476, slip op. at 1–2 (Iowa Dist. Ct. Nov. 3, 2017). Thus, the district court raised the constitutional challenge under the void-for-vagueness doctrine itself. *See Wilson*, slip op. at 6 (Iowa Dist. Ct. Mar. 27, 2018).

21. *Id.* at 7–8.

22. *Id.*

23. *Id.* Other procedural defects included failing to establish the burden of proof or to explain evidentiary issues. *Id.* at 7.

24. *Id.* at 7–8.

25. *Fifth Amendment—Due Process—Void-for-Vagueness Doctrine*—Sessions v. Dimaya, 132 HARV. L. REV. 367, 372 (2018) [hereinafter *Void-for-Vagueness Doctrine*—Dimaya].

26. *See* Beckles v. United States, 137 S. Ct. 886, 892 (2017).

27. Sanders v. State, 67 P.3d 323, 326 (Nev. 2003) ("[V]agueness challenges are not generally raised when a statutory affirmative defense is at issue . . . .").

28. *See, e.g.*, People v. Capitol News, Inc., 560 N.E.2d 303, 307–08 (Ill. 1990); *Sanders*, 67 P.3d at 326–27; People v. Illardo, 399 N.E.2d 59, 61 (N.Y. 1979); Klein v. Leis, 795 N.E.2d 633, 638–39 (Ohio 2003).

29. *See, e.g.*, *Capitol News*, 560 N.E.2d at 305 (noting that the defendants "challenge[d] the constitutionality of the affirmative defense provision on grounds of vagueness"); *Sanders*, 67 P.3d at 326 ("Sanders argues that the 'without good cause' language in NRS 201.051 is vague, thereby making the affirmative defense statute unconstitutional."); *Illardo*, 399 N.E.2d at 61 ("[The defendant] relies on the contention that the affirmative defense provisions of section 235.15 are constitutionally infirm . . . .").

30. *See, e.g.*, *Capitol News*, 560 N.E.2d at 304 ("Capitol News, Inc., upon being charged by indictment in the circuit court of McLean County with the sale or delivery of materials in violation of the Illinois obscenity statute (Ill.Rev.Stat.1987, ch. 38, par. 11–20), filed a motion to dismiss,

in *Wilson*, the district court, not the defendant, raised the vagueness challenge to the defense.[31] Furthermore, courts rarely, if ever, strike down defenses as unconstitutionally vague[32]—making the district court's decision in *Wilson* even more surprising.[33]

On appeal, the Iowa Supreme Court did not explicitly address the district court's unusual holding that Iowa Code section 704.13 was void for vagueness.[34] The Iowa Supreme Court, instead, turned to statutory interpretation to determine the procedural requirements for section 704.13.[35] First, it held that section 704.13 did not require a pretrial determination of immunity; second, it held that section 704.13 only provided defendants with immunity from liability, not prosecution.[36] The Iowa Supreme Court implicitly found that section 704.13 was not void for vagueness by dictating these procedural requirements rather than declaring the statute unenforceable.[37] But, by not explicitly addressing the issue, a question lingers beneath the Iowa Supreme Court's decision: Is the void-for-vagueness doctrine an appropriate remedy for ambiguous statutory defenses?

This Note contends that the void-for-vagueness doctrine is not an appropriate remedy for ambiguous statutory defenses. The Note supports this contention by proceeding as follows. Part II provides background information on the void-for-vagueness doctrine.[38] Next, Part III argues that courts should not entertain vagueness challenges to statutory defenses by providing three

challenging the constitutionality of the statute. . . . Based on [the lower court's] finding that the affirmative defense was not severable from the remainder of the statute, [the lower court] held that the obscenity statute was unconstitutional and dismissed the indictment."); *Illardo*, 399 N.E.2d at 61 ("[The defendant] relies on the contention that the affirmative defense provisions of section 235.15 are constitutionally infirm and that, because these provisions could not be severed from the remainder of the statute, the defect renders the proscription in section 235.05 invalid as well.").

31. State v. Wilson, No. FECR116476, slip op. at 6 (Iowa Dist. Ct. Mar. 27, 2018); State v. Wilson, No. FECR116476, slip op. at 1–2 (Iowa Dist. Ct. Nov. 3, 2017); *see supra* note 20 and accompanying text.

32. For instance, in *Sanders v. State*, the Nevada Supreme Court held that a Nevada statute, which provided an affirmative defense to felony nonsupport, was not unconstitutionally vague. *Sanders*, 67 P.3d at 325–27. Likewise, in *People v. Capitol News, Inc.*, the Illinois Supreme Court held that an affirmative defense to an obscenity statute was not void for vagueness. *Capitol News*, 560 N.E.2d at 307–08. This holding is consistent with the New York Court of Appeals' decision in *People v. Illardo*, which found that a nearly identical affirmative defense to an obscenity statute was not unconstitutionally vague. *Illardo*, 399 N.E.2d at 61, 65. Further, in *Klein v. Leis*, the Ohio Supreme Court held that affirmative defenses related to the carrying of concealed weapons were not void for vagueness. *Klein*, 795 N.E.2d at 638–39.

33. *Wilson*, slip op. at 8 (Iowa Dist. Ct. Mar. 27, 2018).

34. *See* State v. Wilson, No. 18-0564, slip op. at 2, 10–20 (Iowa Apr. 10, 2020).

35. *Id.*

36. *Id.* at 2.

37. *Id.* at 2, 10–20.

38. *See infra* Part II.

rationales.[39] Part IV then explains how the district court should have resolved *State v. Wilson* based on the analysis in Part III.[40] Finally, Part V concludes.[41] Although this Note uses *Wilson* to illustrate its points, this Note's analysis has implications that reach beyond Iowa law to federal and state law generally.

II. BACKGROUND ON THE VOID-FOR-VAGUENESS DOCTRINE

This Part provides the doctrinal background necessary to analyze whether the void-for-vagueness doctrine is an appropriate remedy for ambiguous statutory defenses, focusing on the void-for-vagueness doctrine under the U.S. Constitution.[42] This Part starts by explaining the constitutional foundation for the void-for-vagueness doctrine,[43] before turning to the reasons why laws can be unconstitutionally vague[44] and to the potential expansion of the doctrine in recent years.[45]

A. CONSTITUTIONAL FOUNDATION

"[The U.S. Supreme Court's] doctrine prohibiting the enforcement of vague laws rests on the twin constitutional pillars of due process and separation of powers."[46] The void-for-vagueness doctrine is grounded in the Due Process Clauses of the Fifth and Fourteenth Amendments.[47] The Due Process Clauses prohibit federal and state governments from "taking away someone's life, liberty, or property under a [vague] criminal law."[48] However,

39. *See infra* Part III.

40. *See infra* Part IV.

41. *See infra* Part V.

42. When providing this background information, this Note focuses on how the void-for-vagueness doctrine operates in the criminal law context outside of the First Amendment and, consequently, does not discuss the separate but related doctrine of overbreadth. Sessions v. Dimaya, 138 S. Ct. 1204, 1228–29 (2018) (Gorsuch, J., concurring in part and concurring in the judgment) (explaining that the void-for-vagueness doctrine extends to civil laws that "abridg[e] basic First Amendment freedoms"); 16A AM. JUR. 2D *Constitutional Law* § 428 (2020) ("Imprecise laws can be attacked on their face under two different doctrines: first, the overbreadth doctrine permits the facial invalidation of laws that inhibit the exercise of First Amendment rights if the impermissible applications of the law are substantial when judged in relation to the statute's plainly legitimate sweep; second, even if an enactment does not reach a substantial amount of constitutionally protected conduct, it may be impermissibly vague because it fails to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty interests.").

43. *See infra* Section II.A.

44. *See infra* Section II.B.

45. *See infra* Section II.C.

46. United States v. Davis, 139 S. Ct. 2319, 2325 (2019) (citing *Dimaya*, 138 S. Ct. at 1212–13 (plurality opinion); *id.* at 1224–28 (Gorsuch, J., concurring in part and concurring in the judgment)).

47. Johnson v. United States, 135 S. Ct. 2551, 2556 (2015); *see* Kolender v. Lawson, 461 U.S. 352, 353 (1983).

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

many, if not all, laws suffer from some degree of ambiguity.[49] Accordingly, the Due Process Clauses only protect against laws that are *unconstitutionally* vague—those that "invite[] 'more unpredictability and arbitrariness' than the Constitution allows."[50]

This prohibition against unconstitutionally vague laws safeguards separation of powers.[51] The U.S. Constitution delegates the federal lawmaking power to Congress.[52] But, when Congress passes a vague law, it transfers its duty to articulate the law's requirements "to unelected prosecutors and judges."[53] These officials would violate separation-of-powers principles if they accepted Congress' invitation to rewrite the vague law.[54] The void-for-vagueness doctrine prevents such violations by requiring courts "not to fashion a new, clearer law to take [the vague law's] place, but to treat the law as a nullity and invite Congress to try again."[55]

B. REASONS WHY LAWS CAN BE UNCONSTITUTIONALLY VAGUE

A criminal law can be unconstitutionally vague for "two independent reasons": (1) "it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits;" and (2) "it may authorize and even encourage arbitrary and discriminatory enforcement."[56] If a statute is unconstitutionally vague for either of these reasons, the void-for-vagueness

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49. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 989 (5th ed. 2015); *see also Void-for-Vagueness Doctrine*—Dimaya, *supra* note 25, at 373 ("Ambiguity, and thus some degree of vagueness, is tolerated—even presumed—to make the federal government run.").

50. *Dimaya*, 138 S. Ct. at 1224 (Gorsuch, J., concurring in part and concurring in the judgment) (quoting *Johnson*, 135 S. Ct. at 2558).

51. *Davis*, 139 S. Ct. at 2323, 2325; *Dimaya*, 138 S. Ct. at 1212 (plurality opinion) ("[T]he [void-for-vagueness] doctrine is a corollary of the separation of powers—requiring that Congress, rather than the executive or judicial branch, define what conduct is sanctionable and what is not."); *Dimaya*, 138 S. Ct. at 1227–28 (Gorsuch, J., concurring in part and concurring in the judgment).

52. *Dimaya*, 138 S. Ct. at 1227 (Gorsuch, J., concurring in part and concurring in the judgment) ("The Constitution assigns '[a]ll legislative Powers' in our federal government to Congress." (alteration in original) (quoting U.S. CONST. art. I, § 1)).

53. *Davis*, 139 S. Ct. at 2323.

54. *Id.*

55. *Id.* Interestingly, Justice Thomas suggested that the void-for-vagueness doctrine can actually encourage separation-of-powers violations. *Dimaya*, 138 S. Ct. at 1244–45 (Thomas, J., dissenting); Johnson v. United States, 135 S. Ct. 2551, 2572 (2015) (Thomas, J., concurring). He explained that one problem with the void-for-vagueness doctrine "is that 'indefiniteness' . . . is itself an indefinite concept." *Johnson*, 135 S. Ct. at 2572 (Thomas, J., concurring) (alteration in original) (quoting Winters v. New York, 333 U.S. 507, 524 (1948) (Frankfurter, J., dissenting)). Since whether a statute is indefinite is frequently debatable, "the vagueness doctrine provides courts with 'open-ended authority to oversee [legislative] choices.'" *Dimaya*, 138 S. Ct. at 1244 (Thomas, J., dissenting) (alteration in original) (quoting Kolender v. Lawson, 461 U.S. 352, 374 (1983) (White, J., dissenting)). Accordingly, the void-for-vagueness doctrine could potentially promote judicial activism by allowing courts to strike down laws under the guise of vagueness concerns, thereby encroaching on the Congress' lawmaking prerogative. *Id.*

56. City of Chicago v. Morales, 527 U.S. 41, 56 (1999).

doctrine bars courts from enforcing it.[57] Section II.B.1 further explains the notice requirement,[58] while Section II.B.2 discusses the prohibition against arbitrary and discriminatory enforcement.[59]

1. Failure to Provide Notice

First, a criminal statute can be unconstitutionally vague for failing to provide notice.[60] "Fair notice of the law's demands . . . is 'the first essential of due process.'"[61] The notice requirement is predicated on the principle that individuals are entitled to fair warning of a statute's prohibited conduct before the law can punish them for engaging in such conduct.[62] Fundamentally, the notice requirement ensures that individuals can delineate between lawful and unlawful conduct.[63] Vague laws, which do not provide adequate notice, risk "trap[ping] the innocent" by depriving them of the opportunity to conform their conduct to the laws' requirements.[64]

Courts use an objective standard when determining whether a statute provided adequate notice.[65] Under this objective standard, courts ask whether "[a] person of ordinary intelligence [has] a reasonable opportunity to know what is prohibited, so that he may act accordingly."[66] This standard, however, does not require that individuals have actual knowledge that a statute prohibits their conduct.[67]

In *United States v. Lanier*, Justice Souter recounted three legal manifestations of the notice requirement:

> First, the vagueness doctrine bars enforcement of "a statute which either forbids or requires the doing of an act in terms so vague that

57. *Id.*

58. *See infra* Section II.B.1.

59. *See infra* Section II.B.2.

60. *Morales*, 527 U.S. at 56.

61. Sessions v. Dimaya, 138 S. Ct. 1204, 1228 (2018) (Gorsuch, J., concurring in part and concurring in the judgment) (quoting Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926)).

62. United States v. Harriss, 347 U.S. 612, 617 (1954) ("The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.").

63. Grayned v. City of Rockford, 408 U.S. 104, 108 (1972) ("[B]ecause we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.").

64. *Id.*

65. *Id.*

66. *Id.*

67. Kashem v. Barr, 941 F.3d 358, 371 (9th Cir. 2019) (explaining that the void-for-vagueness doctrine does "not [ask] whether a particular plaintiff actually received a warning that alerted him or her to the danger of being held accountable for the behavior in question" (citing Maynard v. Cartwright, 486 U.S. 356, 361 (1988); *Grayned*, 408 U.S. at 108)); John F. Decker, *Addressing Vagueness, Ambiguity, and Other Uncertainty in American Criminal Laws*, 80 DENV. U. L. REV. 241, 248 (2002) ("An *actual* notice requirement would run afoul of the principle that ignorance of the law is no excuse.").

> men of common intelligence must necessarily guess at its meaning and differ as to its application." Second, as a sort of "junior version of the vagueness doctrine," the canon of strict construction of criminal statutes, or rule of lenity, ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered. Third, although clarity at the requisite level may be supplied by judicial gloss on an otherwise uncertain statute, due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope.[68]

This Note will consider each of these manifestations in turn.

The first and second manifestations relate to two separate and distinct legal doctrines: (1) the void-for-vagueness doctrine, and (2) the rule of lenity.[69] The void-for-vagueness doctrine and rule of lenity both champion fair notice through their focus on resolving ambiguities in statutes.[70] Although this Note primarily focuses on the void-for-vagueness doctrine, explaining the differences between these doctrines is instructive.

The rule of lenity is a statutory construction tool[71] that resolves ambiguities in penal statutes[72] in favor of defendants after all other means of statutory interpretation have been exhausted.[73] "[T]he touchstone of the rule of lenity is statutory ambiguity."[74] Particularly, ambiguity renders the rule of lenity operative when the language in penal statutes, although relatively clear, "lends itself to two or more equally plausible interpretations."[75] In these situations, the rule of lenity resolves the ambiguity by adopting the interpretation that is most favorable to the defendant.[76]

Contrastingly, the void-for-vagueness doctrine is not a statutory construction tool;[77] rather, it is a constitutional requirement rooted in the

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68. United States v. Lanier, 520 U.S. 259, 266 (1997) (citations omitted).

69. Sessions v. Dimaya, 138 S. Ct. 1204, 1244 (2018) (Thomas, J., dissenting) ("The difference between the traditional rule of lenity and the modern vagueness doctrine is not merely semantic.").

70. Steven B. Duke, *Legality in the Second Circuit*, 49 BROOK. L. REV. 911, 912 (1983).

71. *Dimaya*, 138 S. Ct. at 1244 (Thomas, J., dissenting). "[L]enity is a tool of statutory construction, which means States can abrogate it—and many have." *Id.*

72. *Id.* ("Lenity . . . applies only to 'penal' statutes . . . .").

73. Maracich v. Spears, 570 U.S. 48, 76 (2013) ("This Court has held that 'the rule of lenity only applies if, after considering text, structure, history, and purpose, there remains a grievous ambiguity or uncertainty in the statute such that the Court must simply guess as to what Congress intended.'" (quoting Barber v. Thomas, 560 U.S. 474, 488 (2010))).

74. Abbott v. United States, 562 U.S. 8, 28 n.9 (2010) (alteration in original) (quoting Bifulco v. United States, 447 U.S. 381, 387 (1980)).

75. Decker, *supra* note 67, at 243, 245 (emphasis omitted).

76. *Id.*

77. *Dimaya*, 138 S. Ct. at 1244 (Thomas, J., dissenting).

Due Process Clauses.[78] Like the rule of lenity, the void-for-vagueness doctrine addresses statutory ambiguity.[79] But, unlike the rule of lenity, the void-for-vagueness doctrine resolves ambiguities in statutes that are so unclear that a reasonable person would not understand their requirements.[80] Consequently, the court "throw[s] in the towel" and declares the statute unenforceable.[81]

Justice Souter's third manifestation is also concerned with individuals' abilities to conform their conduct to the law's requirements but shifts the focus to judicial expansion of criminal statutes.[82] The third manifestation prohibits retroactive judicial expansion of criminal statutes by analogizing the principles underlying the Ex Post Facto Clause, which only applies to the legislature, to the judiciary.[83] This manifestation is driven by the theory that defendants do not have a fair warning of a statute's requirements if the court newly defined those requirements after the defendant acted.[84]

2. Arbitrary and Discriminatory Enforcement

In addition to notice violations, a statute can be unconstitutionally vague by inviting arbitrary and discriminatory enforcement of the law.[85] Under this prong of the analysis, laws "must be sufficiently clear 'that those enforcing the law do not act in an arbitrary or discriminatory way.'"[86] This prong seeks to prevent unbridled law enforcement by invalidating statutes that do not "provide explicit standards for those who apply them."[87] Concern for arbitrary

78. *Id.*; Decker, *supra* note 67, at 245; *see supra* note 47 and accompanying text. Since the void-for-vagueness doctrine is a constitutional rule, "States cannot alter or abolish" it. *Dimaya*, 138 S. Ct. at 1244 (Thomas, J., dissenting).

79. Duke, *supra* note 70, at 912–13.

80. United States v. Lanier, 520 U.S. 259, 266 (1997) (noting that the vagueness doctrine applies when "a statute['s] . . . terms [are] so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application" (quoting Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926))); Decker, *supra* note 67, at 245.

81. Decker, *supra* note 67, at 245.

82. *Lanier*, 520 U.S. at 266.

83. Marks v. United States, 430 U.S. 188, 191–92 (1977); *see also* Bouie v. City of Columbia, 378 U.S. 347, 353–54 (1964) ("[A]n unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law, such as Art. I, [§] 10, of the Constitution forbids. . . . If a state legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction."). The Ex Post Facto Clause prohibits legislatures from enacting "[a] statute that criminalizes an action and simultaneously provides for punishment of those who took the action before it had legally become a crime." *Ex Post Facto Law*, BLACK'S LAW DICTIONARY (11th ed. 2019); *see Ex Post Facto Clause*, BLACK'S LAW DICTIONARY (11th ed. 2019).

84. *See* sources cited *supra* note 83.

85. City of Chicago v. Morales, 527 U.S. 41, 56 (1999).

86. Beckles v. United States, 137 S. Ct. 886, 894 (2017) (quoting FCC v. Fox Television Stations, Inc., 567 U.S. 239, 253 (2012)).

87. Grayned v. City of Rockford, 408 U.S. 104, 108 (1972); *accord* Smith v. Goguen, 415 U.S. 566, 574 (1974) (noting "a legislature [must] establish minimal guidelines to govern law

and discriminatory enforcement is so great that the Supreme Court stated "the more important aspect of the vagueness doctrine 'is not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement.'"[88]

Society is particularly concerned about arbitrary and discriminatory enforcement by prosecutors, juries, judges, and police officers.[89] Humans are susceptible to biases "driven by attitudes and stereotypes that we have about social categories, such as genders and races."[90] Oftentimes, these biases are implicit, in that people are not consciously aware that their decisions are influenced by these biases.[91] "Consequently, they can function automatically, including in ways that the person would not endorse as appropriate if he or she did have conscious awareness."[92] Unfortunately, these biases can cause those enforcing the law to act, both intentionally and unintentionally, in arbitrary and discriminatory ways.[93]

City of Chicago v. Morales provides one example of the risk vague laws pose to arbitrary and discriminatory enforcement.[94] In *Morales*, the U.S. Supreme Court invalidated a gang-loitering statute under the void-for-vagueness doctrine, finding that the statute promoted arbitrary and discriminatory enforcement by police officers.[95] The Supreme Court reasoned that the statute did not provide the police with sufficient guidelines to determine what activities constituted loitering and, thereby, granted them too much discretion.[96] Scholars argue that this decision was necessary to prevent police from "fall[ing] back on deep-seated stereotypes,"[97] provided that "[a] group of Black or Latino teenagers simply standing on an inner-city street corner is

enforcement"); Giaccio v. Pennsylvania, 382 U.S. 399, 402–03 (1966) ("[A] law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it . . . leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case.").

88. Kolender v. Lawson, 461 U.S. 352, 358 (1983) (quoting *Goguen*, 415 U.S. at 574).

89. *Grayned*, 408 U.S. at 108–09 ("A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application."); Andrew E. Goldsmith, Note, *The Void-for-Vagueness Doctrine in the Supreme Court, Revisited*, 30 AM. J. CRIM. L. 279, 289–91 (2003).

90. Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1128 (2012).

91. *Id.* at 1129.

92. *Id.*

93. Prosecutors are susceptible to bias. *Id.* at 1139. For example, "[j]ournalistic investigations have uncovered some statistical evidence that racial minorities are treated worse than Whites in prosecutors' charging decisions." *Id.* Similarly, juries can also act in prejudicial ways. *Id.* at 1142. In fact, "the general research consensus is that jurors of one race tend to show bias against defendants who belong to another race." *Id.* Furthermore, judges can fall prey to bias, with another research study revealing that "White judges show[] strong implicit attitudes favoring Whites over Blacks." *Id.* at 1146.

94. City of Chicago v. Morales, 527 U.S. 41 (1999).

95. *Id.* at 64.

96. *Id.* at 60–64.

97. Goldsmith, *supra* note 89, at 293.

far more likely to be considered disorderly . . . than a group of white teenagers similarly congregating in their community."[98]

Given this threat of arbitrary and discriminatory enforcement, the void-for-vagueness doctrine requires that statutes sufficiently demarcate between lawful and unlawful conduct[99] to prevent law enforcement from "pursu[ing] their personal predilections."[100] However, most, if not all, laws allow law enforcement some degree of discretion.[101] Accordingly, the U.S. Supreme Court has emphasized that a statute is only unconstitutionally vague under this prong if it "is so standardless that it authorizes or encourages *seriously* discriminatory enforcement."[102]

C. POTENTIAL EXPANSION OF THE VOID-FOR-VAGUENESS DOCTRINE

Between 1960 and 2015, courts were hesitant to declare criminal statutes unconstitutionally vague.[103] In fact, the Supreme Court only invalidated criminal statutes under the void-for-vagueness doctrine five times during this period.[104] This hesitation is attributable to the presumption that statutes are constitutional,[105] and to the judiciary's duty, "if fairly possible, . . . [to] construe congressional enactments so as to avoid a danger of unconstitutionality."[106] Thus, defendants bringing void-for-vagueness claims as a defense to criminal statutes traditionally faced an uphill battle.[107]

However, the Supreme Court's 2015 decision in *Johnson v. United States*[108] departed from the Court's traditional hesitation to declare statutes

98. *Id.* (quoting Dorothy E. Roberts, *Foreword: Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 J. CRIM. L. & CRIMINOLOGY 775, 806 (1999)).

99. Connally v. Gen. Constr. Co., 269 U.S. 385, 393 (1926) ("The citizen cannot be held to answer charges based upon penal statutes whose mandates are so uncertain that they will reasonably admit of different constructions.").

100. Kolender v. Lawson, 461 U.S. 352, 358 (1983) (quoting Smith v. Goguen, 415 U.S. 566, 575 (1974)).

101. Cristina D. Lockwood, *Defining Indefiniteness: Suggested Revisions to the Void for Vagueness Doctrine*, 8 CARDOZO PUB. L. POL'Y & ETHICS J. 255, 256 (2010) ("Arguably, law enforcement discretion always exists with the corresponding potential for discriminatory enforcement.").

102. United States v. Williams, 553 U.S. 285, 304 (2008) (emphasis added); *see also* Lockwood, *supra* note 101, at 275 (explaining that, with this statement, *Williams* limited this prong of the void-for-vagueness doctrine).

103. Shon Hopwood, *Clarity in Criminal Law*, 54 AM. CRIM. L. REV. 695, 698 (2017).

104. *Id.* This assertion excludes First Amendment cases. *Id.* The five cases are *Johnson v. United States*, 135 S. Ct. 2551, 2563 (2015); *City of Chicago v. Morales*, 527 U.S. 41, 64 (1999); *Kolender v. Lawson*, 461 U.S. 352, 361 (1983); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972); and *Dombroski v. Pfister*, 380 U.S. 479, 490–92 (1965).

105. United States v. Nat'l Dairy Prods. Corp., 372 U.S. 29, 32 (1963) (noting that there is a "strong presumpt[ion of] validity that attaches to an Act of Congress").

106. United States v. Harriss, 347 U.S. 612, 618 n.6 (1954).

107. Decker, *supra* note 67, at 247.

108. *See Johnson*, 135 S. Ct. at 2563.

unconstitutionally vague.[109] In *Johnson*, the Supreme Court found that the residual clause of the Armed Career Criminal Act ("ACCA")[110] was invalid under the void-for-vagueness doctrine, despite the fact that the Court had previously rejected vagueness attacks against the clause.[111] The residual clause at issue was part of the ACCA's definition of a "violent felony."[112] The clause stated that a "violent felony" included an offense that "otherwise involves conduct that presents a serious potential risk of physical injury to another."[113]

In finding that the residual clause was unconstitutionally vague, Justice Scalia, writing for the majority, first noted that the clause adopted a "categorical approach,"[114] which created "speculation-layering."[115] The categorical approach created a first layer of speculation by requiring courts to "imagine[] [the] 'ordinary case' of a crime" when determining whether it was a violent felony.[116] To do so, courts asked whether a crime was violent in the abstract based on its elements, rather than whether it was violent under the facts of a specific case.[117] The categorical approach generated a second layer of speculation by creating "uncertainty about how much risk it takes for a crime to qualify as a violent felony."[118] Under this layer, courts were forced to compare the ordinary case of the crime to four enumerated crimes in order to determine whether it produced "serious potential risk."[119] This task was particularly difficult considering that it was "far from clear" how much risk was posed by each of the enumerated crimes.[120] Justice Scalia found that "[b]y combining indeterminacy about how to measure the risk posed by a crime with indeterminacy about how much risk it takes for the crime to qualify as a violent felony, the residual clause [was unconstitutionally vague]."[121]

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109. *Armed Career Criminal Act—Residual Clause*—Johnson v. United States, 129 HARV. L. REV. 301, 306–07 (2015) [hereinafter *Armed Career Criminal Act*—Johnson]; Katherine Menendez, Johnson v. United States*: Don't Go Away*, 31 CRIM. JUST., Spring 2016, at 12, 17.

110. The ACCA increased prison sentences "to a minimum of 15 years and a maximum of life" when "the violator has three or more earlier convictions for a 'serious drug offense' or a 'violent felony.'" *Johnson*, 135 S. Ct. at 2555 (citing Armed Career Criminal Act, 18 U.S.C. § 924(e)(1) (2012)).

111. *Id.* at 2556, 2563.

112. *Id.* at 2555.

113. *Id.* at 2555–56 (emphasis omitted) (quoting 18 U.S.C. § 924(e)(2)(B)(ii)).

114. *Id.* at 2557–60.

115. *Armed Career Criminal Act*—Johnson, *supra* note 109, at 306.

116. *Johnson*, 135 S. Ct. at 2557.

117. *Id.* ("Under the categorical approach, a court assesses whether a crime qualifies as a violent felony 'in terms of how the law defines the offense and not in terms of how an individual offender might have committed it on a particular occasion.'" (quoting Begay v. United States, 553 U.S. 137, 141 (2008))).

118. *Id.* at 2558.

119. *Id.* These four enumerated crimes included "burglary, arson, extortion, and crimes involving the use of explosives." *Id.*

120. *Id.* (quoting *Begay*, 553 U.S. at 143).

121. *Id.*

Justice Scalia reasoned that the doctrine of *stare decisis* did not preclude the Court's holding that the ACCA's residual clause was unconstitutionally vague.[122] He explained that "[t]he doctrine of *stare decisis* allows us to revisit an earlier decision where experience with its application reveals that it is unworkable."[123] He noted that the ACCA's residual clause proved unworkable because, over the course of nine years, the clause produced "anything but evenhanded, predictable, or consistent" decisions.[124]

Justice Scalia also broadened the reach of the void-for-vagueness doctrine by reexamining which statutes fell within its scope.[125] Prior to *Johnson*, the Court reviewed vagueness challenges "on an as-applied basis"[126] by considering the facts of individual cases to determine whether the statute was enforceable.[127] The Court would not strike down a statute as unconstitutionally vague—even if it was mostly vague—so long as a reasonable person would understand the facts of the individual case to fall within the statute's provisions.[128] As a result, a statute confronting a vagueness challenge had to be "vague in *all* of its applications" for the Court to find it facially invalid.[129]

However, in *Johnson*, Justice Scalia found that a statute can be facially void for vagueness even if it is not vague in all applications.[130] As a result, the void-for-vagueness doctrine can render a statute facially unenforceable even if some conduct clearly falls within the statute's provisions.[131] Thus, after *Johnson*, the void-for-vagueness doctrine can preclude enforcement of a statute, even when a defendant clearly acted within the statute's provisions, because the statute as a whole is vague.[132]

When analyzing the Supreme Court's decision in *Johnson*, legal scholars and professionals predicted that this decision will lead to an expansion of the

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122. *Id.* at 2562.

123. *Id.*

124. *Id.* at 2560, 2563.

125. *Id.* at 2560–61; *Armed Career Criminal Act*—Johnson, *supra* note 109, at 309–10 (citing *id.* at 2561).

126. *Johnson*, 135 S. Ct. at 2580 (Alito, J., dissenting) (citing United States v. Mazurie, 419 U.S. 544, 550 (1975)).

127. Maynard v. Cartwright, 486 U.S. 356, 361 (1988) ("Vagueness challenges to statutes not threatening First Amendment interests are examined in light of the facts of the case at hand; the statute is judged on an as-applied basis.").

128. *Johnson*, 135 S. Ct. at 2580 (Alito, J., dissenting) (citing *Cartwright*, 486 U.S. at 361).

129. *Id.* at 2580 (quoting Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494–95 (1982)) (citing Chapman v. United States, 500 U.S. 453, 467 (1991)).

130. *Id.* at 2560–61 (majority opinion); *id.* at 2580–81 (Alito, J., dissenting).

131. *Id.* at 2560–61 (majority opinion); *id.* at 2580–81 (Alito, J., dissenting); *Armed Career Criminal Act*—Johnson, *supra* note 109, at 309–10 ("[Justice Scalia] significantly revived and broadened the vagueness doctrine, indicating that where a statute was *mostly* vague, but perhaps clearly covered a core of conduct, it could still be violative of a defendant's due process rights and therefore void." (citing *id.* at 2561 (majority opinion))).

132. *Johnson*, 135 S. Ct. at 2580–81 (Alito, J., dissenting).

void-for-vagueness doctrine.[133] For instance, an article published in the *Harvard Law Review* stated:

> With *Johnson*, a six-Justice majority evinced a new willingness to engage with questions of statutory clarity in the criminal context. Broadening the vagueness doctrine[,] . . . the *Johnson* majority demonstrated the lengths to which it would go to strike down a criminal statute that offered no clear congressional command. . . . *Johnson* also encourages the judiciary to be more permissive in adjudicating vagueness claims.[134]

Likewise, Katherine Menendez, who represented the defendant in *Johnson*, wrote in an ABA publication, "one of the greatest impacts of the *Johnson* decision may be that it widens the path to raise vagueness challenges to unclear statutes, even statutes in legal arenas very different from the recidivist sentencing statute the Court considered."[135]

Despite the Supreme Court's potential expansion of the void-for-vagueness doctrine in *Johnson*, the Court proceeded to apply the doctrine narrowly only two years later in *Beckles v. United States*.[136] In *Beckles*, the Supreme Court held that the residual clause[137] in "the advisory [Sentencing] Guidelines [was] not subject to vagueness challenges under the Due Process Clause," even though it used the same language as the residual clause found unconstitutionally vague in *Johnson*.[138] When reaching this decision, Justice Thomas, writing for the majority, emphasized that "the Court has invalidated two kinds of criminal laws as 'void for vagueness': laws that *define* criminal offenses and laws that *fix the permissible sentences* for criminal offenses."[139] Justice Thomas found that the advisory Sentencing Guidelines "merely guide the district courts' discretion"—not define criminal offenses or fix the permissible sentences.[140] Thus, the Court held that a vagueness challenge was categorically inappropriate because the advisory Sentencing Guidelines did

133. *Armed Career Criminal Act*—Johnson, *supra* note 109, at 307; Menendez, *supra* note 109, at 17.

134. *Armed Career Criminal Act*—Johnson, *supra* note 109, at 306–07 (footnote omitted).

135. Menendez, *supra* note 109, at 17.

136. Beckles v. United States, 137 S. Ct. 886 (2017); Matthew Gibbons, Note, Sessions v. Dimaya*: Vagueness Doctrine & Deportation Statutes*, 13 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 1, 4–5 (2017).

137. The residual clause at issue in *Beckles* stated a "crime of violence" includes an offense that "otherwise involves conduct that presents a serious potential risk of physical injury to another." *Beckles*, 137 S. Ct. at 890–91 (emphasis omitted) (quoting U.S. SENTENCING GUIDELINES MANUAL § 4B1.2(a) (U.S. SENTENCING COMM'N 2006)).

138. *Id.* at 890; Nora Demleitner, *Opinion Analysis: Court Immunizes Advisory Sentencing Guidelines Against Vagueness Challenges*, SCOTUSBLOG (Mar. 7, 2017, 3:07 PM), http://www.scotusblog.com/2017/03/opinion-analysis-court-immunizes-advisory-sentencing-guidelines-vagueness-challenges [https://perma.cc/7ZW8-N38S].

139. *Beckles*, 137 S. Ct. at 892.

140. *Id.* at 894.

not fall within either category of criminal law to which the void-for-vagueness doctrine applies.[141]

However, in the two years following *Beckles*, the Supreme Court used the logic of *Johnson* to strike down statutes in *Sessions v. Dimaya*[142] and *United States v. Davis*,[143] confirming a new willingness of the Court to invalidate statutes under the void-for-vagueness doctrine. In *Dimaya*, the Supreme Court declared that a residual clause in the Immigration and Nationality Act ("INA"), which defined "crime of violence" using similar language to the residual clause at issue in *Johnson*, was unconstitutionally vague.[144] In reaching this decision, Justice Kagan, writing for the majority, relied on the speculation-layering theory outlined in *Johnson*.[145] She found that the INA's residual clause was impermissibly vague because, like the clause in *Johnson*, it used a categorical approach, which required judges to consider a crime's "ordinary case" and created "uncertainty about the level of risk that makes a crime 'violent.'"[146]

In a portion of the opinion that only garnered a plurality, Justice Kagan looked past a potentially distinguishing factor between *Johnson* and *Dimaya*: *Johnson* was a criminal case while *Dimaya* (a deportation case) was a civil matter.[147] Traditionally, the Supreme Court interpreted the Constitution to allow more vagueness in civil statutes than criminal statutes because civil statutes typically dictate less severe punishments.[148] However, in *Dimaya*, Justice Kagan reasoned that extending *Johnson*'s rationale to deportation cases was warranted because "deportation is 'a particularly severe penalty,' which may be of greater concern to a convicted alien than 'any potential jail sentence.'"[149] As a result, Justice Kagan recognized deportation cases as a "rare exception" to "vagueness doctrine's traditional distinction between criminal and civil law."[150]

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141. *Id.* at 892.

142. Sessions v. Dimaya, 138 S. Ct. 1204 (2018).

143. United States v. Davis, 139 S. Ct. 2319 (2019).

144. *Dimaya*, 138 S. Ct. at 1210–12. In *Dimaya*, the residual clause defined "crime of violence" as "any other offense that is a felony and 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." *Id.* at 1211 (quoting 18 U.S.C. § 16(b) (2017)).

145. *Id.* at 1213–16.

146. *Id.* at 1211, 1213–16.

147. *Id.* at 1212–13 (plurality opinion).

148. *Id.* ("[T]his Court has stated that '[t]he degree of vagueness that the Constitution [allows] depends in part on the nature of the enactment': In particular, the Court has 'expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe.'" (second and third alterations in original) (quoting Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498–99 (1982))).

149. *Id.* at 1213 (quoting Lee v. United States, 137 S. Ct. 1958, 1968 (2017)).

150. *See Void-for-Vagueness Doctrine*—Dimaya, *supra* note 25, at 370 (citing *id.* at 1212–13).

In his concurrence, Justice Gorsuch was more aggressive than Justice Kagan on this point.[151] He explained that the application of the void-for-vagueness doctrine should not turn on the classification of a law as criminal or civil.[152] By doing so, he suggested that the doctrine could be further expanded to apply equally to criminal and civil statutes in future cases.[153] As a result, the Court in *Dimaya* demonstrated a willingness to extend *Johnson*'s rationale to the civil setting[154]—an attitude much different from that in *Beckles*, where the Court refused to extend *Johnson*'s rationale to advisory Sentencing Guidelines.[155]

One year after *Dimaya*, the Supreme Court again invoked *Johnson*'s rationale in *United States v. Davis*.[156] In *Davis*, the Supreme Court struck down another residual clause that defined "crime of violence."[157] The residual clause in *Davis* was almost identical to the clause at issue in *Dimaya*, but the clause in *Davis* was in a "statute [that] authorize[d] heightened criminal penalties for using or carrying a firearm."[158] Writing for the majority, Justice Gorsuch explained that a statute is unconstitutionally vague if it uses the categorical approach—requiring judges to imagine a crime's "ordinary case"—based on the teachings of *Johnson* and *Dimaya*.[159] He then declared the residual clause unconstitutionally vague after finding that it adopted the

151. *Dimaya*, 138 S. Ct. at 1228–29 (Gorsuch, J., concurring in part and concurring in the judgment); *see* Kevin Johnson, *Opinion Analysis: Crime-Based Removal Provision Is Unconstitutionally Vague*, SCOTUSBLOG (Apr. 17, 2018, 2:32 PM), https://www.scotusblog.com/2018/04/opinion-analysis-crime-based-removal-provision-is-unconstitutionally-vague [https://perma.cc/3M8J-ZRXL].

152. *Dimaya*, 138 S. Ct. at 1228–29 (Gorsuch, J., concurring in part and concurring in the judgment) (explaining that "the happenstance that a law is found in the civil or criminal part of the statute books cannot be dispositive"); *see Void-for-Vagueness Doctrine*—Dimaya, *supra* note 25, at 370 (explaining that, in his *Dimaya* concurrence, Justice Gorsuch "suggested leaving the door open to applying *Johnson* in a wider variety of future cases"); *see also* HILLEL R. SMITH, CONG. RESEARCH SERV., HIGH COURT STRIKES DOWN PROVISION OF CRIME OF VIOLENCE DEFINITION AS UNCONSTITUTIONALLY VAGUE 4 (2019), *available at* https://fas.org/sgp/crs/misc/LSB10128.pdf [https://perma.cc/Y556-EYWU] ("Justice Gorsuch opined, however, that the vagueness doctrine should extend to all civil statutes—not just the civil immigration law at issue in the case . . . .").

153. *See* sources cited *supra* note 152.

154. *See Void-for-Vagueness Doctrine*—Dimaya, *supra* note 25, at 371 (noting that "[o]nce the Court had done the analysis in *Johnson*, the only real question in *Dimaya* was whether or not the Court would extend this due process protection to deportation cases").

155. *See supra* notes 136–41 and accompanying text.

156. United States v. Davis, 139 S. Ct. 2319 (2019).

157. *Id.* at 2324, 2336. The residual clause at issue defined "crime of violence" as "an offense that is 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." *Id.* at 2324 (quoting 18 U.S.C. § 924(c)(3)(B) (2018)).

158. *Id.* at 2324–25.

159. *Id.* at 2326 ("What do *Johnson* and *Dimaya* have to say about the statute before us? Those decisions teach that the imposition of criminal punishment can't be made to depend on a judge's estimation of the degree of risk posed by a crime's imagined 'ordinary case.'").

categorical approach under cannons of statutory interpretation.[160] As a result, *Davis* marked the death of the categorical approach.[161]

Notably, *Davis* involved a criminal statute that fixed criminal sentences.[162] Thus, it did not provide the Court with the opportunity to expand the doctrine to a broader range of civil cases, which *Dimaya* indicated could be a possibility.[163] Nevertheless, *Davis* still evidences the Court's new-found enthusiasm for considering vagueness challenges under *Johnson*'s rationale.

Therefore, *Johnson*, *Dimaya*, and *Davis* arguably indicate an expansion of the void-for-vagueness doctrine or, at the very least, a greater willingness of the Court to engage in vagueness analysis. Expanding the doctrine could lead to adverse consequences, especially since the Court did not provide clear guidance regarding when the doctrine should be further expanded in future cases.[164] As explained by an article in the *Harvard Law Review*:

> While vagueness doctrine properly applies to civil deprivations that closely resemble criminal ones, the doctrine could easily be extended too far, doing violence to regulatory schemes that require some degree of vagueness to be effective, but that do not deprive individuals of their liberty in the same urgent way. . . . Ad hoc extension of vagueness doctrine could create arbitrary and unpredictable outcomes in individual cases—exactly what the doctrine is trying to prevent.[165]

Future Supreme Court cases are the only true indicator of whether *Davis* was "the last *Johnson* domino to fall" or whether the Court will continue to invalidate statutes—both criminal and civil—under an expanded understanding of the void-for-vagueness doctrine.[166]

III. THE VOID-FOR-VAGUENESS DOCTRINE IS NOT AN APPROPRIATE REMEDY FOR AMBIGUOUS STATUTORY DEFENSES

With the doctrinal stage set, this Part provides three rationales to support its argument that the void-for-vagueness doctrine is not an appropriate remedy for ambiguous statutory defenses. These rationales focus on the interaction between the void-for-vagueness doctrine and statutory defenses in

160. *Id.* at 2327–33, 2336.

161. Leah Litman, *Opinion Analysis: Vagueness Doctrine as a Shield for Criminal Defendants*, SCOTUSBLOG (June 24, 2019, 2:25 PM), https://www.scotusblog.com/2019/06/opinion-analysis-vagueness-doctrine-as-a-shield-for-criminal-defendants [https://perma.cc/F468-KYCJ].

162. *Davis* interpreted 18 U.S.C. § 924(c), which "threaten[ed] long prison sentences for anyone who uses a firearm in connection with certain other federal crimes." *Davis*, 139 S. Ct. at 2323 (citing 18 U.S.C. § 924(c)).

163. *See supra* notes 147–53 and accompanying text.

164. *Void-for-Vagueness Doctrine*—Dimaya, *supra* note 25, at 371–72.

165. *Id.*

166. Litman, *supra* note 161.

the context of due process generally,[167] the notice requirement,[168] and the prohibition against arbitrary and discriminatory enforcement.[169]

It is important to understand how statutory defenses generally operate before analyzing whether the void-for-vagueness doctrine is an appropriate remedy for ambiguous defenses. Statutory defenses can take various forms. For instance, they can operate as affirmative defenses, by allowing defendants to avoid liability even when they satisfied all elements of a crime, or as immunity statutes, by allowing defendants to altogether avoid criminal prosecution.[170] As noted above, in *Wilson*, whether section 704.13 operated as an affirmative defense or as an immunity statute was one of the primary issues on appeal to the Iowa Supreme Court.[171] Regardless, the key aspect of statutory defenses, which permeates the following analysis, is that they provide defendants with a beneficial tool: the opportunity to argue that they should be exculpated from their alleged wrongdoings.[172]

Statutes, including statutory defenses, can be ambiguous in at least two ways. First, a statute can be ambiguous in its procedural requirements, meaning that the statute does not clearly indicate the legal processes that police officers, judges, juries, and prosecutors must take to carry out the statute's provisions. For instance, in *Wilson*, the Iowa district court found that the procedural requirements of Iowa Code section 704.13 were plagued with ambiguity because they did not establish the burden of proof, indicate whether immunity is determined before or during trial, or explain evidentiary issues.[173] Second, a statute can be ambiguous in its conduct requirements, meaning that the statute does not inform individuals how to conform their actions to the statute's provisions. For instance, in *City of Chicago v. Morales*, the U.S. Supreme Court found that the conduct requirements in a loitering ordinance were ambiguous because the term "loitering" was defined such that

167. *See infra* Section III.A.

168. *See infra* Section III.B.

169. *See infra* Section III.C.

170. Jennifer Randolph, Comment, *How to Get Away with Murder: Criminal and Civil Immunity Provisions in "Stand Your Ground" Legislation*, 44 SETON HALL L. REV. 599, 608–09 (2014); *see also* People v. Guenther, 740 P.2d 971, 980 (Colo. 1987) ("There is a constitutionally significant difference in kind between requiring a defendant, on the one hand, to bear the burden of proving a claim of pretrial entitlement to immunity from prosecution and, on the other, to carry the burden of proof at trial on an affirmative defense to criminal charges."); Elizabeth B. Megale, *Deadly Combinations: How Self-Defense Laws Pairing Immunity with a Presumption of Fear Allow Criminals to "Get Away with Murder*," 34 AM. J. TRIAL ADVOC. 105, 108 (2010) (explaining that an affirmative defense is a rebuttable presumption "that the prosecution could attempt to overcome at trial," while immunity "creates a complete bar to criminal prosecution and civil action").

171. State v. Wilson, No. 18-0564, slip op. at 2, 10–20 (Iowa Apr. 10, 2020).

172. Randolph, *supra* note 170, at 608–09; *see also Defense*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "defense" generally to mean "[a] defendant's stated reason why the plaintiff or prosecutor has no valid case").

173. State v. Wilson, No. FECR116476, slip op. at 7 (Iowa Dist. Ct. Mar. 27, 2018).

an ordinary citizen could not understand "what loitering [was] covered by the ordinance and what [was] not."[174]

This Note distinguishes between statutes that suffer from ambiguities in their procedural and conduct requirements when doing so affects its analysis. With this understanding, this Note next provides three reasons why courts should not use the void-for-vagueness doctrine to invalidate statutory defenses.

A. THE VOID-FOR-VAGUENESS DOCTRINE VIOLATES DUE PROCESS WHEN APPLIED TO STATUTORY DEFENSES

Courts violate due process by expanding the void-for-vagueness doctrine to reach ambiguous statutory defenses. The Due Process Clauses (in addition to separation of powers) form the theoretical foundation for the void-for-vagueness doctrine.[175] The Due Process Clauses of the Fifth and Fourteenth Amendments prevent federal and state governments from interfering with certain individual rights—those involving "life, liberty, or property."[176] By doing so, the Due Process Clauses safeguard individual rights from improper governmental actions, signaling that the Clauses are meant to benefit individuals, not federal or state governments.[177]

Keeping these principles of due process in mind, this Section explains why the void-for-vagueness doctrine is not an appropriate remedy for ambiguous statutory defenses. To begin, it is important to recognize that applying the void-for-vagueness doctrine to statutory defenses would be an extension of the doctrine under current U.S. Supreme Court jurisprudence. As previously discussed, the U.S. Supreme Court has arguably expanded the reach of the void-for-vagueness doctrine in *Johnson*, *Dimaya*, and *Davis*.[178] Nevertheless, the Court has not indicated a willingness to expand the doctrine beyond criminal or civil statutes that create unfavorable consequences for defendants.[179]

In regard to criminal statutes, the Court in *Beckles* noted that it has only applied the void-for-vagueness doctrine to two types of criminal statutes: "laws that *define* criminal offenses and laws that *fix the permissible sentences* for criminal

174. City of Chicago v. Morales, 527 U.S. 41, 56–60 (1999).

175. United States v. Davis, 139 S. Ct. 2319, 2325 (2019); *see supra* Section II.A.

176. U.S. CONST. amend V; *id.* amend. XIV, § 1; *see* Robert A. Sedler, *The Enduring Constitution of the People and the Protection of Individual Rights*, 66 MICH. B.J. 1108, 1112 (1987).

177. CHEMERINSKY, *supra* note 49, at 569–71. For example, procedural due process limits governmental action by requiring that the government use procedural safeguards (notice, hearing, etc.) before depriving people of life, liberty, or property. *Id.* at 569. Likewise, substantive due process limits governmental action by requiring that the government have a sufficient reason for depriving people of these rights. *Id.* at 570.

178. *See supra* Section II.C.

179. The void-for-vagueness doctrine also extends to civil laws that "abridg[e] basic First Amendment freedoms," but these laws are outside the scope of this Note. Sessions v. Dimaya, 138 S. Ct. 1204, 1228–29 (2018) (Gorsuch, J., concurring in part and concurring in the judgment).

offenses."[180] The Court did not later disrupt this statement in *Dimaya* or *Davis*. *Dimaya* did not analyze a criminal statute and, thus, had no bearing on this assertion.[181] The statute analyzed in *Davis* allowed for enhanced criminal sentences and, thereby, clearly fell within *Beckles*' second category (laws that fix permissible sentences).[182] Surely, laws that define criminal offenses and fix permissible sentences work against the defendant's interests.

In regard to civil statutes, *Dimaya* evinced a new-found willingness of the Court to consider vagueness challenges to civil statutes.[183] But, the civil deportation statute at issue still fell within the ambient of sentencing.[184] In fact, the Court repeatedly emphasized the severity of deportation sentences when analyzing whether the void-for-vagueness doctrine should be extended to the civil statute.[185] A civil statute that threatens deportation also is unfavorable to defendants.

Therefore, U.S. Supreme Court precedent has not indicated a desire to extend the void-for-vagueness doctrine beyond criminal and civil statutes that create unfavorable consequences for defendants.[186] Statutory defenses do not fall into this category because they create favorable, not unfavorable, consequences for defendants by shielding them from liability.[187] As a result, applying the void-for-vagueness doctrine to defenses would be an extension of the doctrine.

Under current U.S. Supreme Court jurisprudence, the void-for-vagueness doctrine operates to the benefit of defendants by striking down impermissibly vague statutes that create adverse consequences for defendants.[188] As a result, defendants no longer face the adverse consequences prescribed by the statutes.[189] Thus, the U.S. Supreme Court's jurisprudence sends the following message: The void-for-vagueness doctrine helps, not hurts, defendants. This theory is bolstered by the fact that defendants normally bring the doctrine into proceedings, indicating that they believe the doctrine works in their favor too.[190] This idea that the void-for-

180. Beckles v. United States, 137 S. Ct. 886, 892 (2017).

181. *Dimaya*, 138 S. Ct. at 1212–13 (plurality opinion).

182. United States v. Davis, 139 S. Ct. 2319, 2323–25 (2019).

183. *Dimaya*, 138 S. Ct. at 1212–13 (plurality opinion); *id.* at 1228–29 (Gorsuch, J., concurring in part and concurring in the judgment); *Void-for-Vagueness Doctrine*—Dimaya, *supra* note 25, at 370; *see supra* Section II.C.

184. *Dimaya*, 138 S. Ct. at 1212–13 (plurality opinion).

185. *Id.*

186. Civil laws that extend to the First Amendment are outside the scope of this Note.

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

188. *See, e.g.*, City of Chicago v. Morales, 527 U.S. 41, 49–50 (1999) (noting that when courts struck down a gang-loitering ordinance under the void-for-vagueness doctrine, it benefited defendants by reversing their convictions).

189. *Id.*

190. *Void-for-Vagueness Doctrine*—Dimaya, *supra* note 25, at 372 ("Vagueness doctrine has primarily been used as a tool for defendants to challenge their convictions or arrests.").

vagueness doctrine helps defendants is also consistent with the principles underlying due process: the protection of individual rights.[191]

However, a much different outcome results when courts strike down statutory defenses under the void-for-vagueness doctrine. Statutory defenses benefit defendants by protecting them from liability when their conduct conforms to the defenses' requirements.[192] When the void-for-vagueness doctrine is applied to a defense, defendants can no longer seek the defense's protections because it is unenforceable.[193] This consequence acts to defendants' detriment because they are now exposed to the liability that the defense once protected them against.[194] In this context, the doctrine does not protect individual rights as required by due process; instead, it cuts against individual rights by depriving individuals of an opportunity to seek the defense's protections. Consequently, the void-for-vagueness doctrine violates due process when applied to statutory defenses.

In itself, this violation is probably sufficient to counsel against using the void-for-vagueness doctrine to remedy ambiguous statutory defenses, but this outcome is reinforced when considering the relationship between due process and the void-for-vagueness doctrine. The void-for-vagueness doctrine is founded in the Due Process Clauses—meaning that it should always be working in tandem with due process to safeguard individual rights.[195] The fact that the void-for-vagueness doctrine is, instead, fighting against due process in the context of statutory defenses indicates that the doctrine is not operating as designed. This theoretical malfunction undermines the appropriateness of the doctrine in this context.

In *Davis*, Justice Gorsuch makes an analogous argument.[196] In this case, the government argued that the Court should invoke the cannon of constitutional avoidance "to expand the reach of a criminal statute [facing a vagueness challenge] in order to save it."[197] Expanding a criminal statute disadvantages defendants by subjecting defendants to penalties for conduct not originally proscribed.[198] Justice Gorsuch explained that "[e]mploying the avoidance canon to expand a criminal statute's scope would risk offending

191. *See supra* notes 175–77 and accompanying text.

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

193. *See, e.g.*, State v. Wilson, No. FECR116476, slip op. at 8 (Iowa Dist. Ct. Mar. 27, 2018) ("Therefore, the Court finds § 704.13 to be void for vagueness, and the statute cannot be enforced in this case. Defendant's reliance on § 704.13 as a basis for immunity in this case fails.").

194. *See id.* In *Wilson*, the defendant did not raise the vagueness challenge; instead, the district court raised the challenge *sua sponte*. *Id.* at 6; State v. Wilson, No. FECR116476, slip op. at 1–2 (Iowa Dist. Ct. Nov. 3, 2017); *see supra* notes 20, 31 and accompanying text. The fact that the defendant did not raise the vagueness challenges bolsters the contention that the void-for-vagueness doctrine did not benefit the defendant.

195. *See supra* note 47 and accompanying text.

196. United States v. Davis, 139 S. Ct. 2319, 2332–33 (2019).

197. *Id.* at 2332 (emphasis omitted).

198. *Id.*

the very same due process and separation-of-powers principles on which the vagueness doctrine itself rests."[199] He also noted that such expansion would conflict with the rule of lenity, which, "like the vagueness doctrine, . . . is founded on 'the tenderness of the law for the rights of individuals.'"[200] Based on these findings, Justice Gorsuch "doubt[ed] . . . [that] the canon [of constitutional avoidance] could play a proper role in this case."[201]

Therefore, courts probably misapply a doctrine when the application of that doctrine creates due process violations and conflicts with other well-established doctrines. Both of these conditions are present when courts use the void-for-vagueness doctrine to invalidate statutory defenses. This outcome supports the contention that the void-for-vagueness doctrine is an inappropriate remedy for ambiguous statutory defenses.

B. THE VOID-FOR-VAGUENESS DOCTRINE VIOLATES NOTICE WHEN APPLIED TO STATUTORY DEFENSES

The notice requirement further illustrates that the void-for-vagueness doctrine violates due process when applied to statutory defenses. Notice is "the first essential of due process."[202] When courts strike down statutory defenses as unconstitutionally vague, they deprive individuals of the opportunity to conform their conduct to the requirements of the law—a violation of the notice requirement.[203] This statement holds true regardless of whether ambiguities lie in the procedural or conduct requirements of statutory defenses.

1. Ambiguities in Procedural Requirements

To begin, this Section considers ambiguities in statutory defenses' procedural requirements. When defenses suffer from procedural ambiguities, defendants can still tailor their actions to the defenses' requirements because the conduct requirements—the instructions on how they must act to receive the defenses' benefits—do not suffer from ambiguities. Courts deny defendants the opportunity to seek the defenses' protections, even if they clearly followed the defenses' conduct requirements, by striking down the defenses for procedural ambiguities. This outcome violates the notice requirement because the court withdrew the legislature's promised shield from liability.

The following logic illustrates this proposition. When the legislature enacts a statutory defense, it promises individuals that they will not be

199. *Id.* at 2333.

200. *Id.* (quoting United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95 (1820)).

201. *Id.* at 2332.

202. Sessions v. Dimaya, 138 S. Ct. 1204, 1228 (2018) (Gorsuch, J., concurring in part and concurring in the judgment) (quoting Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926)).

203. *See* Grayned v. City of Rockford, 408 U.S. 104, 108 (1972); *see also supra* Section II.B.1.

penalized for their actions as long as their actions fall within the scope of the defense.[204] For example, Iowa Code section 704.13 promises individuals that they will not face criminal or civil liability when using force if such force is reasonable and justifiable.[205] Based on this promise, defendants may tailor their conduct to fit the requirements of the defense. For instance, Iowans may forgo retreating when faced with danger in reliance on section 704.13's promise of immunity from liability.[206] If a court later finds that the defense was unconstitutionally vague, defendants can no longer seek protection under the statute.[207] As a result, the court retroactively deprives defendants of their ability to receive protection—although they believed that they were entitled to such protection at the time they acted.

Compare this proposition to Justice Souter's third manifestation of the notice requirement. As explained above, Justice Souter's third manifestation of the notice requirement bars courts from adopting "novel" interpretations of penal statutes to assess defendants' prior conduct.[208] The progression of events under Justice Souter's third manifestation is as follows: (1) defendants act; (2) court expands the proscription of a criminal statute; and (3) defendants' actions fall within the new proscription of the criminal statute.[209] The core principle underlying the notice requirement is the "free[dom of individuals] to steer between lawful and unlawful conduct."[210] Here, defendants are unable to conform their actions to the law's requirements because the requirements were defined by the court after they acted.[211]

Conversely, when a court finds a statutory defense unconstitutionally vague, events progress as follows: (1) the legislature declares that defendants' actions are protected if they fall within the statutory defense; (2) defendants act (potentially tailoring their conduct to the defense); and (3) the court declares that defendants cannot seek protection under the defense because it is unconstitutionally vague.[212] Here, defendants are unable to conform their

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

205. IOWA CODE § 704.13 (2018).

206. *Id.*; *see supra* note 8 and accompanying text.

207. *See, e.g.*, State v. Wilson, No. FECR116476, slip op. at 8 (Iowa Dist. Ct. Mar. 27, 2018) ("Therefore, the Court finds § 704.13 to be void for vagueness, and the statute cannot be enforced in this case. Defendant's reliance on § 704.13 as a basis for immunity in this case fails.").

208. United States v. Lanier, 520 U.S. 259, 266 (1997); *see supra* notes 82–84 and accompanying text.

209. *Lanier*, 520 U.S. at 266; Marks v. United States, 430 U.S. 188, 191–92 (1977); Bouie v. City of Columbia, 378 U.S. 347, 353–54 (1964); *see supra* notes 82–84 and accompanying text.

210. Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).

211. *Lanier*, 520 U.S. at 266; *Marks*, 430 U.S. at 191–92; *Bouie*, 378 U.S. at 353–54; *see supra* notes 82–84 and accompanying text.

212. Although the Iowa district court found that Wilson's actions did not fall within the scope of Iowa Code section 704.13, the facts of *Wilson* illustrate this point. *Wilson*, slip op. at 6 (Iowa Dist. Ct. Mar. 27, 2018). The Iowa General Assembly enacted the statutory defense in the spring

actions to the law because the defense, on which they presumably relied when acting, is no longer operative.[213] Essentially, the legislature provided notice that defendants would be protected if they acted within the scope of the defense, and the court rescinded that notice by finding the statute unconstitutionally vague after defendants already acted.

The notice violations that occur when courts retroactively expand criminal statutes and when courts find statutory defenses unconstitutionally vague operate in the opposite direction. In the first scenario, defendants act without knowing conduct is prohibited and then later learn such conduct is prohibited when the court expands the reach of the penal statute. But in the second scenario, defendants act knowing (either actually or implicitly) the law's protections and then later lose those protections when the court finds the defense unconstitutionally vague. Regardless, both scenarios constitute notice violations because the court is depriving individuals of their ability to voluntarily decide whether to follow the law.[214] The court does this by changing the legal regime—adding prohibitions or eliminating protections—after defendants already acted.

Interestingly, the notice violation that occurs when courts find statutory defenses unconstitutionally vague can be analogized to the concept of promissory estoppel in contract law. Under promissory estoppel, "[a] promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise."[215] By enacting a statutory defense, a legislature makes individuals a promise: If you act within the statute's provisions, you will not be liable for your actions.[216] The legislature should reasonably expect that the statute will induce individuals to modify their conduct or, in other words, to rely on the statute. For example, when enacting section 704.13, the Iowa General Assembly reasonably should have believed that individuals would tailor their conduct in reliance of the statute by no longer retreating prior to using reasonable force.[217] Some individuals will rely on the statute by modifying their conduct. And courts must enforce the statute to avoid injustice, for if courts invalidate the statute under the void-for-vagueness doctrine, they deprive individuals of their right to decide between lawful and unlawful conduct—a violation of the notice requirement.

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of 2017, Appellant's Brief, *supra* note 11, at 35, prior to Wilson's fatal actions in August of 2017. *Wilson*, slip op. at 1 (Iowa Dist. Ct. Mar. 27, 2018). In March of 2018, the Iowa district court held that section 704.13 was unconstitutionally vague and, thereby declared that "[Wilson's] reliance on § 704.13 as a basis for immunity in this case fails." *Id.* at 8.

213. *Id.*

214. *Grayned*, 408 U.S. at 108.

215. RESTATEMENT (SECOND) OF CONTRACTS § 90 (AM. LAW INST. 1981).

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

217. IOWA CODE § 704.13 (2018); *see supra* note 8 and accompanying text.

2. Ambiguities in Conduct Requirements

This analysis is also valid when ambiguities arise in a statutory defense's conduct requirements. The more ambiguous a defense's conduct requirements, the less likely that a reasonable person[218] will understand the conduct protected by the statute. As a result, it will be more difficult for people to tailor their conduct to the defense's requirements because the legislature did not provide adequate notice of those requirements.

One could argue the following: Since the legislature did not provide notice, people could not reasonably believe that their conduct fell within the defense's provisions, and thus they suffer no harm when the court finds the defense unconstitutionally vague because they never reasonably believed that their conduct was protected by the defense. However, this logic is incorrect when considering the broadened scope of facial void-for-vagueness challenges after *Johnson*.[219]

As explained in greater detail above, in *Johnson*, the U.S. Supreme Court found that a statute did not have to be vague in all applications to be declared facially void for vagueness.[220] As a result, a statute can be facially invalid under the void-for-vagueness doctrine even if some conduct clearly falls within the statute's scope.[221] As inferred by the *Johnson* opinion, most, if not all, statutes clearly cover at least some conduct, even if they are, on the whole, vague.[222]

In the context of penal statutes, this broadened scope of facial vagueness challenges does not raise due process concerns. Here, finding a penal statute facially void for vagueness benefits defendants: Even if their conduct clearly falls within the penal statute, they will not be convicted under the statute because the statute is facially vague.[223] Thus, the expanded scope of facial vagueness challenges as applied to penal statutes comes within the purpose of the Due Process Clauses: the protection of individual rights.

However, this broadened scope of facial vagueness challenges raises due process concerns when statutory defenses are at issue. Most, if not all, ambiguous statutory defenses—even those suffering from the gravest ambiguities—will reasonably cover at least some conduct.[224] A simple hypothetical is illustrative. Suppose the minimum speed limit on a highway is 45 miles per hour ("mph"). The legislature enacts a statutory defense stating,

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218. The notice requirement uses an objective standard. *Grayned*, 408 U.S. at 108; *see supra* notes 65–67.

219. Johnson v. United States, 135 S. Ct. 2551, 2560–61 (2015); *see supra* notes 125–32 and accompanying text.

220. *Johnson*, 135 S. Ct. at 2560–61; *see supra* notes 125–32 and accompanying text.

221. *Johnson*, 135 S. Ct. at 2560–61; *see supra* notes 125–32 and accompanying text.

222. *Cf. Johnson*, 135 S. Ct. at 2560–61 (recognizing that even vague laws can contain straightforward cases and describing cases where the U.S. Supreme Court found penal statutes void-for-vagueness although "some conduct . . . clearly [fell] within the provision[s'] grasp[s]").

223. *See id.* at 2580–81 (Alito, J., dissenting).

224. *See id.* at 2560–61 (majority opinion).

"No automobile driver shall have to pay a ticket for driving under the minimum speed limit if the driver received the ticket for driving a little under the minimum speed limit during rain." This statutory defense raises numerous ambiguities: How hard does it need to be raining? Do just a few raindrops count? What does it mean to be going "a little under the minimum speed limit"? What about 15 mph under the speed limit? Nevertheless, a reasonable person[225] would likely understand that a driver meets the requirements of this ambiguous defense if he or she is driving 44 mph during a downpour. At a minimum, the defense puts drivers on notice that this conduct is protected.

After *Johnson*, courts can declare statutes facially void for vagueness even if they are not vague in all applications.[226] Under this rule, a court could find a statutory defense (such as the one in the speed limit hypothetical) unconstitutionally vague although some conduct (like driving 44 mph during a downpour) reasonably, if not clearly, falls within the defense's provisions.

This outcome raises due process concerns—particularly, notice concerns. Here, a reasonable person would believe that certain conduct (like driving 44 mph during a downpour) is covered by the statutory defense. Thus, defendants may tailor their conduct to the defense's requirements (by driving 44 mph during a downpour) to receive the defense's protections (not paying the ticket). Courts deprive defendants of the ability to conform their conduct to situations that reasonably fall within the defense by finding a defense facially vague, even though it is not vague in these situations. Essentially, the court retroactively revokes the notice previously provided by the legislature that such conduct is protected. This result creates a notice violation because defendants who already reasonably acted in reliance of the defense are stripped of their ability to choose between lawful and unlawful activity.

Therefore, statutory defenses that suffer from ambiguities in their conduct requirements may reasonably cover only a few situations (as in the speed limit hypothetical) but, nevertheless, defendants are on notice that they will receive protection in those situations. Courts violate defendants' right to fair warning of the law's requirements by retroactively finding that a statute is facially vague because uncertainty surrounds most, but not all, conduct covered by the statute.

In summary, the notice requirement functions to ensure that, if individuals choose to violate the law, they are doing so voluntarily due to fair warning that their conduct is prohibited. Individuals are not given this opportunity when courts find statutory defenses unconstitutionally vague —regardless of whether the vagueness arises in the procedural or conduct requirements—and, thereby, courts violate the notice requirement by doing

225. The notice requirement uses an objective standard. Grayned v. City of Rockford, 408 U.S. 104, 108 (1972); *see supra* notes 65–67.

226. *Johnson*, 135 S. Ct. at 2560–61.

so. Accordingly, the notice requirement supports this Note's argument that the void-for-vagueness doctrine is not an appropriate remedy for ambiguous defenses like Iowa Code section 704.13.

C. STATUTORY DEFENSES DO NOT ENCOURAGE ARBITRARY AND DISCRIMINATORY ENFORCEMENT

As discussed in greater detail above, statutes are unconstitutionally vague if they invite arbitrary and discriminatory enforcement of the law.[227] This prong of the analysis ensures that statutes supply sufficient guidelines so that police officers, prosecutors, juries, and judges do not act according to stereotypes and biases.[228] This Section argues that statutory defenses do not encourage unbridled law enforcement or, at the very least, generate a lower risk of unbridled law enforcement than laws that proscribe conduct or define penalties. As a result, vagueness challenges are not necessary to mitigate the risk of unrestrained law enforcement when statutory defenses are at issue.

To start, this Section considers police officers' discretion. The risk of unbridled law enforcement by police officers is far greater when penal statutes, rather than defenses, are at issue. First, consider the concerns raised by vague penal statutes. Police officers consider the proscription of a penal statute when *initially* deciding whether to pursue criminal action against individuals.[229] For instance, in *City of Chicago v. Morales*, police officers considered the provisions of a gang-loitering statute *before* deciding to force individuals to leave public spaces.[230] In such situations, insufficient guidelines in penal statutes generate the risk that police officers will revert to personal biases when deciding whether legal action is appropriate.

However, the risk of biases influencing police officers' decisions is largely reduced when statutory defenses suffer from ambiguities. Defendants generally bring statutory defenses to actions already brought by police officers.[231] Thus, unlike penal statutes, defenses "become relevant only *after* an arrest is made."[232] Consequently, vagueness in defenses "is far less likely to be an inducement to irresponsible law enforcement" because police officers likely make their initial legal determinations with little or no consideration for the defense.[233] The ambiguities in defenses cannot allow police officers to act on biases if they do not even consider the defenses when making their decisions. Therefore, defenses are unlikely to invite police officers to engage in unrestricted law enforcement because defenses only operate after the

227. City of Chicago v. Morales, 527 U.S. 41, 56 (1999); *see supra* Section II.B.2.

228. *See supra* Section II.B.2.

229. *See Morales*, 527 U.S. at 47.

230. *Id.*

231. *See* People v. Illardo, 399 N.E.2d 59, 62 (N.Y. 1979).

232. *Id.* (emphasis added).

233. *Id.*

officers take legal action.[234] This assertion is valid regardless of whether the defense is ambiguous in its procedural or conduct requirements because, either way, police officers act before the defense is relevant.

For these same reasons, defenses are unlikely to generate unchecked discretion by prosecutors when making charging decisions.[235] Defendants bring defenses into legal proceedings *after* prosecutors file charges.[236] As a result, prosecutors will likely disregard the defenses in their charging decisions and, thus, ambiguities in defenses will not create a risk of prejudice.

However, a different rationale supports a finding that statutory defenses do not invite judges, juries, and prosecutors (post-charging) to engage in arbitrary and discriminatory law enforcement. These individuals have greater discretion to make decisions as statutory defenses' requirements—both procedural and conduct—become less clear. They can use this discretion to disadvantage defendants. For example, judges and juries can use ambiguities in defenses' conduct requirements to grant defenses to defendants that they like but to deny defenses to defendants that they have biases against. Likewise, when defenses suffer from procedural ambiguities, prosecutors may argue based on prejudices that some defendants, but not others, are entitled to beneficial procedures (such as immunity from prosecution under Iowa Code section 704.13).[237]

Ambiguities in statutory defenses allow judges, juries, and prosecutors (post-charging) to make arbitrary and discriminatory decisions. But this outcome does not mean that ambiguous statutory defenses violate the void-for-vagueness doctrine's prohibition against arbitrary and discriminatory enforcement. Such a finding would ignore a critical term defining this prong of vagueness analysis: enforcement. For this prong of vagueness analysis to operate, judges, juries, and prosecutors must be *enforcing* the statute at issue, not just making arbitrary or discriminatory decisions.[238] However, judges, juries, and prosecutors do not enforce statutory defenses.

The word "enforcement" inherently has an involuntary connotation. When officials use enforcement mechanisms (e.g., fines, incarceration), they are compelling people to obey or, at the very least, to respect the law against their free will.[239] If people are voluntarily obeying the law, officials would never need to invoke the enforcement mechanisms against them. Thus, it logically follows that officials do not enforce the law against individuals who are voluntarily submitting to the law's provisions.

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234. *Id.*

235. *See id.*

236. *Id.*

237. State v. Wilson, No. FECR116476, slip op. at 8 (Iowa Dist. Ct. Mar. 27, 2018) (noting that different courts can adopt different procedural requirements for the same statute, which allows prosecutors to make these arguments).

238. *See* Kolender v. Lawson, 461 U.S. 352, 358 (1983).

239. *Enforcement*, BLACK'S LAW DICTIONARY (11th ed. 2019).

Judges, juries, and prosecutors cannot enforce statutory defenses against defendants for two reasons. First, defendants voluntarily submit to defenses' provisions. Defendants bring defenses into legal proceedings,[240] asking judges and juries to grant them protections under the defenses.[241] By doing so, defendants invite judges and juries to evaluate whether their conduct falls within a defense.[242] Likewise, by raising a defense, defendants acquiesce to prosecutors arguing that their actions do not fall within the defense's provisions. These voluntary submissions by defendants contradict the inherent involuntariness underlying the concept of enforcement.

Second, defenses grant defendants protections rather than compel their compliance with the law. When evaluating a statutory defense, judges and juries must decide whether to grant a defendant the statute's protections.[243] The nature of this decision conflicts with the concept of enforcement because granting defenses in no way compels the defendant to obey the law; rather, it provides the defendant with a safeguard against adverse legal consequences. Similarly, when prosecutors argue that defendants are not entitled to a defense, they are not arguing that defendants must face some adverse consequence against their free will. Instead, they are only arguing that defendants cannot seek the protections under that specific defense—but other defenses could be available for defendants. The fact that statutory defenses do not force defendants to respect the law negates a finding that judges, juries, and prosecutors (post-charging) can enforce these defenses.

In summary, statutory defenses raise few, if any, concerns about arbitrary and discriminatory enforcement by police officers, judges, juries, and prosecutors. Police officers and prosecutors (pre-charging) likely do not consider the defenses in their initial legal actions (such as arrests and charging). Judges, juries, and prosecutors (post-charging) do not *enforce* the defenses against defendants—a necessary factor in this prong of vagueness analysis. Therefore, the void-for-vagueness doctrine is not needed to reduce the threat of arbitrary and discriminatory enforcement when statutory defenses are at issue. This outcome further supports this Note's proposition that vagueness challenges are inappropriate when applied to statutory defenses.

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240. *See, e.g.*, State v. Wilson, No. 18-0564, slip op. at 5 (Iowa Apr. 10, 2020) (noting that Wilson (the defendant) asserted Iowa Code section 704.13 (a statutory defense)).

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

242. For instance, in *Wilson*, both the judge and jury decided whether Wilson's conduct fell within Iowa Code section 704.13. *Wilson*, slip op. at 6 (Iowa Dist. Ct. Mar. 27, 2018) (reporting the district court's decision that Wilson did not use justified force under Iowa Code section 704.13); Appellant's Brief, *supra* note 11, at 20–22; Appellee's Brief at 46, State v. Wilson, No. 18-0564 (Iowa Apr. 10, 2020), *available at* https://www.iowacourts.gov/courtcases/7655/briefs/1901/embedBrief [https://perma.cc/XN6B-MT5R] (noting that "[t]he jury found, beyond a reasonable doubt, that [Wilson] 'did not act with justification'" (quoting jury instructions)).

243. *See* sources cited *supra* note 242.

IV. RESOLVING UNCERTAINTIES IN IOWA'S VOID-FOR-VAGUENESS DOCTRINE AFTER *STATE V. WILSON*

The above analysis explains that the void-for-vagueness doctrine is not an appropriate remedy for ambiguous statutory defenses. This analysis focused on the void-for-vagueness doctrine under the U.S. Constitution. In *Wilson*, the Iowa district court's decision did not specify whether Iowa Code section 704.13 was unconstitutionally vague under the U.S. Constitution or Iowa Constitution.[244] Regardless, the Iowa district court erred by finding section 704.13 unenforceable under the void-for-vagueness doctrine.

The Iowa Constitution contains a prohibition against vague statutes "under the Iowa due process clause found in article I, section 9 of the Iowa Constitution."[245] The Iowa Supreme Court recognizes an independent duty to interpret the Iowa Constitution.[246] Under this duty, the Iowa Supreme Court could interpret the void-for-vagueness doctrine under the Iowa Constitution to have a different meaning than the doctrine under the U.S. Constitution.[247]

In general, the void-for-vagueness doctrine under the Iowa Constitution mirrors the doctrine under the U.S. Constitution by focusing on due process, notice, and arbitrary and discriminatory enforcement.[248] Accordingly, if the Iowa Supreme Court extended the void-for-vagueness doctrine under the Iowa Constitution to reach statutory defenses, it would violate many of the same principles discussed in Part III. For this reason, the Iowa Supreme Court should not extend the void-for-vagueness doctrine under the Iowa Constitution to cover statutory defenses.

Even if the Iowa Supreme Court did extend the doctrine in this manner, the Iowa district court still erred in *Wilson*. The U.S. Constitution provides a floor for individual rights.[249] Currently, the U.S. Constitution sets the

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244. *Wilson*, slip op. at 6–7 (Iowa Dist. Ct. Mar. 27, 2018) (stating generally that "the Court has considered the constitutionality of § 704.13" and citing *Formaro v. Polk County*, 773 N.W.2d 834, 840–41 (Iowa 2009), which refers to the due process clauses in both the Iowa Constitution and U.S. Constitution).

245. *Formaro*, 773 N.W.2d at 840. The Iowa Constitution states, "no person shall be deprived of life, liberty, or property, without due process of law." IOWA CONST. art. I, § 9.

246. State v. Cline, 617 N.W.2d 277, 284–85 (Iowa 2000), *abrogated on other grounds by* State v. Turner, 630 N.W.2d 601, 606 n.2 (Iowa 2001); *see* State v. Ochoa, 792 N.W.2d 260, 267 (Iowa 2010). "The degree to which [the Iowa Supreme Court] follow[s] United States Supreme Court precedent, or any other precedent, depends solely upon its ability to persuade [the Iowa Supreme Court] with the reasoning of the decision." *Ochoa*, 792 N.W.2d at 267.

247. *Cline*, 617 N.W.2d at 284–85.

248. *See, e.g.*, State v. Showens, 845 N.W.2d 436, 441–42 (Iowa 2014); *Formaro*, 773 N.W.2d at 840.

249. State v. Swaim, 412 N.W.2d 568, 571 n.1 (Iowa 1987) (noting that state laws provide supplemental rights to the Federal Constitution, inferring that the Federal Constitution establishes the minimal rights afforded); *see Developments in the Law—The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1367 (1982) [hereinafter *Developments in the Law*].

following floor: The void-for-vagueness doctrine benefits defendants.[250] If the Iowa courts extend the void-for-vagueness doctrine under the Iowa Constitution to reach statutory defenses, the Iowa Constitution would provide less protections to individuals than those currently provided under the U.S. Constitution.[251] However, individuals would still be entitled to the minimum protections afforded by the U.S. Constitution, and the Iowa courts must honor those protections.[252] Thus, to avoid a violation of federal rights, the district court in *Wilson* needed to enforce the U.S. Constitution's floor—that the void-for-vagueness doctrine helps defendants—by refusing to strike down section 704.13 under the doctrine. By doing exactly the opposite, the Iowa district court violated the U.S. Constitution's guarantee of due process.

Therefore, in *Wilson*, the Iowa district court misapplied the void-for-vagueness doctrine by finding section 704.13 unconstitutionally vague. On appeal, the Iowa Supreme Court implicitly overruled the district court's holding that section 704.13 was void for vagueness by outlining a procedure for defenses brought under section 704.13.[253] However, the Iowa Supreme Court did not articulate any concerns regarding the district court's application of the void-for-vagueness doctrine to defenses.[254] In fact, it failed to provide any guidance on the Iowa Constitution's void-for-vagueness doctrine.[255]

Absent guidance from the Iowa Supreme Court, the Iowa district court's decision in *Wilson* could potentially add confusion to the Iowa Constitution's void-for-vagueness doctrine. Other Iowa courts could interpret the erroneous decision in *Wilson* to mean that Iowa's void-for-vagueness doctrine reaches a wide variety of statutes, such as defenses, that do not traditionally face vagueness challenges.[256] This interpretation could lead to ad hoc extensions of the doctrine—creating ongoing confusion and potential chaos within Iowa's statutory schemes.[257] Accordingly, the Iowa Supreme Court needs to take jurisprudential measures in future cases to clarify that Iowa's void-for-vagueness doctrine does not extend to defenses.

V. CONCLUSION

In conclusion, the void-for-vagueness doctrine is not an appropriate remedy for ambiguous statutory defenses. Extensions of the void-for-vagueness doctrine to statutory defenses violate due process and fair notice, while raising few, if any, concerns for arbitrary and discriminatory law

250. *See supra* notes 188–91 and accompanying text.
251. *See supra* notes 192–94 and accompanying text.
252. *Swaim*, 412 N.W.2d at 571 n.1; *see Developments in the Law*, *supra* note 249, at 1367.
253. State v. Wilson, No. 18-0564, slip op. at 2, 10–20 (Iowa Apr. 10, 2020).
254. *Id.*
255. *Id.*
256. *See Void-for-Vagueness Doctrine*—Dimaya, *supra* note 25, at 371–72.
257. *See id.*

enforcement. In recent years, the U.S. Supreme Court demonstrated a renewed willingness to consider vagueness challenges to statutes. However, "it failed to give future courts binding precedent about how the vagueness doctrine should be extended (or not) going forward."[258] When adjudicating future vagueness challenges, the U.S. Supreme Court—like the Iowa Supreme Court—needs to ensure that it clearly articulates the scope of the void-for-vagueness doctrine such that the doctrine obviously does not extend to statutory defenses. Without clear guidance, the U.S. judicial system risks aggressive extensions of the void-for-vagueness doctrine. If statutory defenses fall victim to such extensions, individual rights will be violated in direct contravention of due process.

258. *See id.* at 372.