

THE LAW OF LENITY: ENACTING A CODIFIED FEDERAL RULE OF LENITY

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ABSTRACT

The rule of lenity is an ancient canon of statutory construction that requires courts to find in favor of criminal defendants charged under ambiguous statutes. Traditionally, lenity endorses important constitutional concerns regarding due notice, consistent enforcement of law, and legislative supremacy. In modern courts, if lenity were regularly—and properly—applied, it could combat important social problems that plague our criminal justice system. Ambiguous laws allow government actors to arbitrarily target disfavored groups. And more generally, ambiguity within criminal law contributes to overcriminalization, wanton punishment, and capricious enforcement. As the volume of federal criminal law continues to expand, this overcriminalization leads to extreme mass incarceration in the United States. Lenity, if applied more potently in the federal courts, could help combat these serious social issues by supplying a safety valve against the multitude of ambiguous statutes written by Congress.

The problem with lenity today, however, is that courts are rarely clear where lenity should fit within criminal statutory interpretation. Federal courts, including the Supreme Court, alter how they apply lenity case by case. This Note argues that lenity should be codified federally as a clear statement rule, as several states have already done. Specifically, to achieve a consistent and strong application of lenity in the federal courts, Congress should direct the federal courts to apply lenity immediately after an initial textual analysis fails to clarify an ambiguous statute. Codified lenity would guide courts in lenity's application and underscore its fundamental importance to the criminal justice system.

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INTRODUCTION

Is a fish a tangible object? The Supreme Court has held that it is not, due in part to the rule of lenity.¹ When fisherman John Yates set out on a routine commercial fishing expedition on the Gulf of Mexico, he could not have predicted that it would end with his facing a twenty-year sentence for violating the Sarbanes-Oxley Act,² a federal statute designed to protect financial investors.³ After searching Yates's vessel, the *Miss Katie*, in a routine regulatory compliance check, a fish and wildlife officer found seventy-two red grouper that fell about an inch short of federal conservation size regulations.⁴ The officer boxed the prohibited fish in separate crates and directed Yates to leave them alone until returning to port.⁵ When the officer returned to Yates's boat in port, he found that the fish in the segregated box were suspiciously no longer in violation of the size regulations.⁶ When questioned, a crew member admitted that the undersized fish had been thrown overboard and replaced with larger fish.⁷

Federal prosecutors charged Yates with “destroying, concealing, and covering up undersized fish to impede a federal investigation,” in violation of § 1519 of the Sarbanes-Oxley Act.⁸ Section 1519 provides, in part, that anyone who knowingly destroys or conceals “any *record, document, or tangible object*” with the intent of impeding a federal investigation shall be fined, imprisoned a maximum of twenty years, or both.⁹

1. *Yates v. United States*, 574 U.S. 528, 547–48 (2015) (plurality opinion).

2. Sarbanes-Oxley Act of 2002 § 802(a), 18 U.S.C. § 1519 (2018).

3. *Yates*, 574 U.S. at 531.

4. *Id.* at 533. According to federal conservation regulations at the time, fishermen had to throw back any red grouper shorter than twenty inches that they caught. *Id.* Almost all of Yates's fish were nineteen to twenty inches, and none shorter than 18.75 inches. *Id.* By the time of Yates's indictment, the size minimum had been lowered to eighteen inches. *Id.* at 534. These regulations “allow fish to reach a size that enables spawning before being harvested.” *How To Fish, FLA. FISH & WILDLIFE CONSERVATION COMM'N*, <https://myfwc.com/fishing/saltwater/recreational/how-to-fish> [<https://perma.cc/8MJT-SHHU>].

5. *Yates*, 574 U.S. at 533.

6. *Id.*

7. *Id.* at 533–34.

8. *Id.* at 534. The charges were brought almost three years after the incident, but the Supreme Court noted that the reasons for this substantial delay were not in the record. *Id.*

9. Sarbanes-Oxley Act of 2002 § 802(a), 18 U.S.C. § 1519 (2018) (emphasis added).

At trial, Yates argued that fish were not included in the statute's term "tangible object."¹⁰ He maintained that § 1519 set forth "a documents offense" and its reference to "tangible object[s]" includes "computer hard drives, logbooks, [and] things of that nature"—but not fish.¹¹ This definition, Yates reasoned, would align with the Sarbanes-Oxley Act's anticorporate fraud origins.¹² The government argued that "tangible object" meant "simply something other than a document or record."¹³ Following a four-day trial, a jury found Yates guilty of the federal felony charges.¹⁴

A plurality of the Supreme Court reversed Yates's conviction.¹⁵ In reaching this conclusion, the Court first exhausted its "traditional tools of statutory construction" and, as there was doubt left as to the meaning of "tangible object," the plurality invoked the rule of lenity to save Yates from the permanent stigma of a federal felony conviction for throwing the undersized fish overboard.¹⁶ In the plurality opinion, Justice Ruth Bader Ginsburg explained her application of lenity: "[I]t is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite."¹⁷

The dissent criticized the plurality for turning to lenity before "all legitimate tools of interpretation [had] been exhausted" and when "a reasonable doubt persists" regarding whether Congress has made the defendant's conduct a federal crime.¹⁸ Instead, according to the dissent, the statute was clear, and lenity offered "no proper refuge from that straightforward (even though capacious) construction."¹⁹ The dissent argued that the straightforward, ordinary meaning of the term

10. *Yates*, 574 U.S. at 534.

11. *Id.* (citing Joint Appendix at 91–92, *Yates*, 574 U.S. 528 (No. 13-7451)).

12. *See id.* at 535 (detailing that the Sarbanes-Oxley Act was "prompted by the exposure of Enron's massive accounting fraud").

13. *Id.* at 534 (quoting Joint Appendix at 93, *Yates*, 574 U.S. 528 (No. 13-7451)).

14. *Yates v. United States*, 733 F.3d 1059, 1062–63 (11th Cir. 2013), *rev'd*, *Yates*, 574 U.S. at 549.

15. *Yates*, 574 U.S. at 549.

16. *Id.* at 547–49. In spite of his ultimate dissent in this case, at oral argument Justice Antonin Scalia (rightly) remarked, "What kind of a mad prosecutor would try to send this guy up for 20 years . . . ?" Transcript of Oral Argument at 28, *Yates*, 574 U.S. 528 (No. 13-7451).

17. *Yates*, 574 U.S. at 548 (quoting *Cleveland v. United States*, 531 U.S. 12, 25 (2000)).

18. *Id.* at 566 (Kagan, J., dissenting) (quoting *Abramski v. United States*, 573 U.S. 169, 264 (2014) (Scalia, J., dissenting)).

19. *Id.*

“tangible object” would include fish.²⁰ Still, the plurality held that lenity was necessary because Yates would otherwise have “scant reason to anticipate a felony prosecution” given the unrelated nature of the statute.²¹ Essentially, fairness to the defendant necessitated the use of lenity.²²

The rule of lenity, also called the doctrine of strict construction,²³ is a common canon of statutory construction that requires courts to “construe statutory ambiguities in favor of criminal defendants.”²⁴ For lenity to apply, courts have ordinarily required that the statute have “grievous ambiguity or uncertainty.”²⁵ Then, once lenity applies, it tips the scales in the defendant’s favor in the interest of due process,²⁶ consistent enforcement of the law, and legislative supremacy.²⁷ However, in spite of lenity’s important constitutional foundations, modern courts apply the rule of lenity in an inconsistent manner that “water[s] down” the rule’s original mandate and purpose.²⁸

Instead, if courts regularly applied lenity, this rule could partially address important social problems in the criminal justice system.

20. *Id.* at 553–54. As the concurrence drolly stated, this definition of “tangible object” would also include “an antelope, a colonial farmhouse, a hydrofoil, or an oil derrick.” *Id.* at 550 (Alito, J., concurring in the judgment).

21. *Id.* at 547 (plurality opinion).

22. Lenity has also played a role in other interesting, if less sympathetic, prosecutions. For example, the Court invoked lenity in the high-profile case of former Enron CEO Jeffrey Skilling. *Skilling v. United States*, 561 U.S. 358, 410–11 (2010). The Court held that 18 U.S.C. § 1346, which forbids fraudulent deprivations of “the intangible right of honest services,” should be confined to only instances of bribery or kickbacks because of the serious (though intended) ambiguity of the statute as applied to other types of conduct. *Id.* Because Skilling’s alleged conduct involved defrauding shareholders and not bribery or kickbacks, the Court applied lenity, stating that “[i]f Congress desires to go further . . . it must speak more clearly than it has.” *Id.* at 411 (quoting *McNally v. United States*, 483 U.S. 350, 360 (1987)).

23. Zachary Price, *The Rule of Lenity as a Rule of Structure*, 72 *FORDHAM L. REV.* 885, 885 (2004).

24. *Id.*

25. *Muscarello v. United States*, 524 U.S. 125, 138–39 (1998) (quoting *Staples v. United States*, 511 U.S. 600, 619 n.17 (1994)).

26. *Id.* at 148 (Ginsburg, J., dissenting); WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, *LEGISLATION AND STATUTORY INTERPRETATION* 375 (2d ed. 2006). Ambiguous statutes are those with multiple possible meanings. Ralf Poscher, *Ambiguity and Vagueness in Legal Interpretation*, in *OXFORD HANDBOOK OF LANGUAGE AND LAW* 129 (Lawrence M. Solan & Peter M. Tiersma eds., 2012).

27. See Price, *supra* note 23, at 886 (stating that the rationales for the rule of lenity include providing notice, ensuring legislative supremacy, and “block[ing] expansive readings . . . by requiring courts to choose narrow interpretations automatically”).

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

Ambiguity within the criminal context contributes to overcriminalization, wanton punishment, and capricious enforcement.²⁹ The volume of “federal criminal law has exploded in size and scope” in recent decades, with estimates showing that there are currently almost five thousand federal criminal laws and three hundred thousand regulations with “potential criminal penalties.”³⁰ This has led to extreme mass incarceration in the United States, a country with 5 percent of the world’s population but 25 percent of the world’s prisoners.³¹ Although the focus of this Note is the federal system which accounts for only 8.5 percent of incarceration in the United States,³² a federal statute can serve as a prominent example for states to follow. The federal government could also “use its financial and ideological power” to help pave the way for the states to follow suit.³³ Unclear laws in any jurisdiction allow government actors in the criminal justice system to discriminatorily target groups such as racial

29. *Id.* at 699.

30. *Overcriminalization*, HERITAGE FOUND. [hereinafter *Overcriminalization*, HERITAGE], <https://www.heritage.org/crime-and-justice/heritage-explains/overcriminalization> [<https://perma.cc/HJSS-XDKZ>].

31. Charles G. Koch & Mark V. Holden, *Overcriminalization of America*, POLITICO (Jan. 7, 2015), <https://www.politico.com/magazine/story/2015/01/overcriminalization-of-america-113991> [<https://perma.cc/DT2V-BDLN>].

32. LAURA M. MARUSCHAK & TODD D. MINTON, U.S. DEP’T OF JUST., CORRECTIONAL POPULATIONS IN THE UNITED STATES 11 (2020), <https://www.bjs.gov/content/pub/pdf/cpus1718.pdf> [<https://perma.cc/Z6VM-2Y5V>].

33. Wendy Sawyer & Pete Wagner, *Mass Incarceration: The Whole Pie 2020*, PRISON POL’Y INITIATIVE (Mar. 24, 2020), <https://www.prisonpolicy.org/reports/pie2020.html> [<https://perma.cc/NBH8-FJBY>]. Lenity is especially appropriate in the federal regime because of the many reasons that all lead to longer sentences when an individual is convicted of a federal crime. See *Prison Time Surges for Federal Inmates*, PEW CHARITABLE TRS. (Nov. 18, 2015) [hereinafter *Prison Time*, PEW], <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2015/11/prison-time-surges-for-federal-inmates> [<https://perma.cc/8RYW-7ZYD>] (finding that the average length of time served by federal inmates rose from 17.9 months in 1988 to 37.5 months in 2012). First, the federal Sentencing Guidelines are “premised on the idea that a term of imprisonment is the default option in the vast majority of cases.” Marc Mauer, *Long-Term Sentences: Time To Reconsider the Scale of Punishment*, 87 UMKC L. REV. 113, 118 (2018). Second, a vast number of federal crimes are subject to mandatory minimums that “result in long sentences.” U.S. SENT’G COMM’N, AN OVERVIEW OF MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 6 (2017), https://www.uscc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170711_Mand-Min.pdf [<https://perma.cc/YBG5-S95C>]. Third, there is no parole in the federal system. *Prison Time*, PEW, *supra*.

minorities,³⁴ LGBTQ+ individuals,³⁵ and the indigent.³⁶ Lenity, if applied more robustly in the federal courts, could help combat these serious social issues by supplying a safety valve against the multitude of ambiguous statutes written by Congress.

The problem with lenity, however, is that federal courts are rarely clear about where it fits within a criminal statutory interpretation framework.³⁷ Federal courts, including the Supreme Court, fluctuate case by case as to whether lenity should be a canon of last resort, whether it should come second only to a textual analysis, or whether it should even be applied when “textualism would support a broader view.”³⁸

Inevitably, problems arise from this vacillation and uncertain application. But lenity could instead be codified federally as a clear statement rule, as several states have already done.³⁹ If lenity were interpreted in a constant, reliable way, canons of statutory interpretation could “at least form a more or less reliable ‘interpretive regime.’”⁴⁰ This regime could direct courts, and others involved in law enforcement, as to how criminal statutes should be interpreted.⁴¹ This Note maintains that it would further incentivize Congress to draft laws that are unambiguous, which would in turn allow for a more certain and consistent interpretation of criminal statutes and thereby provide more notice for criminal defendants and less discriminatory application of these laws. As one scholar stated, “Lenity lies at the heart of interpretive questions in the criminal justice arena, the state of which adds urgency and cause for greater consideration of the framework and

34. *Chicago v. Morales*, 527 U.S. 41, 54 n.20 (1999).

35. William N. Eskridge, Jr., *Challenging the Apartheid of the Closet: Establishing Conditions for Lesbian and Gay Intimacy, Nomos, and Citizenship, 1961–1981*, 25 HOFSTRA L. REV. 817, 861–63 (1997).

36. *Papachristou v. Jacksonville*, 405 U.S. 156, 170 (1972).

37. *United States v. Hansen*, 772 F.2d 940, 948 (D.C. Cir. 1985); Price, *supra* note 23, at 890–91.

38. Price, *supra* note 23, at 893–94; *see, e.g.*, *Ocasio v. United States*, 136 S. Ct. 1423, 1434 n.8 (2016) (stating that lenity is a canon of last resort); *Smith v. United States*, 508 U.S. 223, 240 (1993) (Scalia, J., dissenting) (using lenity after a textual analysis failed); *McBoyle v. United States*, 283 U.S. 25, 27 (1931) (using lenity when textualism might otherwise be used).

39. *See infra* Part III.A.

40. Aaron-Andrew P. Bruhl, *Statutory Interpretation and the Rest of the Iceberg: Divergences Between the Lower Federal Courts and the Supreme Court*, 68 DUKE L.J. 1, 68 (2018).

41. William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court, 1993 Term—Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 66 (1994).

application of the rule.”⁴² This Note argues that, to achieve a consistent and robust application of lenity in the federal courts, Congress should codify the rule of lenity, dictating that lenity apply after an initial textual analysis fails to clarify an ambiguous statute. This would guide courts in lenity’s application and express its fundamental importance in the criminal justice system. As other academic work contends with the value of a robust and clear rule of lenity,⁴³ this Note adds to the scholarship by proposing a concrete legislative solution to the haphazard application of the modern rule in the federal courts.

This Note proceeds in three parts. Part I examines the problems lenity can alleviate, the background of statutory interpretation, and lenity’s place among the canons. Part II looks at the inconsistent application of lenity in the federal courts and discusses why codification would reduce this unpredictability. Finally, Part III proposes a codified rule to combat lenity’s unpredictable and weak application in the federal courts and draws some inspiration on lenity’s role from states that have previously codified a similar clear statement rule.

I. THE CONTEXT AND DOCTRINE OF LENITY

Lenity is a complex doctrine, and it is important to study it in context to understand its innate value and disappointing history of inconsistent application. This Part examines some of the problems in the criminal justice system that lenity can improve. It then looks at the origins and methods of substantive canons of statutory interpretation. Finally, it examines the basic doctrine of lenity in the criminal context and its primary justifications.

A. *The Problem*

Overcriminalization, or “the overuse and abuse of criminal law,”⁴⁴ is a huge and growing issue in the United States that has gained

42. Intisar A. Rabb, *The Appellate Rule of Lenity*, 131 HARV. L. REV. F. 179, 181–82 (2018).

43. See generally, e.g., Hopwood, *supra* note 28 (arguing for a clear statement rule to avoid vagueness in federal criminal law); Joseph E. Kennedy, *Making the Crime Fit the Punishment*, 51 EMORY L.J. 753 (2002) (arguing for a clear statement rule in ambiguous statutes with low mens rea thresholds); Price, *supra* note 23 (arguing generally for a stronger rule of lenity in criminal law).

44. *Overcriminalization*, HERITAGE, *supra* note 30.

increasing scrutiny from those on either end of the political spectrum.⁴⁵ The number of federal criminal laws has grown astronomically even in the past decades.⁴⁶ In the 1980s, the U.S. Code already contained a considerable three thousand criminal offenses, which has crept up to approximately 4,500 criminal offenses today.⁴⁷ Some commentators blame this huge increase on congressmembers' attempts "to score political points with voters" who believe that more laws and increased penalties "somehow solve[] a crime problem."⁴⁸ But whatever the cause of overcriminalization, its effect is devastating. One scholar has even gone so far as to say that overcriminalization "threaten[s] the very foundation of our free society."⁴⁹ And as the number of laws has exploded, "so has the level of ambiguity within those laws."⁵⁰

The result of such an enormous criminal code comprised of ambiguous statutes that "cover everything and decide nothing" is to essentially place lawmaking power in the hands of prosecutors, police, and judges.⁵¹ Each new law provides "a new legal instrument to apply against members of the so-called 'criminal class.'"⁵² Further, such a broad criminal code means that it is impossible to enforce all the laws on the books; prosecutors and police instead have to use their own discretion and priorities to choose which laws to enforce.⁵³

45. See generally *ACLU Criminal Law Reform Project*, ACLU, <https://www.aclu.org/other/aclu-criminal-law-reform-project> [<https://perma.cc/KTZ7-K8QK>] (arguing against overcriminalization from a liberal perspective); *Overcriminalization*, HERITAGE, *supra* note 30 (arguing against overcriminalization from a conservative perspective).

46. *Overcriminalization*, HERITAGE, *supra* note 30.

47. *Id.*; GianCarlo Canaparo & Zack Smith, *Count the Crimes on the Federal Law Books. Then Cut Them.*, HERITAGE FOUND. (June 24, 2020), <https://www.heritage.org/crime-and-justice/commentary/count-the-crimes-the-federal-law-books-then-cut-them> [<https://perma.cc/ZD4F-3BCQ>].

48. *Overcriminalization*, HERITAGE, *supra* note 30.

49. Tim Lynch, *Overcriminalization*, CATO INST., <https://www.cato.org/cato-handbook-policy-makers/cato-handbook-policy-makers-8th-edition-2017/overcriminalization> [<https://perma.cc/382J-48TL>]; see also Lauren-Brooke Eisen, *Overcriminalization Task Force Should Focus on Reducing Prison Populations*, BRENNAN CTR. FOR JUST. (July 26, 2013), <https://www.brennancenter.org/our-work/analysis-opinion/overcriminalization-task-force-should-focus-reducing-prison-populations> [<https://perma.cc/GN2U-WLAF>] (calling overcriminalization and overincarceration an "epidemic" in the United States).

50. Hopwood, *supra* note 28, at 695–96.

51. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 509 (2001); see also Hopwood, *supra* note 28, at 703.

52. Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. UNIV. L. REV. 703, 711 (2005).

53. Stuntz, *supra* note 51, at 519.

An enormous criminal code also contributes to prisons bursting at the seams and overburdened courts.⁵⁴ But more importantly, it leads to millions of individuals getting caught up in the criminal justice system,⁵⁵ with huge racial disparities.⁵⁶ As of 2018, there were over 6.4 million people in the correctional system, either incarcerated or under community supervision.⁵⁷ The collateral effects of incarceration touch spouses, partners, children, and families.⁵⁸ Although codified lenity would not come close to solving every problem, it could serve as an important backstop to the excessive number of federal criminal laws and their inconsistent application.

B. The Function of Canons of Construction in Statutory Interpretation

Canons of construction are generally “a set of background norms and conventions that are used by courts when interpreting statutes.”⁵⁹ Though the Supreme Court has called canons simply “rules of thumb”⁶⁰ to help interpret statutes, their use is complicated.⁶¹ Though many state legislatures have provided a framework for the use of canons in statutory interpretation, Congress has only codified one comprehensive interpretive statute that functions similarly to a canon, the Dictionary Act, which defines several words applicable across the

54. *Overcriminalization*, NAT’L ASS’N OF CRIM. DEF. LAWS., <https://www.nacdl.org/Landing/Overcriminalization> [<https://perma.cc/7PLS-ZCWW>].

55. *Id.*

56. See SENT’G PROJECT, TRENDS IN U.S. CORRECTIONS 5 (2020), <https://www.sentencingproject.org/publications/trends-in-u-s-corrections> [<https://perma.cc/9K8E-L2D5>] (“Black men are six times as likely to be incarcerated as white men and Hispanic men are 2.7 times as likely.”).

57. MARUSCHAK & MINTON, *supra* note 32, at 1. Of these 6.4 million people, about 2.1 million are incarcerated. *Id.* at 2. This equates to about one out of every one hundred Americans. Lorna Collier, *Incarceration Nation*, AM. PSYCH. ASS’N (Oct. 2014), <https://www.apa.org/monitor/2014/10/incarceration> [<https://perma.cc/H28Z-UQMC>].

58. Tony N. Brown & Evelyn Patterson, *Wounds from Incarceration that Never Heal*, NEW REPUBLIC (June 28, 2016), <https://newrepublic.com/article/134712/wounds-incarceration-never-heal> [<https://perma.cc/5Y4L-QYED>].

59. James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1, 7 (2005).

60. *Varity Corp. v. Howe*, 516 U.S. 489, 511 (1996) (quoting *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253 (1992)).

61. See Brudney & Ditslear, *supra* note 59, at 7 (calling the reality of using canons of construction “more complicated”).

U.S. Code.⁶² Essentially, federal judges have extremely broad discretion over which canons to use, when to use them, how persuasive they are, and where they fit in with other methods of statutory interpretation, such as legislative purpose, legislative history, and public policy.⁶³

Canons of construction can generally be divided into two main categories: textual canons and substantive canons.⁶⁴ Textual canons are considered “guidelines for evaluating linguistic or syntactic meaning”⁶⁵ and tend to be noncontroversial due to their long-standing use and generally accepted understandings.⁶⁶ Substantive canons, on the other hand, such as constitutional avoidance, tend to be much more controversial due to their roots in “broader policy or value judgments”⁶⁷ that “explicitly embody some substantive preference about the law.”⁶⁸ With substantive canons, judges are theoretically intended to “harmonize statutory meaning with policies” from “the common law, other statutes, or the Constitution.”⁶⁹ These canons—

62. Dictionary Act, 1 U.S.C. §§ 1–7 (2018); Anita S. Krishnakumar, *Reconsidering Substantive Canons*, 84 U. CHI. L. REV. 825, 898 & n.307 (2017) [hereinafter Krishnakumar, *Reconsidering Substantive Canons*].

63. Brudney & Ditslear, *supra* note 59, at 7; *see also* Anita S. Krishnakumar & Victoria F. Nourse, *The Canon Wars*, 97 TEX. L. REV. 163, 169 (2018) (“[A]s a general rule, canons are judicial assumptions about meaning—default rules. Default rules are second-best guesses or policies that apply when all first-best evidence fails.”). Professor Abbe Gluck and former Judge Richard Posner have conducted a survey of federal appellate judges on their approach to statutory interpretation. *See generally* Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*, 131 HARV. L. REV. 1298, 1301 (2018) (“This Article reports the results of a survey of forty-two federal appellate judges regarding their approaches to statutory interpretation, including their consideration of statutory text, dictionaries, the canons of construction, legislative history, and purpose.”). According to thirteen of these judges, lenity was an “actual rule,” distinct from other discretionary canons, and they considered it mandatory “substantive law.” *Id.* at 1332. However, other scholars have noted that appellate judges use the lenity framework much less often than the Supreme Court. Rabb, *supra* note 42, at 205–06. Professor Intisar Rabb noted that federal appellate courts applied the framework in only 22 percent of eligible cases. *Id.*

64. ESKRIDGE ET AL., *supra* note 26, at 341–42 (identifying textual canons, substantive canons, and an additional category of “extrinsic” canons referencing legislative history and agency interpretation, which, for purposes of this Note, are considered alongside substantive canons).

65. *Id.*

66. *Id.* Textual canons can be defined as “[t]extual reasoning and rules [that] ask what the statutory text typically means to an ordinary speaker of the language, as well as how well different possible meanings fit with the statute (or even the code) as a whole.” *Id.* at 257.

67. *Id.* at 342.

68. STEVEN F. HUEFNER, LEGISLATION AND REGULATION IN A NUTSHELL 387 (2017).

69. ESKRIDGE ET AL., *supra* note 26, at 342.

which include the rule of lenity⁷⁰—are also quite numerous and “significantly affect” general statutory interpretation taking place in courts.⁷¹

Some criticize substantive canons because judges can apply them in a biased fashion reflecting the judge’s individual policy positions⁷² or in other nonneutral manners.⁷³ These canons are inherently indeterminate due to their discretionary use⁷⁴ and because almost every canon has a competing canon leading to the opposite result.⁷⁵ This means interpreters of statutes can pick and choose from canons to reach whatever outcome they want.⁷⁶ Others criticize substantive canons because they allow “strong judges” to “override the intent of the legislature in order to make law according to their own views” and frustrate the legislature’s policy preferences.⁷⁷ However, sometimes these canons are praised for furthering “rule-of-law norms” that alert Congress to how laws should be initially written to aid later judicial interpretation.⁷⁸

Federal judges’ wide latitude to pick between these canons creates uncertainty, and the Supreme Court’s inconsistent interpretations have created a complex web that lower courts must somehow unravel in order to follow.⁷⁹ However, in spite of their obvious limitations, canons

70. HUEFNER, *supra* note 68, at 387–89.

71. ESKRIDGE ET AL., *supra* note 26, at 342.

72. Brudney & Ditslear, *supra* note 59, at 13–14.

73. HUEFNER, *supra* note 68, at 398–99.

74. Brudney & Ditslear, *supra* note 59, at 7–9.

75. See Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed*, 3 VAND. L. REV. 395, 401–06 (1950) (identifying almost thirty sets of competing canons of construction). An example of competing canons is a pair of canons summarized as: (1) “[a] statute cannot go beyond its text”; and (2) “[t]o effect its purpose a statute may be implemented beyond its text.” *Id.* at 401. Ostensibly, an interpreter could choose one or the other to affect the outcome that they wanted. See generally Anita S. Krishnakumar, *Dueling Canons*, 65 DUKE L.J. 909 (2016) (examining the Supreme Court’s use of canons in both the majority and dissenting opinions in the same case to support opposing outcomes).

76. HUEFNER, *supra* note 68, at 399–400.

77. James M. Landis, *A Note on “Statutory Interpretation,”* 43 HARV. L. REV. 886, 890 (1930); Stephen F. Ross, *Where Have You Gone, Karl Llewellyn? Should Congress Turn Its Lonely Eyes to You?*, 45 VAND. L. REV. 561, 570 (1992).

78. Brudney & Ditslear, *supra* note 59, at 8–9.

79. Scholars have even noted that canons are so uncertain that “no established consensus exists regarding the criteria for achieving canon status.” Krishnakumar & Nourse, *supra* note 63, at 168.

of construction remain “widely used and defended.”⁸⁰ But whatever way canons are used by the courts, clear statement, codified rules regarding statutory interpretation can alleviate some of the uncertainty in the courts and political discretion currently experienced by judges.⁸¹

C. *The Rule of Lenity and Its Justifications*

As stated above, the rule of lenity is a common law substantive canon that requires courts to construe an ambiguous statute in favor of a criminal defendant.⁸² However, the Supreme Court has not consistently settled on an overall framework for applying lenity.⁸³ Generally, to apply the rule of lenity, a judge must first at least find that the plain text of the statute at issue is ambiguous.⁸⁴ This requires that the judge “generate possible readings of the text” before choosing the narrowest one by “invoking lenity.”⁸⁵ The judge first uses textual canons to make this initial finding of ambiguity.⁸⁶ Of course, finding ambiguity in a statute requires its own “interpretive, legal judgment.”⁸⁷ Because of this first finding of textual ambiguity, lenity has been called a “meta-rule” because “[i]t is a rule about the application of other rules of statutory construction.”⁸⁸

80. VALERIE C. BRANNON, CONG. RSCH. SERV., R45153, STATUTORY INTERPRETATION: THEORIES, TOOLS, AND TRENDS 25 (2018), <https://fas.org/sgp/crs/misc/R45153.pdf> [<https://perma.cc/5574-QPHC>].

81. Conversely, criminal justice reformers sometimes argue against uniformity of interpretation and instead call for judges to tailor their approach case by case. In certain close cases, giving judges discretion can protect defendants (or victims). Especially in the sentencing context, reformers often call for judges to have wide discretion to make decisions, thinking that this leads to more fair sentencing overall. Matthew Van Meter, *One Judge Makes the Case for Judgment*, ATLANTIC (Feb. 25, 2016), <https://www.theatlantic.com/politics/archive/2016/02/one-judge-makes-the-case-for-judgment/463380> [<https://perma.cc/7PGE-SXE8>]; Ruth Sangree & Rachel Barkow, *Breaking the Cycle of Mass Incarceration*, BRENNAN CTR. (Jan. 3, 2020), <https://www.brennancenter.org/our-work/analysis-opinion/breaking-cycle-mass-incarceration> [<https://perma.cc/EF6C-KHAC>]. But in the lenity context where the rule is designed to favor defendants, limiting a judge’s discretion would only ever serve the defendant’s interests.

82. Price, *supra* note 23, at 885, 891–92. For a thorough analysis of a finding of ambiguity, see Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345, 384–86.

83. *See infra* Part II.A.

84. *See* Price, *supra* note 23, at 890 (“The rule of lenity . . . requires the judge to make a finding of ambiguity—and textual ambiguity is itself an interpretive, legal judgment.” (emphasis omitted)).

85. *Id.*

86. Kahan, *supra* note 82, at 384–86.

87. Price, *supra* note 23, at 890 (emphasis omitted).

88. *Id.* at 889.

Justice Antonin Scalia lamented that the rule of lenity often affords “little more than atmospherics, since it leaves open the crucial question—almost invariably present—of how much ambiguousness constitutes an ambiguity.”⁸⁹ The Supreme Court has clarified somewhat that “[t]he simple existence of *some* statutory ambiguity . . . is not sufficient to warrant application of [the rule of lenity], for most statutes are ambiguous to some degree.”⁹⁰ But there is significant controversy about *which* interpretive tools should properly be used to discern the text’s meaning before turning to lenity.⁹¹

In spite of the controversy surrounding its application, lenity serves important constitutional ideals. Lenity’s justifications include fair notice—that a defendant should receive fair notice of a statute’s prohibited behavior by the court’s adopting a strict, narrow interpretation of the conduct proscribed by statute.⁹² This notion is rooted in the constitutional value of due process.⁹³ The other primary justifications for lenity are legislative supremacy and uniformity—that lenity “prevents judicial usurpation of the legislative power to determine what conduct is criminal.”⁹⁴ Both the constitutional principle of due process and the constitutional principle of equal protection are implicated by this justification.⁹⁵ Chief Justice John

89. *United States v. Hansen*, 772 F.2d 940, 948 (D.C. Cir. 1985) (Scalia, J.).

90. *Muscarello v. United States*, 524 U.S. 125, 138 (1998) (emphasis added).

91. See Sarah Newland, Note, *The Mercy of Scalia: Statutory Construction and the Rule of Lenity*, 29 HARV. C.R.-C.L. L. REV. 197, 198 (1994) (“Because the courts must find that a statute is ambiguous before applying the rule [of lenity], the method of and background materials referred to in statutory construction affect the scope of the use of lenity.”); see also *infra* Part II.A. Finding ambiguity is not a novel concept to courts; the first step of the common *Chevron* deference framework is finding ambiguity in a statute. VALERIE C. BRANNON & JARED P. COLE, CONG. RSCH. SERV., R44954, *CHEVRON DEFERENCE: A PRIMER 14* (2017), <https://fas.org/sgp/crs/misc/R44954.pdf> [<https://perma.cc/PWA3-PB2F>].

92. Marie Gryphon, *The Better Part of Lenity*, 7 J.L. ECON. & POL’Y 717, 718 (2011).

93. ESKRIDGE ET AL., *supra* note 26, at 375–76. The Constitution forbids the federal government and the states to deprive any person of “life, liberty, or property, without due process of law.” U.S. CONST. amends. V, XIV. Due process “looms large in criminal procedure, and is also important as a limitation on the manner and extent to which conduct may be defined as criminal in the substantive criminal law.” WAYNE R. LAFAVE, *CRIMINAL LAW* 182 (6th ed. 2017).

94. Gryphon, *supra* note 92, at 718. This justification is similar to the legislative supremacy doctrine where “[c]riminal law must be a product of a clear judgment on Congress’s part,” not a product of judicial decree. Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 332 (2000).

95. ESKRIDGE ET AL., *supra* note 26, at 375–76; see U.S. CONST. amends. V, XIV. Equal protection “governs all governmental actions which classify individuals for different benefits or burdens under the law” and “requir[es] that individuals be treated in a manner similar to other

Marshall encapsulated the fair notice and legislative supremacy rationales for lenity when writing for the Court in 1820: “The rule that penal laws are to be construed strictly . . . is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department.”⁹⁶

Despite the constitutional justifications for the rule of lenity, there has always been substantial controversy surrounding its application and continued usage. Even in 1776, Jeremy Bentham deemed lenity “the subject of more constant controversy, than perhaps of any in the whole circle of the Law.”⁹⁷ Today, many scholars argue that lenity is applied haphazardly by federal courts, subverting its justifications of fair notice and predictability in criminal law.⁹⁸ Additionally, there is significant controversy regarding lenity’s overall place within the canonical hierarchy.⁹⁹

Lenity’s legislative supremacy justification is also controversial by virtue of the legislature’s possible preference that courts read their ambiguously drafted statutes as broadly as possible.¹⁰⁰ Ambiguous language in criminal statutes may be a legislative attempt to delegate a statute’s case-by-case discretionary enforcement to courts and law enforcement, as is common in administrative and civil law.¹⁰¹ However, the rule of lenity compels the legislature to “detail the breadth of prohibitions in advance of their enforcement” to explicitly give notice of prohibited criminal conduct.¹⁰² With the ever-expanding catalog of

similarly situated persons.” JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* 741 (8th ed. 2010). The Supreme Court has recognized a “‘fundamental right’ to fair treatment in the criminal justice system for purposes of equal protection.” *Id.* at 1197.

96. *United States v. Wiltberger*, 18 U.S. 76, 95 (1820).

97. JEREMY BENTHAM, *A COMMENT ON THE COMMENTARIES: A CRITICISM OF WILLIAM BLACKSTONE’S COMMENTARIES ON THE LAWS OF ENGLAND* 141 (Charles Warren Everett ed., Clarendon Press 1928) (1776).

98. *See, e.g.*, Kahan, *supra* note 82, at 346 (“Judicial enforcement of lenity is notoriously sporadic and unpredictable.”); William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1083 (1989) [hereinafter Eskridge, *Public Values*] (stating that rule of lenity cases are “capricious” and involve “random invocation” of the rule); Stephen F. Smith, *Overcoming Overcriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 537, 567 (2012) (“[C]ourts are notoriously inconsistent in their adherence to the venerable rule of lenity.”).

99. *See infra* Part II.A.

100. Price, *supra* note 23, at 886.

101. Kahan, *supra* note 82, at 367–70; Price, *supra* note 23, at 886.

102. Price, *supra* note 23, at 887.

criminal law, lenity is an important check on the legislature's power and on courts' discretion.¹⁰³

II. INCONSISTENT APPLICATION OF LENITY IN THE FEDERAL COURTS

Because of lenity's historically chaotic application, a clear statement rule, codified by Congress, would supply more certainty and uniformity desperately needed in federal criminal law. First, this Part examines the inconsistent application of lenity and the different formulations of the rule. Second, it explores the validity of codifying canons. Finally, it assesses why codifying the lenity-second approach specifically would create a more robust version of lenity in the federal courts.

A. *Three Different Formulations of the Rule of Lenity Framework*

Part of lenity's controversy stems from its haphazard application and fluctuating relationship to other canons. There are three primary views of how lenity should fit into the rest of the statutory interpretation framework.¹⁰⁴ Different coalitions of Supreme Court Justices have used these different interpretations at various times, though only the lenity-last and lenity-second frameworks are generally applied by modern federal courts.¹⁰⁵ In recent decades, the Court has most often used the lenity-last approach,¹⁰⁶ but has occasionally used the lenity-second approach advocated by Justice Scalia.¹⁰⁷

1. *The Lenity-Last Approach.* In recent history the Court has held most often, with important exceptions, that lenity is a canon of last

103. Hopwood, *supra* note 28, at 695–96, 738–39.

104. See Gryphon, *supra* note 92, at 720–21 (differentiating the lenity-last view and Justice Scalia's view of lenity); Kahan, *supra* note 82, at 390–96 (differentiating the lenity-last and the lenity-first approaches); Price, *supra* note 23, at 889–96 (differentiating the lenity-last approach, Justice Scalia's lenity-second approach, and the lenity-first approach); Rabb, *supra* note 42, at 188–93 (differentiating the lenity-first formulation, the lenity-last formulation, and Justice Scalia's textualist rule of lenity).

105. Rabb, *supra* note 42, at 189 (stating that the lenity-first framework “was common on the Supreme Court when lenity was first incorporated into American law, and continued to be in use until relatively recently”).

106. *United States v. Davis*, 139 S. Ct. 2319, 2351–52 (2019) (Kavanaugh, J., dissenting).

107. ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 299 (2012).

resort.¹⁰⁸ The Court endorsed this view in *Ocasio v. United States*,¹⁰⁹ stating that lenity can only be invoked when there is a “grievous ambiguity or uncertainty” in a criminal statute, so extreme that the Court “can make no more than a guess as to what Congress intended.”¹¹⁰ Under this lenity-last theory, a court would rely upon lenity *only* if there was an interpretive “tie” after all other interpretive methods failed¹¹¹—methods which would include exhausting textual canons, other substantive canons, legislative history, and purposive arguments.¹¹²

For example, *Muscarello v. United States*¹¹³ involved a provision of the U.S. Code that imposes a five-year mandatory minimum sentence on anyone who “uses or carries a firearm” “during and in relation to” a “drug trafficking crime.”¹¹⁴ The defendant, Frank Muscarello, illegally sold marijuana; when he was stopped on his way to sell the drug, police discovered a gun in his locked glove compartment.¹¹⁵ Muscarello argued that “carr[ying]” a gun in a locked glove compartment did not fall under the statute’s prohibition on carrying a firearm during drug trafficking.¹¹⁶ After first examining the statute’s text, Congress’s legislative intent, the statute’s purpose, and the overall statutory scheme, the majority concluded that the statute covered Muscarello’s conduct, and dismissed Muscarello’s claims of lenity.¹¹⁷

The lenity-last interpretation has one of two potential problems: either lenity would never apply at all because the Court can usually find some meaning in a statute beyond a “guess” as to Congress’s intent, or lenity would be a completely superfluous doctrine because if

108. Justice Brett Kavanaugh’s dissent in *Davis*, 139 S. Ct. at 2351–52 (Kavanaugh, J., dissenting), lists the following cases as precedent for the proposition that lenity is a canon of last resort: *Ocasio v. United States*, 136 S. Ct. 1423, 1434 n.8 (2016); *United States v. Hayes*, 555 U.S. 415, 429 (2009); *Muscarello v. United States*, 524 U.S. 125, 138 (1998); *United States v. Wells*, 519 U.S. 482, 499 (1997); *Reno v. Koray*, 515 U.S. 50, 65 (1995); *United States v. Shabani*, 513 U.S. 10, 17 (1994); *Smith v. United States*, 508 U.S. 223, 239 (1993); *Moskal v. United States*, 498 U.S. 103, 108 (1990); *Callanan v. United States*, 364 U.S. 587, 596 (1961).

109. *Ocasio v. United States*, 136 S. Ct. 1423 (2016).

110. *Id.* at 1434 n.8 (quoting *Muscarello*, 524 U.S. at 138–39).

111. Price, *supra* note 23, at 891.

112. *Id.* (citing Kahan, *supra* note 82, at 386).

113. *Muscarello v. United States*, 524 U.S. 125 (1998).

114. 18 U.S.C. § 924(c)(1)(A) (2018); *Muscarello*, 524 U.S. at 126.

115. *Muscarello*, 524 U.S. at 127.

116. *Id.*

117. *Id.* at 127–39.

the Court had to guess what Congress intended, there would be no meaningful law to apply.¹¹⁸ As one scholar argues, the lenity-last approach means that “[c]ompeting views of the statute will disappear, reconciled by other conventions, before the rule even comes into operation.”¹¹⁹ If courts used all other methods of interpretation first, then there would be no tie left for lenity to break.

A superfluous rule of lenity under the lenity-last theory is not enough. As another scholar notes, “[r]anking lenity ‘last’ among interpretive conventions all but guarantees its irrelevance” because canons of statutory interpretation are *intended* to resolve questions of ambiguity.¹²⁰ When a court can use any possible interpretation method at its disposal, it may never find room for ambiguity. In contrast, a hardier doctrine of lenity supplies an important check on government actors and provides important constitutional protection for criminal defendants.

2. The Lenity-First Approach. A second view of lenity, the lenity-first theory, is extremely favorable to defendants. Under this theory of interpretation, “the [application] of lenity might also mean confining the reach of criminal statutes even in cases where textualism would support a broader view.”¹²¹ Under this method, a judge would accept the narrowest plausible interpretation of the statute in favor of the defendant even before textual or other canons had been exhausted.¹²² Though popular with early courts, this formulation of lenity has fallen into disuse in modern courts.¹²³

118. Justice Scalia, responding to a statement in a Court opinion that lenity should only apply when “the equipoise of competing reasons cannot otherwise be resolved,” wrote: “[T]he rule [of lenity] either would never apply (when is the last time you read a decision saying that an interpretive ‘equipoise’ could not be resolved?) or would be superfluous (if alternative meanings were in utter equipoise, the statute would be inoperative as meaningless).” SCALIA & GARNER, *supra* note 107, at 298 (quoting *Johnson v. United States*, 529 U.S. 694, 713 n.13 (2000)).

119. Price, *supra* note 23, at 890.

120. Kahan, *supra* note 82, at 386.

121. Price, *supra* note 23, at 893–94.

122. *Id.*

123. Rabb, *supra* note 42, at 188 (“A close examination of past judicial practice reveals early and deliberate emphasis on lenity first, which is now experiencing a late-onset displacement . . .”).

This method has not been explicitly articulated in judicial opinions,¹²⁴ but Justice Oliver Wendell Holmes appears to use this lenity-first in his opinion in *McBoyle v. United States*.¹²⁵ In *McBoyle*, the Court held that the defendant's crime of transporting a stolen airplane did not fall within a federal statute prohibiting theft of "motor vehicles."¹²⁶ Although the statute specifically enumerated other prohibited vehicles, it would have been plausible to read the text as also prohibiting the defendant's conduct.¹²⁷ Justice Holmes focused on the necessity of fair warning to the defendant from the narrowest plain meaning of the text alone, and explained that the Justices' considering policy or speculating about the legislature's intent would not provide the proper warning.¹²⁸

Under lenity-first, if any of the plain text, legislative history, or policy considerations suggested that the statute should be construed narrowly against the defendant, the more lenient plausible interpretation would win.¹²⁹ This extremely broad use of lenity is likely inoperable. Using this approach, "judges might manipulate the threshold judgment of plausibility" and by "judicial fiat" undermine the intent of the legislature.¹³⁰ If lenity could be applied *before even* a textual analysis of a statute, the courts could usurp the legislature's power to make the laws. With this approach, lenity would trump even the written text.

3. *The Lenity-Second Approach.* Finally, a middle ground is the lenity-second approach—a court applies lenity to a statute second only to the text. Under the lenity-second approach, judges first identify the text's plain meaning and resolve as much ambiguity as possible with textual canons.¹³¹ But if "reasonable doubt persists," they apply lenity before resorting to *all* other nontextual methods of interpretation.¹³²

124. Price, *supra* note 23, at 894; *see also* Rabb, *supra* note 42, at 189 (noting that the lenity-first approach is disfavored by modern courts).

125. *McBoyle v. United States*, 283 U.S. 25 (1931).

126. *Id.* at 25–27.

127. *Id.* at 26.

128. *Id.* at 27.

129. *See* Price, *supra* note 23, at 893–94 (discussing a theory of lenity by which courts pick the narrowest plausible interpretation of the statute).

130. *Id.* at 894–95.

131. SCALIA & GARNER, *supra* note 107, at 299.

132. Price, *supra* note 23, at 891–92; *see also* SCALIA & GARNER, *supra* note 107, at 299 ("The criterion we favor is this: whether, after all the legitimate tools of interpretation have been

Thus, under the lenity-second theory, lenity would be invoked only after exhausting the textual canons but before considering other means of interpretation, such as substantive canons, purpose, or legislative history.¹³³ The statute would not need to be “grievously ambiguous,” but the ambiguity would still have to be within a reasonable doubt.¹³⁴ A court would not use legislative history, purpose, or any other extra-textual evidence to broaden the reading of the legislature’s text.¹³⁵ Justice Scalia, one of lenity’s biggest proponents, thought that lenity should operate this way.¹³⁶

The lenity-second approach is exemplified in a dissent by Justice Scalia. The case revolved around the interpretation of a statute forbidding the “use” of a firearm in furtherance of narcotics trafficking.¹³⁷ The defendant had not used the firearm as a weapon—the common contextual meaning of the term—but instead had used the firearm to trade for drugs.¹³⁸ The majority interpreted the text of the statute broadly by harkening to Congress’s apparent purpose in drafting the statute—guarding against the “dangerous combination” of drugs and guns—thus encompassing a nonobvious meaning of the “use” of a gun.¹³⁹ In dissent, Justice Scalia insisted that the word “use” should follow the ordinary textual meaning of the word in context—to use as a weapon.¹⁴⁰ At the very least, Justice Scalia urged, the debatable nature of the term was “enough, under the rule of lenity, to require finding for the [defendant].”¹⁴¹ So, first he turned to the text to

applied, ‘a reasonable doubt persists.’” (quoting *Moskal v. United States*, 498 U.S. 103, 108 (1990))).

133. See Price, *supra* note 23, at 891–92 (describing a theory of lenity by which lenity narrows the use of nontextual interpretive methods).

134. SCALIA & GARNER, *supra* note 107, at 299 (quoting *Moskal*, 498 U.S. at 108).

135. See Price, *supra* note 23, at 891–92 (“On this view, lenity operates to cut off broad readings based on policy, legislative history, or other extratextual sources whenever the text standing alone supports a narrower view.”).

136. For a brief examination of Justice Scalia’s jurisprudence and legacy regarding lenity, see Zachary S. Price, *The Court After Scalia: The Rule of Lenity*, SCOTUSBLOG (Sept. 2, 2016, 2:14 PM), <https://www.scotusblog.com/2016/09/the-court-after-scalia-scalia-and-the-rule-of-lenity> [<https://perma.cc/2MK2-ARZM>].

137. *Smith v. United States*, 508 U.S. 223, 242–43 (1993) (Scalia, J., dissenting).

138. *Id.* at 225 (majority opinion).

139. *Id.* at 239–40.

140. *Id.* at 242–43 (Scalia, J., dissenting).

141. *Id.* at 246.

determine the ordinary meaning of “use,” and, still finding ambiguity, would have invoked lenity and held for the defendant.¹⁴²

This lenity-second approach is the most desirable and workable for Congress to codify. Although it still defers to Congress by first following the text of a criminal statute, application of lenity before any other methods of interpretation retains consistency, respects constitutional notice requirements,¹⁴³ and alerts Congress to be precise in drafting statutes.

In *United States v. Davis*,¹⁴⁴ a 2019 five–four decision, Justice Neil Gorsuch appeared to endorse the lenity-second theory.¹⁴⁵ Writing for the majority in *Davis*, Justice Gorsuch first worked through several textual canons of interpretation including the “consistent meaning” canon, which presumes that the same language in related statutes has a consistent meaning, and then conducted a broader contextual analysis of the federal criminal code.¹⁴⁶ Turning to the government’s argument that the Court should use the constitutional avoidance canon¹⁴⁷ before resorting to lenity, he stated that “no one before us has identified a case in which this Court has invoked the [constitutional avoidance] canon to *expand* the reach of a criminal statute in order to save it.”¹⁴⁸ He explained further that expanding the statute under the constitutional avoidance canon would “sit uneasily with the rule of lenity’s teaching that ambiguities about the breadth of a criminal statute should be resolved in the defendant’s favor.”¹⁴⁹ In essence,

142. *See id.* (“Even if the reader does not consider the issue to be as clear as I do, he must at least acknowledge, I think, that it is eminently debatable—and that is enough, under the rule of lenity, to require finding for the petitioner here.”). Elsewhere, Justice Scalia wrote:

If the rule of lenity means anything, it means that the Court ought not . . . use an ill-defined general purpose to override an unquestionably clear term of art, and (to make matters worse) give the words a meaning that even one unfamiliar with the term of art would not imagine. The temptation to stretch the law to fit the evil is an ancient one, and it must be resisted.

Moskal v. United States, 498 U.S. 103, 132 (1990) (Scalia, J., dissenting).

143. *See United States v. Bass*, 404 U.S. 336, 348 (1971) (emphasizing clear statutory language as being essential to fair warning).

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

145. *See infra* notes 146–49 and accompanying text.

146. *Davis*, 139 S. Ct. at 2329.

147. Mentioned in *supra* Part I.B., the constitutional avoidance canon is a “substantive canon” that directs “that statutory provisions should be construed to avoid giving rise to a serious constitutional question.” HUEFNER, *supra* note 68, at 389.

148. *Davis*, 139 S. Ct. at 2332.

149. *Id.* at 2333. For a discussion of the interaction between legislative history and lenity, see Newland, *supra* note 91, at 213–16.

Justice Gorsuch elevated the rule of lenity above other possible methods of statutory interpretation at his disposal, after textual canons.

Justice Brett Kavanaugh argued in dissent that under the constitutional avoidance canon, it was the Court's duty to first inquire whether the statute could "reasonably, plausibly, or fairly possibly be interpreted" as constitutional, before turning to any consideration of lenity.¹⁵⁰ Essentially, Justice Kavanaugh's view was that the constitutional avoidance canon would trump any further consideration of the rule of lenity, at odds with Justice Gorsuch's understanding of the canons' interaction. Justice Kavanaugh endorsed the lenity-last—or at least, lenity-nearly-last—approach.¹⁵¹

Given the Court's recent endorsement of the more robust lenity-second approach, why would a codified rule of lenity be of any use? The simple answer is that a different court composition could easily undermine lenity's slight victory in *Davis*. The Supreme Court has explicitly stated that the use of any canon of statutory interpretation does not have precedential weight and has, so far, declined to establish any kind of canonical hierarchy to aid the lower courts.¹⁵² The federal courts of appeals have been guilty of similar inconsistency regarding lenity.¹⁵³ Because canons are "usually deployed according to an interpreter's preferred methodology,"¹⁵⁴ without some sort of standardization, this discretionary usage will continue to be inconsistent.

Though lenity ultimately triumphed in the Court's latest application, the five-four opinion leaves a strong application of lenity in doubt. While the *Davis* Court may agree that lenity-second is the correct approach, a slightly different Court composition could easily undercut this small victory for lenity, continuing the inconsistent application of lenity. Additionally, the lower federal courts need guidance on lenity's role in the interpretation of criminal statutes.

150. *Davis*, 139 S. Ct. at 2336, 2349 (Kavanaugh, J., dissenting).

151. *See supra* Part II.A.1 (discussing the lenity-last approach).

152. *See Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001) ("For one thing, canons are not mandatory rules. They are guides that 'need not be conclusive.' They are designed to help judges determine the Legislature's intent as embodied in particular statutory language. And other circumstances evidencing congressional intent can overcome their force." (citation omitted) (quoting *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 115 (2001))).

153. Price, *supra* note 23, at 927–28.

154. Jacob Scott, *Codified Canons and the Common Law of Interpretation*, 98 GEO. L.J. 341, 343 (2010).

Congress should step in and codify the lenity-second approach to protect this essential doctrine from obscurity. Though *Davis* demonstrates the Court's relatively recent support for the lenity-second approach, a codified rule of lenity would solidify lenity's role in a way that would survive changes in the Court's composition—and address the critical issues in the criminal justice system.

B. The Validity of Congress's Codification of Canons

Generally speaking, textual and substantive “canons are nothing more than common law.”¹⁵⁵ However, to address the problems with the uncertainty of statutory interpretation, every state, the District of Columbia, and, even to an extent, Congress have codified certain canons of construction.¹⁵⁶ These codified canons include a wide range of textual and substantive rules.¹⁵⁷

Congress has enacted only one general rule to aid federal courts in statutory interpretation: the Dictionary Act, which provides definitions of certain words applicable across the entire U.S. Code.¹⁵⁸ Some statutes, however, have their own codified method of interpretation. For example, a provision in the federal Racketeer Influenced and Corrupt Organizations Act of 1970¹⁵⁹ (“RICO”) mandates that “[t]he provisions of this title . . . shall be liberally construed to effectuate its remedial purposes.”¹⁶⁰ The Supreme Court has indeed consistently construed RICO liberally, as Congress commanded.¹⁶¹ Notably, however, no federal statute gives federal

155. *Id.* at 344.

156. Krishnakumar, *Reconsidering Substantive Canons*, *supra* note 62, at 896 (citing Scott, *supra* note 154, at 341, 350 & n.35 (listing all codified canons)); *see supra* note 62 and accompanying text.

157. Scott, *supra* note 154, at 351.

158. Dictionary Act, 1 U.S.C. §§ 1–7 (2018); Krishnakumar, *Reconsidering Substantive Canons*, *supra* note 62, at 898 & n.307.

159. Racketeer Influenced and Corrupt Organizations Act of 1970, 18 U.S.C. §§ 1961–1968 (2018).

160. *Id.* § 1961; *see also* Julian R. Murphy, *Lenity and the Constitution: Could Congress Abrogate the Rule of Lenity?*, 56 HARV. J. ON LEGIS. 423, 444 (2019) (“In its RICO jurisprudence, the Court has admittedly given words in criminal provisions broad meaning, but that is because the provisions themselves are ‘drafted . . . broadly enough to encompass a wide range of criminal activity.’” (quoting *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 248 (1989))).

161. Murphy, *supra* note 160, at 444.

courts any “interpretive methodology” or “hierarchy of tools to be consulted in any particular order.”¹⁶²

At the state level, legislatures have codified many varying statutory interpretation rules and cross-cutting directives. Different states have codified the plain meaning rule,¹⁶³ the presumption of consistent usage,¹⁶⁴ the presumption of a “reasonable” intention of the legislature,¹⁶⁵ and the use of legislative history.¹⁶⁶ For example, New York uses “a set of . . . interpretation guidelines that specifically invite its courts to be Intentionalist interpreters.”¹⁶⁷ It mandates that “[t]he primary consideration of the courts” is to “give effect to the intention of the Legislature,” first from a literal reading, then, if the statute is still ambiguous, “from such facts” that may “legitimately reveal it.”¹⁶⁸ Thus, legislatures have a history of giving interpretative guidance to courts, and courts generally adhere to those precepts. Congress could add lenity to this body of codified interpretive canons.¹⁶⁹

Several legal scholars suggest that a comprehensive federal framework of *all* canons of statutory interpretation should be enacted.¹⁷⁰ They offer ideas of a legislative “Federal Rules of Statutory

162. Krishnakumar, *Reconsidering Substantive Canons*, *supra* note 62, at 898 & n.307.

163. *See, e.g.*, IND. CODE § 1-1-4-1(1) (West, Westlaw through the 2020 Second Regular Session of the 121st General Assembly) (“Words and phrases shall be taken in their plain, or ordinary and usual, sense.”).

164. *See, e.g.*, COLO. REV. STAT. § 2-4-101 (West, Westlaw through the 2020 Regular Session and the Nov. 3, 2020 election) (“Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly.”).

165. *See, e.g.*, MINN. STAT. § 645.17 (West, Westlaw through the 2020 Regular Session and 1st through 6th Special Sessions) (“In ascertaining the intention of the legislature the courts may [presume]: (1) the legislature does not intend a result that is absurd, impossible of execution, or unreasonable . . .”).

166. *See, e.g.*, TEX. GOV'T CODE ANN. § 311.023 (West, Westlaw through the end of the 2019 Regular Session of the 86th Legislature) (“In construing a statute, whether or not the statute is considered ambiguous on its face, a court may consider among other matters the: . . . (3) legislative history . . .”). *See generally* Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 *YALE L.J.* 1750 (2010) (describing state legislatures’ embrace of legislative history as a method of statutory interpretation); Scott, *supra* note 154 (discussing state legislatures’ treatment of legislative history).

167. HUEFNER, *supra* note 68, at 322.

168. N.Y. STAT. LAW § 92 (McKinney 2016).

169. *See infra* Part III.A.

170. *See, e.g.*, Gary E. O’Connor, *Restatement (First) of Statutory Interpretation*, 7 *N.Y.U. J. LEGIS. & PUB. POL’Y* 333, 334 (2004) (proposing that the American Law Institute create a “Restatement of Statutory Interpretation”); Nicholas Quinn Rosenkranz, *Federal Rules of*

Interpretation,” similar to the Federal Rules of Civil Procedure,¹⁷¹ and a nonlegislative “Restatement of Statutory Interpretation” modeled after restatements such as the Restatement of Contracts.¹⁷² They argue that because Congress has already recognized the value of these types of “controlling interpretive frameworks to assist other areas” of law such as civil procedure or contract interpretation, a specific framework for statutory interpretation would be entirely valid.¹⁷³ In statutory interpretation, the “role of the judge is arguably more cabined” than compared to “common law or constitutional interpretation.”¹⁷⁴ This is especially true because of the superior role of the legislature and “the nature of legislation itself” when interpreting statutes.¹⁷⁵

Alternatively, other scholars argue that the legislature veers into unconstitutional territory under the separation of powers doctrine when it attempts general “interpretive directives.”¹⁷⁶ General interpretive directives are statutes that apply generally to all or a large part of the laws created by Congress.¹⁷⁷ The Dictionary Act, referenced above, is such a statute because it “provides definitions and interpretive instructions for ‘any Act of Congress.’”¹⁷⁸ General directives can be further divided into retrospective and prospective categories.¹⁷⁹ The main objection to retrospective general directives is that they could create “particularly reckless amendments” of statutes, whereas the primary objection to prospective general directives is that they could unduly “bind” future Congresses.¹⁸⁰ These are valid considerations—however, there are strong responses to them.

Statutory Interpretation, 115 HARV. L. REV. 2085, 2089 (2002) (proposing that Congress promulgate a “Federal Rules of Statutory Interpretation”).

171. Rosenkranz, *supra* note 170, at 2089.

172. O’Connor, *supra* note 170, at 334.

173. Gluck, *supra* note 166, at 1849–50.

174. *Id.* at 1848–49.

175. *Id.* at 1849.

176. See Linda D. Jellum, “Which Is To Be Master,” *The Judiciary or the Legislature? When Statutory Directives Violate Separation of Powers*, 56 UCLA L. REV. 837, 842 (2009) (“[I]nterpretive directives are likely unconstitutional when enacted to apply generally to many statutes . . .”).

177. Rosenkranz, *supra* note 170, at 2110.

178. Dictionary Act, 1 U.S.C. §§ 1–7 (2018); Rosenkranz, *supra* note 170, at 2110.

179. Rosenkranz, *supra* note 170, at 2110.

180. *Id.* at 2120; see 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 2–3, at 125–26 n.1 (3d ed. 2000) (noting that it would “raise serious constitutional questions” to allow provisions of a specific statute to “[a]utomatically . . . give determinative weight . . . to previously

One response is found in Congress's power "[t]o make all laws which shall be necessary and proper for carrying into Execution [its enumerated] Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."¹⁸¹ "[T]he Necessary and Proper Clause permits Congress to proscribe any procedure or practice of courts that impairs the faithful exercise of '[t]he judicial Power' and to prescribe rules and procedures conducive to the faithful exercise of that power."¹⁸² Codified rules of statutory interpretation, like the rule of lenity, are "necessary and proper" to effectuate the will of the legislature and to interpret statutes more accurately and justly. Creating law is inherently in the power of the legislature, not the judiciary, and a legislature clarifying its own laws is not violating the separation of powers doctrine. A codified lenity rule would not improperly bind a future Congress because a future legislature could always repeal the lenity statute.¹⁸³

The important point is that, because the legislature controls and drafts statutes, codifying those statutes' interpretation gives the legislature a say in how they are understood without overstepping its bounds. Scholars largely agree that codified canons are a valid use of legislative power, not a usurpation from the courts nor a separation of powers violation.¹⁸⁴

enacted legislative 'rules' of construction" because it would permit earlier Congresses to require action by a subsequent Congress).

181. U.S. CONST. art. I, § 8, cl. 18.

182. Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey?*, 109 YALE L.J. 1535, 1590–91 (2000).

183. However, a powerful counterargument to this point is that it is very difficult to repeal a law, possibly even more difficult than passing a law in the first place. Philip K. Howard, *Obsolete Law—The Solutions*, ATLANTIC (Mar. 30, 2012), <https://www.theatlantic.com/national/archive/2012/03/obsolete-law-0151-the-solutions/255141> [<https://perma.cc/ARV8-ZNJZ>]. Though of course, this counterargument applies to any new legislation.

184. See, e.g., Alex Kozinski, *Should Reading Legislative History Be an Impeachable Offense?*, 31 SUFFOLK U. L. REV. 807, 819 (1998) (arguing that Congress enacting legislation to guide statutory interpretation would not usurp the judicial function in any way); O'Connor, *supra* note 170, at 344 (stating that one way to deal with the common law "messiness" of the canons of interpretation is to codify canons or create rules-enabling legislation); Rosenkranz, *supra* note 170, at 2091 (arguing that Congress has at least some constitutional power over interpretive methodology); Ross, *supra* note 77, at 574–78 (arguing that Congress can take certain actions in drafting legislation to guidepost their intent and thus "minimize situations where statutory language invokes a descriptive canon contrary to the legislative intent"); Scott, *supra* note 154, at 344 ("Because the canons are nothing more than common law, legislative enactments that repudiate or ratify canons should not only be included in any conversation about the canons, but

An additional counterargument against codifying statutory interpretation is that judges will simply continue to follow their own policy preferences and discount direction from the legislature. However, “[a]cknowledging that ideology plays a role in judicial decisionmaking does not mean that the role of law should completely be discounted.”¹⁸⁵ Empirical and anecdotal evidence shows that judges are constrained by legal doctrine such as codified canons in the states “some of the time—and often, much of the time,” which would apply equally to a federal scheme of codification.¹⁸⁶ Were lenity codified, some judges most likely would continue to follow their own methods of interpreting criminal statutes, but absolute perfection is not the expectation here. At the very least, codified lenity would “narrow the range of permissible outcomes,” which would partially serve codified lenity’s intended effect—to provide more uniformity across federal criminal law and give added notice to criminal defendants and congressional drafters.¹⁸⁷

C. *Why Codify the Rule of Lenity?*

Codifying lenity would solidify its uniform role in the criminal justice system and create a more powerful version of the doctrine. This powerful version of lenity would promote the due process rights of criminal defendants. It could “demand more specificity from Congress and narrow substantive criminal laws and penalty provisions, especially” where there is some doubt as to Congress’s original intent and where the stakes are high, as they are in all criminal cases.¹⁸⁸ Codification itself could help create this robust version of lenity by broadcasting widely the seriousness and vigorous function of the new

should be considered important and controlling.”); Alan R. Romero, Note, *Interpretive Directions in Statutes*, 31 HARV. J. ON LEGIS. 211, 219 (1994) (proposing that “[l]egislatures could devise a variety of novel interpretive directions that could have a significant impact on judicial statutory interpretation”).

185. Gluck, *supra* note 166, at 1850.

186. *Id.*; see Richard H. Fallon, Jr., *Constitutional Constraints*, 97 CALIF. L. REV. 975, 1004 (2009) (“Unanimous opinions provide some evidence that justices of otherwise diverse ideological outlooks acknowledge the existence of rules capable of dictating legally correct outcomes—not chosen on the basis of ideological preferences—when those rules clearly apply.”).

187. See Gluck, *supra* note 166, at 1850 (stating that, although methodology does not dictate outcomes, methodology can affect outcomes).

188. Hopwood, *supra* note 28, at 695.

rule to both courts and Congress, which would help “maximiz[e] the democratic accountability of our criminal justice system.”¹⁸⁹

1. *Uniformity in the Courts.* Consistency is “central[] to the rule of law in general,” but it also “has a special role to play in judge-made law.”¹⁹⁰ Given the importance of lenity and the constitutionally mandated due process rights of criminal defendants, uniformity is especially essential in this context. Currently, it is “impossible to predict which canons a court may choose to employ when it endeavors to resolve statutory doubt” and “how much weight a court will give any particular canon of construction,” leaving the defendant at the mercy of the judge’s ideology.¹⁹¹ In the criminal context, this lack of uniformity could potentially make the defendant’s outcome dependent on the judge’s interpretive preferences.¹⁹²

In its statutory interpretation jurisprudence, the Court has declined to give precedential weight to canons or to determine a hierarchy of canons, further making it difficult to know how the courts will interpret an admittedly ambiguous statute.¹⁹³ Some scholars argue that even if a court can eventually resolve statutory doubt by using “a maze of canons and contradictory history,” by that point “it is too late to allow the defendant meaningful notice of the crime or penalty.”¹⁹⁴ With a federally mandated rule of lenity, law enforcement and prosecutors will be on notice that textually ambiguous statutes will be construed against the state, not the defendant, and they can modify their enforcement of ambiguous statutes accordingly.¹⁹⁵

The application of a codified clear statement rule of lenity under the lenity-second approach would provide a consistent method of

189. Price, *supra* note 23, at 925.

190. Antonin Scalia, Essay, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE W. RES. L. REV. 581, 588 (1989–90).

191. David S. Romantz, *Reconstructing the Rule of Lenity*, 40 CARDOZO L. REV. 523, 573 (2018).

192. See, e.g., CASS R. SUNSTEIN, DAVID SCHKADE, LISA M. ELLMAN & ANDRES SAWICKI, ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY 130 (2006) (concluding that federal judges appointed by Republican and Democratic “presidents are systematically different, in their voting behavior”).

193. See *supra* note 152 and accompanying text.

194. Romantz, *supra* note 191, at 574.

195. See Price, *supra* note 23, at 919–20 (arguing that the rule of lenity is an important check on prosecutors because it incentivizes them to charge “real” crimes and stops their pursuit of “novel theories”).

statutory interpretation in criminal law that would allow the legislature to clarify the language of the underlying statute.¹⁹⁶ It would still allow for reasoned analysis when judges evaluated statutes for the initial ambiguity question but would also standardize the court's decision regarding the next step.¹⁹⁷ Especially given the ever-increasing number of federal laws, codified lenity would ensure more reliable notice for the defendant.¹⁹⁸ It would also “provid[e] a consistent interpretive framework that allows only gradual change or modification in areas involving certain protected values,” such as constitutional rights.¹⁹⁹

Codification of lenity would still not achieve absolute uniformity. Judges could still pick which textual canons to incorporate before lenity, meaning that this first step could determine whether lenity might be reached at all. But a clear statement rule could still provide a more uniform standardized system by showing judges the importance of lenity in interpreting the legislature's preferences. It could also give defendants on appeal a stronger challenge to their conviction—that judges did not properly apply the lenity statute—which could further protect their due process rights.

2. *Notice to Defendants—and Congress.* Though lenity's notice rationale is somewhat a fiction, as potential defendants generally do not read statutes, Justice Holmes explained the notice rationale as follows:

196. In defense of lenity, Justice Scalia said: “Treating [lenity] as a clear-statement rule would comport with the original basis for the canon and would provide considerable certainty.” SCALIA & GARNER, *supra* note 107, at 298.

197. Courts apply the U.S. Sentencing Guidelines in a similar way—following the standard Guidelines but making appropriate reasoned exceptions for unique cases. Pursuant to the Guidelines, a sentencing court must first identify the precise sentencing range appropriate for the convicted person's conduct and offender characteristics. U.S. SENT'G GUIDELINES MANUAL § 1A1.2 (U.S. SENT'G COMM'N 2018), <https://www.uscourts.gov/sites/default/files/pdf/guidelines-manual/2018/GLMFull.pdf> [<https://perma.cc/7UC9-LCPD>]. The court usually must stay within the standard sentencing range, but it can sentence outside of the Guidelines' range in special circumstances. 18 U.S.C. § 3553(b) (2018). Then, the appellate court can review the “reasonableness” of the departure from the prescribed range. *Id.* § 3742(e)(3).

198. See *Sykes v. United States*, 564 U.S. 1, 35 (2011) (Scalia, J., dissenting) (“We face a Congress that puts forth an ever-increasing volume of laws in general, and of criminal laws in particular.”); Hopwood, *supra* note 28, at 699 (“Given the breadth and seriousness of federal criminal law, construing these statutes broadly creates a great risk that they will be applied arbitrarily and will lead to excessive punishment. Broad or unclear laws also allow federal prosecutors to stretch the law beyond what anyone had anticipated.”).

199. Newland, *supra* note 91, at 204–05 (citing Eskridge, *Public Values*, *supra* note 98, at 1008–09).

Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear.²⁰⁰

So, the issue is not just whether defendants have notice of what the law says; the issue is whether those tasked with defining federal criminal law—members of Congress—give notice that conduct is prohibited so law enforcement can administer laws appropriately. The rule of law must be based on law, and the principle that statutes should be “comprehensible” to defendants “reaffirms the rule of law each time punishment is meted out.”²⁰¹ Congress has enacted many broad criminal statutes with poor definitions and “enormous breadth and depth” which has contributed to the outrageously high incarceration rate in the United States.²⁰² A clear statement law of lenity could have a “cautionary effect” on Congress, “stimulating more thought and deliberation as legislators set about building majorities for explicit prohibitions.”²⁰³ Congress could “no longer obscure its political choices behind vague or ambiguous provisions,” a result which would “better express[]” society’s will.²⁰⁴ Instead, Congress would be accountable to the people for the exact words that it wrote—and reap any consequences for those policy choices.

A codified rule of lenity would give Congress notice that its members must compose laws that unambiguously prescribe punishable conduct. The Supreme Court said that the fundamental principle of lenity—“that no citizen should be held accountable for a violation of a statute whose commands are uncertain”—should “induce Congress to speak more clearly.”²⁰⁵ Currently, empirical data suggests that congressional staffers responsible for drafting legislation “try hard to legislate within constitutional bounds” but “demonstrate[] little

200. *McBoyle v. United States*, 283 U.S. 25, 27 (1931).

201. Lawrence M. Solan, *Law, Language, and Lenity*, 40 WM. & MARY L. REV. 57, 135 (1998).

202. Smith, *supra* note 98, at 585; *see Sykes*, 564 U.S. at 35 (Scalia, J., dissenting) (“We face a Congress that puts forth an ever-increasing volume of . . . criminal laws in particular.”); Hopwood, *supra* note 28, at 699 (describing the current era of overcriminalization and excessive punishment and attributing it partially to the expanding federal criminal code).

203. Price, *supra* note 23, at 915.

204. Hopwood, *supra* note 28, at 732.

205. *United States v. Santos*, 553 U.S. 507, 514 (2008) (plurality opinion).

knowledge of . . . the rule of lenity.”²⁰⁶ But, with a federal codified rule of lenity, members of Congress and staffers might have a greater understanding of the constitutional directive and keep it in mind when drafting criminal statutes.²⁰⁷ As Justice Scalia argued, “[R]ules like [lenity], so deeply ingrained, must be known to both drafter and reader alike so that they can be considered inseparable from the meaning of the text.”²⁰⁸

In drafting generally applicable criminal statutes, Congress may not be entirely accurate, and the proscribed conduct will almost always be underinclusive or overinclusive. Codified lenity, however, could give Congress more guidance in drafting statutes to avoid overinclusion. It could aid Congress in “recogniz[ing] the full extent of the consequences it is imposing on individuals,” because it would alert Congress that without a clear description of the prohibited conduct, the courts would apply lenity.²⁰⁹

Should Congress desire to draft a broad statute where lenity does not apply, they would still be able to do so. Certain federal statutes that were deliberately drafted vaguely, such as RICO or other white-collar criminal statutes, could easily include a “built-in directive that [the statute] should be interpreted liberally.”²¹⁰ This built-in directive would not undermine lenity’s notice justification because defendants would have notice that this specific statute provides for wide application.²¹¹

Thus, codified lenity could be a powerful tool in defense of the two main constitutional protections that lenity provides: uniformity and

206. Krishnakumar, *Reconsidering Substantive Canons*, *supra* note 62, at 898–99. Researchers found that only 35 percent of surveyed drafters of federal criminal legislation knew “lenity” by name. Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 946 (2013).

207. *See* Scalia, *supra* note 190, at 583 (“[T]he legislature presumably has [rules of strict construction] in mind when it chooses its language—as would be the case, for example, if the Supreme Court were to announce and regularly act upon the proposition that ‘is’ shall be interpreted to mean ‘is not.’”).

208. SCALIA & GARNER, *supra* note 107, at 31. However, commentators have also argued that “[l]enity has rarely, if ever, been said to be about making Congress draft better or approximating how Congress drafts” but instead is simply a “constitutional backstop” for the courts. Gluck & Bressman, *supra* note 206, at 957.

209. Newland, *supra* note 91, at 206.

210. Solan, *supra* note 201, at 140.

211. *See id.* at 140–41 (noting that RICO has its own built-in directive to be interpreted liberally, and that “[h]owever badly RICO was drafted, it provides adequate notice to anyone engaged in its predicate acts of fraud and violence that there is potential criminal liability”).

notice. It is especially imperative that Congress safeguard criminal defendants from infringements on their constitutional rights.

III. A SOLUTION TO THE INCONSISTENT APPLICATION OF LENITY IN THE FEDERAL COURTS: CODIFICATION OF THE LENITY-SECOND APPROACH

A partial solution to lenity's uncertain role is to codify it in the U.S. Code. First, this Part looks at comparable statutes from state legislatures that codified lenity or, conversely, prohibited the use of the doctrine. Next, it discusses the specific formulation of codified lenity that this Note suggests.

A. *State Approaches to Lenity*

Though Congress has codified only one true type of canon of statutory interpretation,²¹² the states have been much more active. This Section explores explicit anti-lenity state statutes, then discusses state statutes codifying lenity.

1. *Elimination of Lenity by State Statute.* “[M]ore than two-thirds of” states once codified their own version of the rule of lenity,²¹³ but most have since repealed this explicit directive, instead implicitly eliminating lenity through a general “liberal construction” statute.²¹⁴ For example, the Arkansas Code directs that “[a]ll general provisions, terms, phrases, and expressions used in any statute shall be liberally construed in order that the true intent and meaning of the General Assembly may be fully carried out.”²¹⁵ Effectively, these state legislatures have instructed courts to unilaterally decide whether or not

212. See *supra* note 62 and accompanying text.

213. HUEFNER, *supra* note 68, at 389.

214. Scott, *supra* note 154, at 399. At least a few scholars in the early twentieth century believed the trend toward liberal construction grew from the public's and the legislatures' frustration with “judicial obstruction or nullification of the social policies to which more and more it is compelled to be committed.” Roscoe Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383, 407 (1908); see Livingston Hall, *Strict or Liberal Construction of Penal Statutes*, 48 HARV. L. REV. 748, 760 (1930) (“The public is already impatient with the refined, and for practical purposes unnecessary, distinctions embodied in the penal codes.”).

215. ARK. CODE ANN. § 1-2-202 (West, Westlaw through the 2020 First Extraordinary Session and the 2020 Fiscal Session of the 92nd Arkansas General Assembly); see HUEFNER, *supra* note 68, at 389 (noting that some states repealed their explicit directives “in favor of a non-substantive canon . . . ‘to promote justice’”); Price, *supra* note 23, at 902–03 (noting that statutes, in addition to “common law principles,” regulate statutory construction in many states).

to construe a statute against a defendant, depending upon their interpretation of the “intent” of the legislature. Some states go a step further, and explicitly codify a ban on the use of strict construction.²¹⁶ For example, the California Civil Code states, “The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to this Code.”²¹⁷ Essentially, these state legislatures have directed courts not to apply lenity regularly. And a few states have gone even further, codifying liberal construction and banning strict construction.²¹⁸

In spite of these statutes, according to scholars, state courts often use the common law version of lenity to operate as a tiebreaker when all other interpretive tools have been spent, even in states that codified a prohibition on the consistent application of lenity.²¹⁹ Due to lenity’s constitutional importance, most state courts of last resort have either completely ignored their state’s abrogation of lenity or have somewhat limited its application.²²⁰ For instance, courts in Arizona, New Hampshire, North Dakota, and South Dakota “continue to employ the rule of lenity despite statutes directing them not to.”²²¹ Cases in these states do not mention the state statute and just use the doctrine of lenity without comment on its interaction with the legislature’s

216. Scott, *supra* note 154, at 399, 424 (listing the following state statutes as expressly rejecting the rule of lenity (i.e., strict construction): ARIZ. REV. STAT. ANN. § 1-211(B) (2019); CAL. CIV. CODE § 4 (West 2019); COLO. REV. STAT. § 2-4-212 (2008); IDAHO CODE ANN. § 73-102 (2019); 5 ILL. COMP. STAT. 70/1.01 (2019); IOWA CODE § 4.2 (1999); KAN. STAT. ANN. § 77-109 (2019); KY. REV. STAT. ANN. §§ 446.015, .080 (West 2019); MO. REV. STAT. § 1.010 (2019); MONT. CODE ANN. § 1-2-103 (2019); N.M. STAT. § 12-2A-18 (2019); N.D. CENT. CODE § 1-02-01 (2008); OKLA. STAT. ANN. TIT. 25, § 29 (West 2019); S.D. CODIFIED LAWS § 2-14-12 (2019); UTAH CODE ANN. § 68-3-2 (2019); WASH. REV. CODE § 1.12.010 (2019)).

217. CAL. CIV. CODE § 4 (West, Westlaw through Chapter 372 of 2020 Regular Session); see also IDAHO CODE § 73-102 (West, Westlaw through the 2020 Second Regular and First Extraordinary Session of the 65th Idaho Legislature) (“The rule of the common law that statutes in derogation thereof are to be strictly construed, has no application to these compiled laws.”).

218. Scott, *supra* note 154, at 399.

219. See ESKRIDGE ET AL., *supra* note 26, at 379 (“In the state courts, our perception is that the rule [of lenity] is alive and well, usually operating as a tiebreaker . . .”); Solan, *supra* note 201, at 128 (“The [California and New York] courts continue to feel that a tie-breaker is needed despite legislative action seemingly to the contrary.”).

220. Price, *supra* note 23, at 903–04 (citing *Dixon v. State*, 673 A.2d 1220, 1225 (Del. 1996); *Commonwealth v. White*, 3 S.W.3d 353, 354–55 (Ky. 1999); *People v. Denio*, 564 N.W.2d 13, 17 (Mich. 1997); *State v. Isom*, 837 P.2d 491, 495 n.6 (Or. 1992); *State v. Archuletta*, 526 P.2d 911, 912 (Utah 1974)).

221. *Id.* (citing *Reinesto v. Superior Ct.*, 894 P.2d 733, 735 (Ariz. Ct. App. 1995); *State v. Richard*, 786 A.2d 876, 879 (N.H. 2001); *State v. Laib*, 644 N.W.2d 878, 883 (N.D. 2002)).

directive.²²² The California Supreme Court, however, has expressly declined to follow that state's statute abrogating lenity, due to lenity's "constitutional underpinnings."²²³ Overall, most states remain flexible in their approach to lenity, and the application of the rule varies haphazardly across the states.²²⁴

2. *State Codification of Lenity.* So far, three states have codified the rule of lenity.²²⁵ Florida's rule is as follows: "The provisions of this code and offenses defined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused."²²⁶ Many court opinions in the state cite to this statute,²²⁷ and the Florida Senate's Committee on Criminal Justice has praised the doctrine for ensuring that "people who rely upon a reasonable interpretation of statutory language are not punished as criminals."²²⁸ The Florida Supreme Court called the rule

222. See e.g., *Reinesto*, 894 P.2d at 735 ("When the meaning of a statute is unclear or subject to more than one interpretation, the rule of lenity requires us to resolve any ambiguity in favor of the defendant."); *Richard*, 786 A.2d at 879 ("When a statutory provision is ambiguous, the rule of lenity demands that all doubt be resolved against turning a single transaction into multiple offenses and thereby expanding the statutory penalty."); *Laib*, 644 N.W.2d at 883 ("[T]he rule of lenity 'serves as an aid for resolving an ambiguity . . .'" (quoting *United States v. Valencia-Andrade*, 72 F.3d 770, 775 (9th Cir. 1995))).

223. *People v. Avery*, 38 P.3d 1, 5 (Cal. 2002).

224. For an overview of states' application of lenity, see Price, *supra* note 23, at 904–06.

225. These states are Florida, Ohio, and Texas. See *infra* notes 226, 242, and 256. Though not explicitly codifying lenity, some state codes direct judges to consider equity and "natural rights" in criminal statutory interpretation. Scott, *supra* note 154, at 401. Utah's state code elevates "equity" (and its "dictates of fairness and conscience") over the common law. *Id.*; see UTAH CODE ANN. § 68-3-2(4) (West, Westlaw through the 2020 Sixth Special Session) ("When there is a conflict between the rules of equity and the rules of common law in reference to the same matter, the rules of equity prevail."). Both Montana and Oregon assert that when faced with an ambiguous statute, a judge must adopt the "one in favor of natural right." MONT. CODE ANN. § 1-2-104 (West, Westlaw through the 2019 Session); see also OR. REV. STAT. ANN. § 174.030 (West, Westlaw through the 2020 Regular Session of the 80th Legislative Assembly) ("Where a statute is equally susceptible of two interpretations, one in favor of natural right and the other against it, the former is to prevail."). These types of statutes have been criticized for their lack of clarity and allowing for too much judicial discretion. Scott, *supra* note 154, at 401.

226. FLA. STAT. § 775.021(1) (West, Westlaw through the 2020 Second Regular Session of the Twenty-Sixth Legislature).

227. For a few examples, see the following cases: *State v. Weeks*, 202 So. 3d 1, 8–9 (Fla. 2016); *Kasischke v. State*, 991 So. 2d 803, 814 (Fla. 2008); *Polite v. State*, 973 So. 2d 1107, 1111–12 (Fla. 2007); *State v. Rife*, 789 So. 2d 288, 294 (Fla. 2001).

228. COMM. ON CRIM. JUST., FLA. SENATE, CONSTITUTIONAL PROHIBITIONS AFFECTING CRIMINAL LAWS 8 n.59 (2010), <https://www.flsenate.gov/UserContent/Session/2011/Publications/>

of lenity a “fundamental tenet of Florida law regarding the construction of criminal statutes, which weighs in favor of the defendant,”²²⁹ though it has also called legislative intent “‘the polestar that guides’ the Court’s inquiry.”²³⁰ In spite of its praise of lenity, Florida’s overall application of the law appears to fall into the lenity-last category because it has also called lenity a “canon of last resort.”²³¹

Despite using it as a canon of last resort, the Florida Supreme Court has used the lenity statute to overturn criminal convictions. In *State v. Weeks*,²³² defendant Christopher Weeks pled no contest to being a felon in possession of a firearm when he was caught using a firearm for hunting.²³³ However, prior to possessing the gun, Weeks had researched Florida law and believed that his firearm fell under Florida’s exception for felons’ possession of a “replica” of an “antique firearm.”²³⁴ The trial court found Weeks guilty.²³⁵ The appellate court concluded that Weeks’s firearm fell under the “replica of an antique” exemption in the statute because the firing mechanism itself was the defining feature of the antique, and Weeks’s replica used an antique firing mechanism.²³⁶ The Florida Supreme Court examined the statute’s text, applied textual canons, and looked to the legislative history and intent.²³⁷ It held that the statute was ambiguous and that Florida’s codified rule of lenity supported a construction of the statute that favored the defendant.²³⁸

But the Florida statute does not go far enough. Weeks was unique in that he took affirmative steps to ensure that he was within the

InterimReports/pdf/2011-212cj.pdf [https://perma.cc/8EJ2-YZTS] (quoting *Cuellar v. State*, 70 S.W.3d 815, 825 (Tex. Crim. App. 2002)).

229. *Weeks*, 202 So. 3d at 8 (quoting *Polite*, 973 So. 2d at 1112).

230. *Rife*, 789 So. 2d at 292 (quoting *McLaughlin v. State*, 721 So. 2d 1170, 1172 (Fla. 1998)).

231. *Weeks*, 202 So. 3d at 8 (quoting *Kasischke*, 991 So. 2d at 814); *see also Rife*, 789 So. 2d at 294 (identifying lenity as “the default principle in construing criminal statutes”).

232. *State v. Weeks*, 202 So. 3d 1 (Fla. 2016).

233. *Id.* at 3–4.

234. *Id.* at 3; *see* FLA. STAT. § 790.23 (West, Westlaw through the 2020 Second Regular Session of the Twenty-Sixth Legislature) (banning convicted felons from possessing firearms); FLA. STAT. § 790.001(6) (exempting antique firearms); FLA. STAT. § 790.001(1) (defining antique firearms).

235. *Weeks*, 202 So. 3d at 4.

236. *Weeks v. State*, 146 So. 3d 81, 83 (Fla. Dist. Ct. App. 2014).

237. *Weeks*, 202 So. 3d at 7–8, 9.

238. *Id.* at 8–9.

confines of the law by researching the felon-in-possession statute.²³⁹ He sought out information to be on notice of the law. But, because lenity is a “canon of last resort,”²⁴⁰ if the Florida court *had* found evidence in the legislative history to imply that the legislature meant for the felon-in-possession statute to apply to his replica antique firearm, his affirmative steps to conform with the law would have been meaningless. The unique facts of Weeks’s case, and the precise details of his firearm’s firing mechanism, ultimately allowed the Florida court to approve the reversal of his conviction.²⁴¹ But had there been more dispute over the exact specifications of the gun, the court might easily have upheld the conviction based on its own interpretation of legislative history or intent. Alternatively, the lenity-second approach would provide more protection for individuals like Weeks. In a case with more controversy over whether the exact elements of a firearm fell into the exception, lenity-second would give the benefit of the doubt to the defendant based on the plain meaning of the text before turning to more unpredictable methods.

Ohio has also codified lenity. When faced with an ambiguous statute, “sections of the Revised Code defining offenses or penalties shall be strictly construed against the state, and liberally construed in favor of the accused.”²⁴² Consistent with its statute, Ohio has also interpreted U.S. Supreme Court decisions to hold that “an ambiguous criminal statute must be construed in favor of the defendant.”²⁴³ The Ohio Supreme Court has held that lenity should be used in an ambiguous statute before turning to legislative intent, which implies that it employs the lenity-second approach.²⁴⁴

239. *See id.* at 9 (describing Weeks’s efforts in researching and applying the relevant statutes to his conduct).

240. *Id.* at 8 (quoting *Kasichke v. State*, 991 So. 2d 803, 814 (Fla. 2008)).

241. *Id.* at 9–10.

242. OHIO REV. CODE ANN. § 2901.04(A) (West, Westlaw through 2019–2020 General Assembly); *see also* *State v. Polus*, 48 N.E.3d 553, 555 (Ohio 2016) (approving the application of § 2901.04(A) in criminal cases).

243. *State v. Stevens*, 11 N.E.3d 252, 255 (Ohio 2014) (citing *Rewis v. United States*, 401 U.S. 808, 812 (1971)); *see also* *United States v. Santos*, 553 U.S. 507, 514 (2007) (plurality opinion) (“Under a long line of our decisions . . . [t]he rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them.”).

244. *See Polus*, 48 N.E.3d at 555 (noting that generally, courts “consider several factors to determine legislative intent,” but “[i]n criminal cases,” courts apply the rule of lenity); *Stevens*, 11 N.E.3d at 255 (additionally criticizing the lower court’s considering the legislative history and intent to resolve the textual ambiguity).

In *State v. Stevens*,²⁴⁵ the Ohio Supreme Court—without first turning to other methods of interpretation—resolved in favor of defendants charged under a textually ambiguous statute.²⁴⁶ The two defendants, Zachary Bondurant and Jeffrey Stevens, were involved in low-level drug sales that amounted to just \$460 and \$250 respectively.²⁴⁷ The state charged them with “engaging in a pattern of corrupt activity” in violation of Ohio’s version of RICO that only kicked in if the threshold amount involved exceeded \$500.²⁴⁸ The statutory ambiguity was whether the \$500 threshold applied to the criminal enterprise as a whole or to each individual involved in the enterprise.²⁴⁹ The Ohio Supreme Court stated that the lower court’s decision—that the statute meant \$500 for the enterprise as a whole—was incorrectly based on what it thought “the legislature likely intended.”²⁵⁰ Instead, because the statute was textually ambiguous, it was a “longstanding principle of Ohio law” that ambiguous criminal statutes were to be construed in the defendants’ favor.²⁵¹ This principle protected the two alleged “small-time drug dealers” from serving seven and nine years in prison respectively,²⁵² demonstrating the power of the lenity-second application.

Texas’s codified rule of strict construction, which applies only to certain offenses, at first seems more aggressive than the general lenity statutes from Florida and Ohio,²⁵³ and commentators have called the statute “far more explicit and demanding than its counterparts in Florida and Ohio.”²⁵⁴ To prevent “the erosion of [the rule of lenity]” and “to ensure uniform, consistent application throughout the state,”²⁵⁵

245. *State v. Stevens*, 11 N.E.3d 252 (Ohio 2014).

246. *Id.* at 255–56.

247. *Id.* at 252.

248. *Id.* at 252–53.

249. *Id.* at 253.

250. *Id.*

251. *Id.*

252. *Id.* at 252–53, 255.

253. See Paul J. Larkin, Jr. & John-Michael Seibler, *Turning the Rule of Lenity into a Rule of Lenity*, 163 HERITAGE FOUND. 5 (Nov. 17, 2015), <https://www.heritage.org/crime-and-justice/report/turning-the-rule-lenity-rule-lenity> [<https://perma.cc/36KX-55U5>] (“While some Texas courts have vigorously applied the Rule of Lenity in the past . . . [the Texas lenity statute] has the potential for more uniform application and robust accountability.”).

254. *Id.* at 4.

255. TEX. HOUSE RSCH. ORG., BILL ANALYSIS: H.B. 1396 1–2 (2015), <https://hro.house.texas.gov/pdf/ba84r/hb1396.pdf> [<https://perma.cc/Y9P8-YW66>].

in 2015, the Texas legislature codified the rule of lenity as applied to a very limited number of criminal offenses outside of its Penal Code:

[A] statute or rule that creates or defines a criminal offense or penalty shall be construed in favor of the actor if any part of the statute or rule is ambiguous on its face or as applied to the case, including:

- (1) an element of offense; or
- (2) the penalty to be imposed.²⁵⁶

The Texas House stated this statute would “act as a reminder to courts and prosecutors working outside of the Penal Code that the rule [of lenity] should be applied” and that it would give notice to the Texas legislature to clarify any ambiguous statutes.²⁵⁷ The statute also “gives the courts less opportunity to evade its demands through creative interpretation” and has instilled hope in commentators that it will have “its intended effect” of guarding the rule of lenity.²⁵⁸

However, given the statute’s limited reach to only criminal statutes outside of Texas’s Penal Code and the Texas Controlled Substances Act,²⁵⁹ its impact has thus far not been large. One published case, *State v. Cortez*,²⁶⁰ involved a defendant, Jose Luis Cortez, whose car tires allegedly touched the white painted line on the road separating it from the shoulder.²⁶¹ A state trooper pulled him over for the traffic infraction and found drugs in Cortez’s vehicle.²⁶² In affirming the trial court’s suppression hearing ruling in favor of Cortez, the Texas Court of Criminal Appeals agreed that a tire touching the white painted line on the road did not violate the traffic law forbidding driving on the shoulder of the road.²⁶³ It refused to broadly interpret the traffic law because “[c]riminal statutes outside the penal code must be construed strictly, with any doubt resolved in favor of the accused.”²⁶⁴ The concurrence agreed, citing Texas’s lenity statute, but noted that since

256. TEX. GOV’T CODE ANN. § 311.035(b) (West, Westlaw through the 2019 Regular Session of the 86th Legislature).

257. TEX. HOUSE RSCH. ORG., *supra* note 255, at 2.

258. Larkin & Seibler, *supra* note 253, at 4.

259. TEX. GOV’T CODE ANN. § 311.035(c) (“Subsection (b) [the lenity rule] does not apply to a criminal offense or penalty under the Penal Code or under the Texas Controlled Substances Act.”).

260. *State v. Cortez*, 543 S.W.3d 198 (Tex. Crim. App. 2018).

261. *Id.* at 200.

262. *Id.*

263. *Id.* at 206.

264. *Id.* (quoting *Stevenson v. State*, 499 S.W.3d 842, 849 (Tex. Crim. App. 2016)).

“the text, structure, and history” did not cure the ambiguity of the traffic law, the court was compelled “to draw the line in favor of” Cortez.²⁶⁵

Besides *Cortez*, few published cases have yet applied the 2015 Texas statute. And as of yet, we do not know where the Texas state courts will apply this limited application of lenity within their statutory interpretation, though the *Cortez* concurrence implies that the statute’s history should aid in the initial ambiguity determination.²⁶⁶ This may mean that Texas will use lenity-last, in spite of commentators’ hope for a more aggressive Texas rule.²⁶⁷

The states that have codified lenity are moving toward a more uniform system of statutory interpretation as it relates to criminal defendants, which provides notice to defendants of how their conduct will be judged and how they will be sentenced. It also notifies legislatures that courts will interpret their statutes with lenity in mind. This, in turn, may lead to legislatures drafting less ambiguous state criminal statutes. The states that have codified lenity can be a source of inspiration for Congress were it to enact its own codified lenity.

B. Codification of the Lenity-Second Approach

The lenity-second approach, where lenity would be applied immediately after gleaning all possible meaning from the text, is the best formulation of lenity for codification.²⁶⁸ Although no version of

265. *Id.* at 210–11.

266. *See id.* at 210 (“This text tells us nothing about *how* a shoulder may be distinguished from the roadway *by* markings. Neither is there any legislative history regarding this portion of the statute.”).

267. *See* TEX. GOV’T CODE § 311.023 (West, Westlaw through the 2019 Regular Session of the 86th Legislature) (“In construing a statute, whether or not the statute is considered ambiguous on its face, a court may consider among other matters the: . . . (3) legislative history . . .”); Larkin & Seibler, *supra* note 253, at 5 (calling § 311.035 “[a]n aggressive lenity statute”).

268. Take for example, the difference the lenity-second approach would make in *Muscarello v. United States*, 524 U.S. 125 (1998), discussed in *supra* Part II.A.1. The Supreme Court found that the defendant was guilty of “us[ing] or carr[y]ing a firearm” in drug trafficking when the gun was locked away in his glove compartment. *Id.* at 126–27. Lenity-second would mandate that the ordinary meaning of the terms “using” and “carrying” would prevail, sufficiently notifying the defendant of forbidden conduct. Muscarello, a convicted drug trafficker, admittedly is not the most sympathetic example, and implementing lenity-second might allow individual defendants like Muscarello to walk free. But even if a few unsympathetic defendants receive favorable treatment, lenity’s purposes of giving notice to individuals of prohibited conduct, mandating more precise language from Congress, and punishing only specific proscribed conduct would overall benefit society and the criminal justice system at large.

lenity will cure all the “ills of the criminal justice system,” lenity-second codification could be a powerful tool to combat overcriminalization.²⁶⁹

To effectuate the lenity-second approach, Congress could draft a statute similar to the codified rules of lenity in Florida and Texas²⁷⁰ though making clear that the initial ambiguity question should be resolved by a textual analysis. For example:

An ambiguous statute or rule that creates or defines a criminal offense or penalty shall be construed against the government and construed in favor of the accused. When the language is susceptible to differing constructions based on textual analysis, it shall be construed most favorably to the accused if any part of the statute or rule is susceptible to more than one objectively reasonable interpretation of the text, including: (1) an element of offense; or (2) the penalty to be imposed.

First, Congress’s intent, as expressed through written text, would be followed using textual methods of statutory interpretation, an approach which would respect legislative supremacy. The textual canons themselves have widely accepted meanings and long-standing usage.²⁷¹ They allow for less judicial discretion based on value judgments and create more uniformity across interpretation by different judges.²⁷² Next, after exhausting textual canons and still finding ambiguity in the text, judges would immediately turn to lenity. This lenity-second formulation respects both the direction of the legislature through the text and the constitutional rights of the defendant through lenity.

Lenity-second is superior to either the lenity-last or lenity-first formulations. The lenity-last formulation would make the rule of lenity all but worthless because Congress could always find *some* way to first limit the statute’s ambiguity through one of its methods of interpretation.²⁷³ It would leave no role for lenity as a tiebreaker. The lenity-first formulation is too deferential to defendants, could be seen

269. Price, *supra* note 23, at 925.

270. See *supra* Part III.A.2.

271. ESKRIDGE ET AL., *supra* note 26, at 341.

272. See *id.* at 356 (calling textual canons “probably relatively neutral in their allocational effects”).

273. See SCALIA & GARNER, *supra* note 107, at 298 (arguing that invoking lenity “only when the equipoise of competing reasons cannot otherwise be resolved” would mean either that the rule would never apply or that it would be superfluous (quoting *Johnson v. United States*, 529 U.S. 694, 613 n.13 (2000))).

as judicial lawmaking, and could create separation of powers problems, making it “probably not a realistic possibility, given the disregard of legislative preferences that it would entail.”²⁷⁴ The lenity-second approach instead strikes the best balance between the two interests at stake—respecting legislative supremacy and providing due process notice to criminal defendants.

CONCLUSION

Lenity is a powerful tool for courts that “vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed.”²⁷⁵ However, lenity’s power has been weakened by its inconsistent application and discretionary use by courts. With a rule of lenity enacted into federal law, this ancient doctrine could be applied more consistently. The result would be clearer statements from Congress, a greater understanding of proscribed conduct, and fairer notice to individuals. Ultimately, codified lenity would be a forceful mechanism to use in the quest for a more just system of law.

274. Price, *supra* note 23, at 923–24.

275. United States v. Santos, 553 U.S. 507, 514 (2007).