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Context is everything.

A federal law prohibits those convicted of committing an act of domestic violence from possessing weapons.[1] This term, the U.S. Supreme Court decided that this statute would apply even to those convicted of crimes that did not necessarily involve violent acts.[2] This conclusion strains the ordinary meaning of language, but is quite consistent with a long tradition in criminal cases that favors a pro-government interpretation of a statute when the public welfare is at stake. And domestic violence, Justice Sotomayor stressed in her opinion, has reached epidemic levels, prompting Congress to get guns out of the hands of abusers.[3]

Congress in 1996 expanded existing felon-in-possession laws that forbid the possession of a firearm, or any commerce involving a firearm, by any person who has committed a "misdemeanor crime of domestic violence."[4] The statute defines such a misdemeanor as one involving "the use or attempted use of physical force" against a spouse, child, or similarly situated person.[5]

The Supreme Court's opinion this term in *United States v. Castleman* concluded that even a misdemeanor involving only an "offensive touching" was sufficient to trigger the prohibition.[6] Viewed entirely through the lens of the statute, this result is particularly surprising. Just four years ago, the Supreme Court interpreted another provision of this same statute and concluded that something more than a mere unwanted touching was required to satisfy the requirement of "physical force."[7]

In 2010, the Court in *Johnson v. United States* interpreted another federal provision forbidding firearm possession by those with criminal records.[8] *Johnson* considered whether a simple battery conviction was sufficient to enhance a defendant's sentence under the Armed Career Criminal Act (ACCA). The enhancement applied if a defendant possessed a firearm having previously committed three "violent felonies," which were defined as "any crime punishable by imprisonment for a term exceeding one year" that "has as an element the use, attempted use, or threatened use of physical force against the person of another . . . ."[9] The ACCA thus included the same "physical force" requirement as

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[1] 18 U.S.C. § 922(g)(9) (2014).

[2] United States v. Castleman, 134 S. Ct. 1405, 1413 (2014).

[3] *Id.* at 1409.

[4] *See* 18 U.S.C. § 922(g)(9); Alison J. Nathan, Note, *At the Intersection of Domestic Violence and Guns: The Public Interest Exception and the Lautenberg Amendment*, 85 CORNELL L. REV. 822, 837–38 (2000).

[5] 18 U.S.C. § 922(g)(9); 18 U.S.C. § 921(a)(33)(A)(ii).

[6] *Castleman*, 134 S. Ct. at 1410.

[7] Johnson v. United States, 559 U.S. 133, 142 (2010).

[8] *Id*. at 137.

[9] *Id*. at 136 (quoting 18 U.S.C. § 924(e)(2)(B)).

the federal prohibition of gun possession by those convicted of misdemeanor acts of domestic violence.

In *Johnson*, however, the Court concluded that a charge of simple battery—which could be no more than an offensive touching—did not necessarily constitute "physical force."[10] The defendant in *Johnson* had three prior state convictions in Florida that the government offered as the predicates for the enhancement under the ACCA: an aggravated battery, a burglary, and a simple battery (which state law defined as a felony because of his prior record).[11] The record before the Supreme Court did not indicate how the state proved the simple battery. There were two ways to demonstrate the defendant's guilt, either through "[a]ctually and intentionally touch[ing] or strik[ing] another person against that person's will," or "[i]ntentionally caus[ing] bodily harm to another person."[12] Johnson's battery conviction therefore may have required the prosecution to prove nothing more than minimal undesired contact.

At common law, simple battery required "force" as an element, and offensive touching was sufficient to satisfy this element. In *Johnson*, however, the Court recognized that the ACCA added something to the common law requirement for simple battery, identifying only crimes involving "*physical* force."[13] Further, the Court noted that "physical force" was being used to define the term "violent felony," which "connotes a substantial degree of force."[14] "Physical force," the Court concluded, must be force that is "capable of causing physical pain or injury to another person."[15]

In *Castleman*, by contrast, the Court concluded that a federal law prohibiting the possession of firearms by those convicted of misdemeanors involving domestic violence (that is, limited by Congressional definition to crimes involving "physical force") could be triggered just by a conviction of unwanted touching of an intimate partner.[16] The majority concluded that the context of the term "physical force" mattered. In *Johnson*, it was used to define violent felony; in *Castleman*, it was used to define an act of domestic violence.[17] While the term violent felony "connotes a substantial degree of force," Justice Sotomayor wrote, "that is not true of 'domestic violence,' which is a term of art encompassing acts that one might not characterize as 'violent' in a nondomestic context."[18]

The *Castleman* ruling resulted in the same phrase having different meanings in the same statute—ideally, Justice Scalia pointed out, something courts tend to avoid.[19] Scalia further observed that nothing about *Castleman* required the broad rule or the conflicting statutory interpretation that the majority created.[20] Castleman had been convicted under a Tennessee statute forbidding "intentionally or

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[10] *Id.* at 143.
[11] *Id.* at 137.
[12] FLA. STAT. § 784.03 (2014).
[13] *Id.* at 140 (emphasis added).
[14] *Id.*
[15] *Id.*
[16] United States v. Castleman, 134 S. Ct. 1405, 1411–12 (2014).
[17] *Id.*
[18] *Id.* at 1411.
[19] *Id.* at 1417 (Scalia, J., dissenting) (citing IBP, Inc. v. Alvarez, 546 U.S. 21, 33–34 (2005)).
[20] *Id*. at 1422 (Scalia, J., dissenting).

knowingly caus[ing] bodily injury" to another.[21] The record thus clearly reflected not only that he had done something more than an offensive touching, it demonstrated that his actions satisfied *Johnson*'s standard for physical force. Force that has caused injury is certainly force *capable* of causing injury.

The result in *Castleman* is explained not just by the phrase "physical force," but by the broader context of the case. While Castleman's conviction would have been affirmed under either Sotomayor's or Scalia's interpretation of the statute, there is a substantial practical distinction between the approaches of the two justices in this opinion. Justice Sotomayor's interpretation of "physical force" would forbid a much larger category of persons from possessing guns than Justice Scalia's interpretation.

In light of the *Johnson* case, Justice Sotomayor's majority opinion doubtlessly stretches traditional concepts of statutory interpretation and *stare decisis*, but is very consistent with the broad interpretation courts give to criminal laws enacted to protect the public from future harm. Much of criminal law is designed to prevent harm by deterring dangerous acts.[22] Sometimes, however, the criminal law punishes relatively minor acts that themselves are not harmful but may ripen into something dangerous.[23] Drugs mislabeled by a manufacturer pose a danger to all the potential purchasers greatly disproportionate to the initial careless act.[24] Individuals who drive while intoxicated pose an extraordinary risk to other motorists.[25] When courts encounter statutes with public welfare goals, they tend to give the legislature's language as broad a reach as is reasonably possible.[26] This seems to be an implicit, and close to explicit, reason for the majority's opinion in *Castleman*.

The opinion began not with a statement of the narrow issue but rather with a discussion of the background of the act in question: "Recognizing that '[f]irearms and domestic strife are a potentially deadly combination,' Congress forbade the possession of firearms by anyone convicted of 'a misdemeanor crime of domestic violence.'"[27] The Court then observed that there are a million victims of domestic abuse annually, with hundreds of those incidents resulting in death. The Court

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[21] *Id.* at 1409.

[22] *See* Markus Dirk Dubber, *Policing Possession: The War on Crime and the End of Criminal Law*, 91 J. CRIM. L. & CRIMINOLOGY 829, 853 (2001) ("All offenses spring from a single source, the state's duty to guard the public welfare against social dangers.").

[23] *See* Laurie L. Levenson, *Good Faith Defenses: Reshaping Strict Liability Crimes*, 78 CORNELL L. REV. 401, 419 (1993) (observing that selling impure food or drugs, driving faster than the posted limit, selling alcohol to minors, and improperly handling dangerous chemicals are all strict liability crimes).

[24] *Id.* (explaining that strict liability is imposed because "a pharmaceutical manufacturer is in a unique position to know and control product quality").

[25] *See, e.g.*, Michigan Dep't of State Police v. Sitz, 496 U.S. 444, 451 (1990) (recognizing "the magnitude of the drunken driving problem [and] the States' interest in eradicating it").

[26] *See, e.g.*, United States v. Freed, 401 U.S. 601, 612 (1971) (interpreting hand grenade prohibition as strict liability offense in light of public safety interest animating the statute); Andrew Oliveria, Christopher Schenck, Christopher D. Cole & Nicole L. Janes, *Environmental Crimes*, 42 AM. CRIM. L. REV. 347, 393 (2005) (observing that "[b]ecause the statute is directed at 'public welfare offenses,' most courts interpret the [Rivers and Harbors Act] broadly").

[27] United States v. Castleman, 134 S. Ct. 1405, 1408 (2014) (internal citations omitted).

noted that "[d]omestic violence often escalates in severity over time, and the presence of a firearm increases the likelihood that it will escalate to homicide . . . ."[28] Finally, the majority observed that one Senator speaking in favor of this provision stated that "'all too often,' . . . 'the only difference between a battered woman and a dead woman is the presence of a gun.'"[29]

If the work of the Court in *Castleman* is judged by its adherence to canons of statutory interpretation, the opinion may come up lacking.[30] If, however, the Court is judged on its interpretation of a public welfare statute—or something akin to a public welfare statute—its broad interpretation is quite consistent with a long line criminal law cases. Courts often face ambiguous language, or even language seeming to strongly limit liability, and conclude that strong public policy, designed to protect the welfare of citizens, permits a broad view of a criminal statute, the rule of lenity notwithstanding.[31]

Often courts will not even acknowledge the tension between the statutory language and the strong public policy. For example, a majority of state legislatures expressly recognize the legitimacy of faith healing as an accepted method of treatment for medical illness.[32] When, however, a child's death results from the failure to seek medical treatment, courts have been unreceptive to the logical extension of this legislatively mandated religious tolerance. They uniformly reject these statutes as a defense to manslaughter based solely on their interpretation of the statutory language.[33]

A Massachusetts case illustrates the extent to which courts will stretch statutory language to preserve a public policy encouraging even the most devout Christian Scientist parents to seek medical attention when the lives of their children are in danger.[34] David and Ginger Twitchell relied entirely on prayer as their two-and-a-half year old son died from the consequences of peritonitis caused by the perforation of his bowel, a condition easily remediable by surgery.[35] The

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[28] *Id*. (internal citations omitted).
[29] *Id*. at 1409 (quoting 142 Cong. Rec. 22986 (1996) (statement of Sen. Wellstone)).
[30] *See* Deborah Widiss, *Undermining Congressional Overrides: The Hydra Problem in Statutory Interpretation*, 90 TEX. L. REV. 859, 871 (2012) ("[F]or statutes that are identified as in *pari materia* (in the same manner), courts will apply prior judicial interpretations not just to subsequent cases that arise under the statute *actually* interpreted but also to identical or similar language in other statutes addressing similar issues.") (italics in original). *See also* CALEB NELSON, STATUTORY INTERPRETATION 486–89 (2011) (discussing the "in *pari materia*" canon of statutory interpretation).
[31] There is a fairly lively debate as to whether the rule of lenity continues to exist. *See* Note, *The New Rule of Lenity*, 119 HARV. L. REV. 2420, 2420 (2006) (discussing academic perspectives on the rule).
[32] *See* Allison Ciullo, Note, *Prosecution Without Persecution: The Inability of Courts to Recognize Christian Science Spiritual Healing and a Shift Toward Legislative Action*, 42 NEW ENG. L. REV. 155, 157 (2007).
[33] *See, e.g.*, State v. McKown, 475 N.W.2d 63, 66 (Minn. 1991); Walker v. Superior Court, 763 P.2d 852, 866 (Cal. 1988) ("[P]rayer treatment will be accommodated as an acceptable means of attending to the needs of a child only insofar as serious physical harm or illness is not at risk."); Hall v. State, 493 N.E.2d 433, 435 (Ind. 1986) ("Prayer is not permitted as a defense when a caretaker engages in omissive conduct which results in the child's death.").
[34] Commonwealth v. Twitchell, 617 N.E.2d 609 (Mass. 1993).
[35] *Id*. at 612.

Twitchells relied on a Massachusetts statute, quoted in their church's literature, that said: "A child shall not be deemed to be neglected or lack proper physical care for the sole reason that he is being provided remedial treatment by spiritual means alone in accordance with the tenets and practice of a recognized church or religious denomination by a duly accredited practitioner thereof."[36]

The Supreme Judicial Court of Massachusetts observed that this language was adopted by the legislature in a statute titled "An Act defining the term 'proper physical care' under the law relative to care of children by a parent."[37] The court concluded that this provision "refer[red] to neglect and lack of proper physical care," which could be demonstrated by either "(1) neglect to provide support [or] (2) willful failure to provide necessary and proper care."[38] These concepts, the court concluded, were not relevant to a homicide prosecution. By the reasoning of the court, "wanton and reckless conduct," which was required to demonstrate homicide, "is not a form of negligence" nor does it "involve a wilful intention to cause the resulting harm."[39] To describe the court's reasoning as tortured would be generous, but the public policy supported by the decision was obviously compelling. Even in a country that respects religious diversity, society has an extraordinary interest in ensuring that toddlers not die because of their parents' faith.

In the context of strict liability crimes, courts have been more explicit about recognizing that they were construing ambiguous statutes in favor of the state because a public welfare interest animated the legislature to act. Legislatures are rarely clear about their desire to eliminate a mens rea requirement for a crime.[40] In virtually every instance in which a court has concluded that a crime does not require culpability, legislatures have simply been silent on what mental state is required—and, often, these legislatures have instructed courts to find that a mens rea term is implicitly required unless the legislative intent to exclude one is clear.[41] Courts are thus typically facing ambiguity, with a presumption against strict liability, whenever they conclude that no mens rea is required for a crime. Yet courts frequently find, with no statutory language or legislative history, that the legislature intended to fashion a strict liability crime. Most often, a court's conclusion that the legislature intended to deter a relatively minor crime to prevent some serious social harm is sufficient for it to find that the crime is one of strict liability.[42]

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[36] *Id*. at 612 n.4. (quoting MASS. GEN. LAWS ch. 273, § 1 (1992)). This provision of the law was repealed as a result of this case. Ciullo, *supra* note 32, at 182–83.
[37] *Twitchell*, 617 N.E.2d at 615.
[38] *Id.*
[39] *Id*. at 615–616.
[40] *See* Daryl K. Brown, *Criminal Law Reform and the Persistence of Strict Liability*, 62 DUKE L.J. 285, 322–23 (2012) (noting rare instances of legislatures expressly eliminating mens rea terms).
[41] *Id.* at 313–16 (recognizing that legislative presumptions against strict liability exist but are frequently not followed).
[42] *See* WAYNE R. LAFAVE, CRIMINAL LAW § 5.5(a) 291 (5th ed. 2010) (recognizing a variety of factors courts use to determine whether a statute contains a strict liability offense, but noting "the more serious the consequences to the public, the more likely the legislature meant to impose liability without regard to fault and vice versa").

Strict liability crimes are largely a creation of the modern regulatory state. The justification for such crimes has evolved and become more sophisticated over the course of the twentieth century.[43] *United States v. Balint* is typically taught as the paradigmatic case in which the Supreme Court permitted a conviction without requiring the prosecution to demonstrate criminal culpability. This was certainly one of the earlier examples of judicially recognized strict liability, though (as *Balint* itself recognizes) other decisions approving of strict liability crimes predated it.[44] *Balint* concluded that statutes can be reasonably interpreted to have omitted a mens rea requirement when the statute in question seeks to achieve "some social betterment rather than the punishment of the crimes as in cases of *mala in se*."[45] Subsequent cases have offered a variety of factors for courts to consider in evaluating whether, in the absence of a stated mens rea requirement, a court should conclude that the legislature intended a strict liability offense—but a public welfare exception has remained as the most frequently cited factor.[46]

Almost exactly forty years ago, Judge Breitel on the New York Court of Appeals concluded, much like Justice Sotomayor, that statutes should be interpreted differently when the primary aim of the statute is to prevent future harm rather than punish past criminal acts. In *People v. Alamo*, the New York court considered whether breaking into a car and sitting behind the wheel constituted a completed act of larceny or merely an attempt when the police intercepted the would-be car thief.[47] The majority concluded that achieving dominion and control over a vehicle is sufficient for a conviction for driving while intoxicated if the would-be driver is drunk, and therefore should also be sufficient for a larceny conviction.[48] The majority observed that "consistency is always desirable in the application of various laws."[49] In dissent, Judge Breitel presented a persuasive argument for the contrary result. He observed that "[t]he statutory proscription against persons operating a motor vehicle while intoxicated is directed at a different evil involving a lesser degree of turpitude and a special problem of proof hardly applicable to larceny."[50] That "different evil" was, of course, the risk that drunken driving would lead to fatalities, while larceny certainly does not naturally ripen into a risk to human life.

Justice Scalia's criticisms of the majority opinion in *Castleman* are well founded if courts are expected to look only to the legislative text and not to the goals of Congress. An appreciation of the broader context of criminal statutes has, however, long animated judges. There is as at least as much of a tradition of broadly

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[43] *See* Levenson, *supra* note 23, at 419 (noting that strict liability offenses were "promulgated to address the dangers brought about by the advent of the industrial revolution"). *See also* United States v. Balint, 258 U.S. 250, 251 (1922) ("[T]he general rule at common law was that the scienter was a necessary element in the indictment and proof of every crime.").
[44] *Balint*, 258 U.S. at 252.
[45] *Id.*
[46] *See* Dannye Holley, *Culpability Evaluations in the State Supreme Courts from 1977 to 1999: A "Model" Assessment*, 34 AKRON L. REV. 401, 405–07 (2001).
[47] 315 N.E.2d 446 (N.Y. 1974).
[48] *Id*. at 449–50.
[49] *Id*. at 449.
[50] *Id*. at 451 (Breitel, J., dissenting).

construing public welfare statutes as there is of ensuring that legislative terms are consistently construed. Perhaps not accidentally, the Court agreed to hear this case within months of the twentieth anniversary of the passage of the Violence Against Women Act.[51] The fear of battery ripening into homicide ultimately presented, for the Court, a public safety concern analogous to those used by many other courts to justify a broader interpretation of statutes than their texts would seem to permit.

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[51] The Act was made law on September 13, 1994. *See* Violence Against Women Act of 1994, Pub. L. 103-322, 108 Stat. 1796 (codified in scattered sections of 42 U.S.C.).