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Legal Sidebar

The Supreme Court's Narrow Construction of Federal Criminal Laws: Historical Practice and Recent Trends

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Criminal law marks a boundary between conduct that society deems permissible and behavior that it deems worthy of punishment. Those who cross the line may be subject to penalty and social disapproval. In addition to punishment, transgressors may face wide-ranging collateral consequences, among other things.

Defendants charged with criminal offenses have mounted various legal challenges to the line drawn by criminal law itself. One category of legal challenge centers on arguments related to where or how the boundary between lawful and unlawful conduct is established. For example, defendants have argued that certain criminal statutes are unclear and fail to give fair notice to the public as to what conduct is wrongful; that other criminal statutes improperly reach those with no awareness that they have crossed the line and thus fail to reserve criminal punishment for those who are truly culpable; and that the application of particular criminal statutes in individual circumstances strays beyond what Congress intended or clashes with countervailing constitutional values.

In recent years, the Supreme Court has issued a series of decisions agreeing with defendants that have raised each of these arguments, narrowly construing some criminal statutes in the process. A federal appellate judge described these rulings as "nearly an annual event." In the Court's latest term, the Justices again issued opinions limiting the reach of specific criminal statutes. This Sidebar addresses this apparent Supreme Court trend, identifying the substantive reasons why the Court has limited the scope of criminal statutes and offering examples from historic and modern cases. The discussion and examples are not comprehensive but are representative in nature. The Sidebar also summarizes four cases from the recently concluded 2022 Supreme Court term—*Counterman v. Colorado*, *Dubin v. United States*, *United States v. Hansen*, and *Twitter v. Taamneh*—in which the Court narrowly construed the criminal laws and concepts at issue. The Sidebar closes with considerations for Congress.

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Why the Supreme Court May Narrowly Interpret a Criminal Law

Defendants charged with criminal offenses may contest whether they committed the offense, and also may attack the criminal law itself. The latter category of challenges may include arguments, for example, that the federal statute is vague and fails to give clear notice as to what conduct is unlawful. This section highlights some of the primary challenges to criminal laws that have led the courts to give a narrow or limiting construction to a criminal law.

Vagueness: The Line Between Lawful and Unlawful Conduct Does Not Provide Fair Notice

The Supreme Court has observed that the criminal law presupposes that an individual possesses the capacity to choose whether to conform one's conduct to the dictates of the law. The Court has also emphasized that the line between lawful and unlawful conduct must be sufficiently clear that an individual can understand the limits of the law and thereby make a meaningful choice about whether to stay within them. When the line is unclear, an individual may lack fair warning that his or her conduct risks criminal sanction. Clarity also helps law enforcement identify when an individual has actually engaged in forbidden conduct such that criminal punishment may be warranted. By contrast, an unclear line may invite arbitrary and discriminatory enforcement practices.

A criminal law that fails to provide the requisite clarity may be invalidated under the Fifth Amendment's void-for-vagueness doctrine. For example, in a series of cases, the Supreme Court applied this doctrine to strike down three related federal criminal provisions that generally prohibit felonies involving a "serious potential" or "substantial" risk of physical injury or force: *Johnson v. United States* (invalidating 18 U.S.C. § 924(e)(2)(B)(ii)), *Sessions v. Dimaya* (18 U.S.C. § 16(b)), and *United States v. Davis* (18 U.S.C. § 924(c)). Where a narrow construction is feasible, however, the Supreme Court may apply that construction to an indeterminate statute so as to avoid a vagueness problem. For instance, the Court has adopted narrow constructions of certain federal fraud statutes in response to vagueness considerations. In *McNally v. United States*, the Court read the federal mail fraud statute's scope as being limited to protecting property rights; then, in response to subsequent legislation defining mail and wire fraud as including "honest services" fraud, the Court in *Skilling v. United States* confined the honest-services provision to fraud schemes involving bribes or kickbacks.

Congressional Intent: An Interpretation of the Law Sweeps More Broadly Than Congress Intended

If there is a dispute about the meaning of a federal criminal statute, a court may look to evidence of what Congress intended to proscribe. To discern congressional intent, courts may use various tools of statutory interpretation. While the universe of tools is fairly well-established, judges may prefer or assign different weight to particular tools. Courts often start by examining the contested text of the statute. If the meaning of the text is clear, then the interpretive analysis may end. If the text is ambiguous, courts sometimes may look to other indicia of statutory meaning. These indicia may include other components of the statute, including nearby words, words that were omitted, headings, and the provision's placement in its statutory context; past interpretations of the text, including precedent; the underlying reasons why the statute was enacted or proposed (that is, what was happening in society that prompted Congress to act); statements, committee reports, and other legislative history signaling what Congress may have sought to accomplish in the statute; and the real-life consequences of selecting from alternative interpretations of the relevant text.

In 2021, in *Van Buren v. United States*, the Supreme Court turned to some of these tools in determining the scope of a criminal statute punishing certain computer offenses. In *Van Buren*, a police officer used a

law enforcement database for non-law enforcement purposes in violation of the department's policies. The officer was convicted of violating a criminal statute that makes it unlawful to "intentionally . . . exceed[] authorized access" to certain computers and thereby obtain information. The officer appealed to the Supreme Court, which relied primarily on the text and structure of the statute to hold that it applies only when an individual accesses information or an area in the computer that the individual does not have authorization to access, such as a folder rendered off-limits by a password requirement. The Court observed that if the statute were read broadly to criminalize any use of a computer for a forbidden purpose, as the government urged, the statute would "attach criminal penalties to a breathtaking amount of commonplace computer activity," including an employee using a work computer to read personal emails.

Likewise, in *McDonnell v. United States*, the Court unanimously held in 2016 that an "official act" for purposes of a federal bribery law requires "a formal exercise of governmental power, such as a lawsuit, hearing, or administrative determination," not merely "arranging a meeting, contacting another official, or hosting an event" (as the government contended). In reaching this conclusion, the Court focused primarily on the statutory text, reasoning that definitions in a legal dictionary and a related statute supported the narrower reading.

Mens Rea Requirements: An Interpretation Extends Beyond Culpable Conduct to Innocent Conduct

The foundational components of criminal liability generally encompass a bad act (*actus reus*) committed with a culpable state of mind (*mens rea*). As the Supreme Court wrote in *Morissette v. United States*, a crime typically requires the "concurrence of an evil-meaning mind with an evil-doing hand." The Court explained that criminal law presupposes that an individual can freely "choose between good and evil" and that "our substantive criminal law is based upon a theory of punishing the vicious will." Put differently, criminal liability is ordinarily not appropriate when the individual does not have the requisite criminal intent. (The Court has described an intent element as "indispensable" to criminal statutes, but the Court also has recognized a limited class of "regulatory" or "public welfare" offenses—driven more by public policy than punishment—that may be committed without a *mens rea*.)

The Supreme Court has sometimes rejected interpretations of criminal statutes that would result in punishment without a sufficient culpable mental state. In *Arthur Andersen LLP v. United States*, for example, the Court considered an appeal by a large auditing company that instructed its employees to destroy documents pursuant to its document retention policy in advance of a government investigation. The company was convicted of "knowingly . . . corruptly persuading" another with the intent that the other withhold from or alter documents for use in an official proceeding. While the lower courts determined that the defendant could be guilty even if it honestly and sincerely believed that its conduct was lawful, the Supreme Court held that this interpretation did not adequately encompass the culpability necessary for criminal liability and could even reach innocent conduct. The Court stated that "[o]nly persons conscious of wrongdoing can be said to 'knowingly . . . corruptly persuad[e].'"

Countervailing Considerations: The Scope of a Criminal Law Intrudes Upon Other Constitutional Values

The Supreme Court may interpret a criminal statute against the backdrop of certain "background principles" of American law. One such principle is the notion that the states retain traditional authority to punish local criminal activity and that courts should not interpret federal criminal statutes in a manner that would encroach upon this authority unless Congress expressly indicates its intent to do so. This principle, predicated on federalism concerns, ensures that the Court does not unjustifiably disturb the "sensitive relation between federal and state criminal jurisdiction."

In *Kelly v. United States*, for example, the Court in 2020 rejected an expansive interpretation of statutory provisions criminalizing property fraud. In *Kelly*, government officials had ordered road lane closures and created traffic congestion as a form of political retaliation against another government official. The defendants were convicted of violating federal criminal laws prohibiting property fraud on the theory that the defendants commandeered the physical lanes, misallocated the labor of public works employees, and affected toll collection. The Supreme Court ruled, however, that the fraud statutes require property to be the object of the fraud, rather than merely incidental to its execution. The Court acknowledged that "the evidence the jury heard no doubt shows wrongdoing—deception, corruption, abuse of power," but the Court declined to interpret the statute to "criminalize all such conduct," reasoning that adopting a broader construction could lead to a "ballooning of federal power" by permitting the federal government "to enforce (its view of) integrity in broad swaths of state and local policymaking."

Similarly, in *Bond v. United States*, the Court in 2014 narrowly construed a criminal statute related to chemical weapons. In *Bond*, the defendant learned that her husband had impregnated another woman and out of revenge placed caustic substances on things that the woman was likely to touch. The defendant was charged with violating a federal statute prohibiting the knowing use of any "chemical weapon," defined to include any chemical that can cause permanent harm, where such use is not intended for a peaceful purpose. Emphasizing federalism concerns and the context from which the statute arose—a treaty about chemical warfare and terrorism—the Supreme Court determined that Congress did not clearly intend for the statute to reach this type of purely local conduct.

The Rule of Lenity: Ambiguous Criminal Laws Should be Construed Strictly in Favor of the Defendant

The rule of lenity, another judicial tool in construing criminal statutes, provides that where there are two plausible interpretations of an ambiguous criminal statute, the interpretive tie should go to the defendant. The rule has deep roots. In 1820, Chief Justice John Marshall wrote that "the rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself." In contemporary criminal law, the rule appeared in the 2008 case *United States v. Santos*. In that case, the Supreme Court considered the meaning of a federal money laundering statute prohibiting the use of the "proceeds" of criminal activities for certain purposes. A plurality of the Justices expressly applied the rule of lenity to conclude that "proceeds" means net profits rather than the broader sum of gross receipts, reasoning that the former interpretation "is always more defendant-friendly."

Cases from the 2022 Supreme Court Term

The aforementioned arguments were raised in multiple cases from the Supreme Court's recently completed 2022 term. The Court invoked some of these reasons to narrowly construe federal criminal laws, continuing the practice of carefully reviewing the scope of criminal statutes. This section briefly summarizes these cases.

True Threats: Counterman v. Colorado

In *Counterman v. Colorado*, the defendant claimed that a statute criminalizing "true threats" lacked a sufficient *mens rea* requirement and intruded upon a countervailing consideration, specifically his First Amendment rights. The Court agreed, holding that a statement is a "true threat" unprotected by the First Amendment (and thus punishable under criminal law) only if the government proves that the defendant had some subjective understanding of the statement's threatening nature, meaning that the government would have to prove that the defendant was at least reckless in this regard. The Court indicated that, in the First Amendment context, a requirement of subjective awareness would help avoid the possibilities of chilling or deterring otherwise protected speech.

Encouraging Illegal Immigration: *United States v. Hansen*

In *United States v. Hansen*, the Supreme Court turned to congressional intent to narrowly construe a federal criminal statute that makes it unlawful to encourage or induce unlawful entry into the United States. The defendant argued that the statute is constitutionally overbroad because it reaches First Amendment protected speech. Under the defendant's ordinary reading of encouragement or inducement, the statute could criminalize general persuasion or abstract advocacy. The Court primarily relied on statutory context and history to hold that Congress instead used these terms in their specialized sense, drawing on criminal law concepts such as aiding and abetting. Under this interpretation, the Court determined that the statute prohibits only intentional solicitation or facilitation of the prohibited acts and thus was not overbroad.

Aggravated Identity Theft: *Dubin v. United States*

In *Dubin v. United States*, the Supreme Court narrowed the scope of a federal aggravated identity theft statute to ensure that the application of the statute aligned with congressional intent and fair notice considerations. The case concerned a defendant's use of a patient's Medicaid identification number to fraudulently bill Medicaid. The defendant was convicted of violating the aggravated identity theft statute on the theory that aggravated identity theft occurs when a name or other means of identification is used in fraudulent billing. The Court rejected this expansive interpretation, which would bring "garden-variety" overbilling within the scope of the statute. The Court opted instead for the defendant's more "targeted reading," specifically that the statue applies only when the use of another person's means of identification is at the "crux" of what makes the conduct criminal. The Court explained that congressional intent, reflected in the statute's "text and structure," and concerns that an interpretation should give the public fair notice of what is unlawful, supported this conclusion.

Aiding and Abetting International Terrorism: *Twitter v. Taamneh*

In *Twitter v. Taamneh*, the Court unanimously held that the crime of aiding and abetting international terrorism cannot be read in a "boundless" fashion to "sweep in innocent bystanders as well as those who gave only tangential assistance" to terrorist organizations. In *Twitter*, anyone who commits the substantive crime of aiding and abetting international terrorism may be sued by victims of the terrorism, and the plaintiffs sought damages from social media platforms for allowing ISIS to use and benefit from their platforms, among other things. The Ninth Circuit found that this degree of assistance sufficed for purposes of the statute. The Supreme Court reversed, reasoning that under common law principles, aiding and abetting requires intentional participation generally in a specific act of terrorism.

Congressional Considerations

Although there are different reasons why the Supreme Court might read a federal criminal statute narrowly, the Court will not necessarily adopt such a reading in every case. The principles and examples discussed in this Sidebar indicate, however, that the Court continued a trend of narrowly construing federal criminal statutes in the 2022 term.

Should Congress disagree with the Court's construction of a criminal statute, it remains free (within constitutional bounds) to amend the statute consistent with its preferred interpretation. Such an effort might encompass defining or clarifying an ambiguous term or adding or refining an express mental state requirement. These considerations may further the goals of ensuring adequate notice to individuals as to what is unlawful, providing guardrails against inconsistent enforcement, and averting court challenges, among other things.

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