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

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.
At trial, Yates argued that fish were not included in the statute’s term “tangible object.” 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. This definition, Yates reasoned, would align with the Sarbanes-Oxley Act’s anticorporate fraud origins. The government argued that “tangible object” meant “simply something other than a document or record.” Following a four-day trial, a jury found Yates guilty of the federal felony charges.

A plurality of the Supreme Court reversed Yates’s conviction. 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. 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.”

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.” Instead, according to the dissent, the statute was clear, and lenity offered “no proper refuge from that straightforward (even though capacious) construction.” 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)).
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).
19. Id.
“tangible object” would include fish. 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. Essentially, fairness to the defendant necessitated the use of lenity.

The rule of lenity, also called the doctrine of strict construction, is a common canon of statutory construction that requires courts to “construe statutory ambiguities in favor of criminal defendants.” For lenity to apply, courts have ordinarily required that the statute have “grievous ambiguity or uncertainty.” Then, once lenity applies, it tips the scales in the defendant’s favor in the interest of due process, consistent enforcement of the law, and legislative supremacy. 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.

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)).


24. Id.


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”).

Ambiguity within the criminal context contributes to overcriminalization, wanton punishment, and capricious enforcement. 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.” 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. Although the focus of this Note is the federal system which accounts for only 8.5 percent of incarceration in the United States, 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. Unclear laws in any jurisdiction allow government actors in the criminal justice system to discriminatorily target groups such as racial

29. Id. at 699.


minorities, LGBTQ+ individuals, and the indigent. 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. 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.”

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. If lenity were interpreted in a constant, reliable way, canons of statutory interpretation could “at least form a more or less reliable interpretive regime.”

This regime could direct courts, and others involved in law enforcement, as to how criminal statutes should be interpreted. 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

39. See infra Part III.A.
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

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. The number of federal criminal laws has grown astronomically even in the past decades. 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. 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.” 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.” And as the number of laws has exploded, “so has the level of ambiguity within those laws.”

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. Each new law provides “a new legal instrument to apply against members of the so-called ‘criminal class.’” 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.

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.


48. Overcriminalization, HERITAGE, supra note 30.


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

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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].


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
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 lenity— are also quite numerous and “significantly affect” general statutory interpretation taking place in courts.

Some criticize substantive canons because judges can apply them in a biased fashion reflecting the judge’s individual policy positions or in other nonneutral manners. These canons are inherently indeterminate due to their discretionary use and because almost every canon has a competing canon leading to the opposite result. This means interpreters of statutes can pick and choose from canons to reach whatever outcome they want. 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. 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.

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. 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.
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.
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.” 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.

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. However, the Supreme Court has not consistently settled on an overall framework for applying lenity. 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. This requires that the judge “generate possible readings of the text” before choosing the narrowest one by “invoking lenity.” The judge first uses textual canons to make this initial finding of ambiguity. Of course, finding ambiguity in a statute requires its own “interpretive, legal judgment.” 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.”


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.


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

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.
93. E SKRIDGE 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. LAFAYE, CRIMINAL LAW 182 (6th ed. 2017).
95. E SKRIDGE 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.”

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.” Today, many scholars argue that lenity is applied haphazardly by federal courts, subverting its justifications of fair notice and predictability in criminal law. Additionally, there is significant controversy regarding lenity’s overall place within the canonical hierarchy.

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. 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. 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. 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).


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.

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
resort. The Court endorsed this view in Ocasio v. United States, 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.” Under this lenity-last theory, a court would rely upon lenity only if there was an interpretive “tie” after all other interpretive methods failed—methods which would include exhausting textual canons, other substantive canons, legislative history, and purposive arguments.

For example, Muscarello v. United States 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.” 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. Muscarello argued that “carr[y]ing” a gun in a locked glove compartment did not fall under the statute’s prohibition on carrying a firearm during drug trafficking. 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.

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

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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).
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.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{120} When a court can use any possible interpretation method at its disposal, it may never find room for ambiguity. In contrast, a harder 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.”\textsuperscript{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.\textsuperscript{122} Though popular with early courts, this formulation of lenity has fallen into disuse in modern courts.\textsuperscript{123}

\begin{itemize}
\item \textsuperscript{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)).
\item \textsuperscript{119} Price, supra note 23, at 890.
\item \textsuperscript{120} Kahan, supra note 82, at 386.
\item \textsuperscript{121} Price, supra note 23, at 893–94.
\item \textsuperscript{122} Id.
\item \textsuperscript{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 . . . .”).
\end{itemize}
This method has not been explicitly articulated in judicial opinions, but Justice Oliver Wendell Holmes appears to use this lenity-first in his opinion in *McBoyle v. United States*. 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.” Although the statute specifically enumerated other prohibited vehicles, it would have been plausible to read the text as also prohibiting the defendant’s conduct. 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.

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. 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. 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. But if “reasonable doubt persists,” they apply lenity before resorting to all other nontextual methods of interpretation.

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126. *Id.* at 25–27.
127. *Id.* at 26.
128. *Id.* at 27.
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. The statute would not need to be “grievously ambiguous,” but the ambiguity would still have to be within a reasonable doubt. A court would not use legislative history, purpose, or any other extratextual evidence to broaden the reading of the legislature’s text. Justice Scalia, one of lenity’s biggest proponents, thought that lenity should operate this way.

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. 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. The majority interpreted the text of the statute broadly by harking 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. 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. 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].” So, first he turned to the text to

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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.”).


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.


145. Seeinfra 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 leni ty, 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))).
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.” 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. These codified canons include a wide range of textual and substantive rules.

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. Some statutes, however, have their own codified method of interpretation. For example, a provision in the federal Racketeer Influenced and Corrupt Organizations Act of 1970 ("RICO") mandates that “[t]he provisions of this title . . . shall be liberally construed to effectuate its remedial purposes.” The Supreme Court has indeed consistently construed RICO liberally, as Congress commanded. 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.
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.”\textsuperscript{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,\textsuperscript{163} the presumption of consistent usage,\textsuperscript{164} the presumption of a “reasonable” intention of the legislature,\textsuperscript{165} and the use of legislative history.\textsuperscript{166} For example, New York uses “a set of . . . interpretation guidelines that specifically invite its courts to be Intentionalist interpreters.”\textsuperscript{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.”\textsuperscript{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.\textsuperscript{169}

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

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{162} Krishnakumar, \textit{Reconsidering Substantive Canons}, supra note 62, at 898 & n.307.
\item \textsuperscript{163} \textit{See, e.g.}, \textit{IND. CODE} § 1-1-4-1(1) (West, \textit{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.”).
\item \textsuperscript{164} \textit{See, e.g.}, \textit{COLO. REV. STAT.} § 2-4-101 (West, \textit{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.”).
\item \textsuperscript{165} \textit{See, e.g.}, \textit{MINN. STAT.} § 645.17 (West, \textit{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 . . . .”)
\item \textsuperscript{166} \textit{See, e.g.}, \textit{TEX. GOV'T CODE ANN.} § 311.023 (West, \textit{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 . . . .”). \textit{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); \textit{Scott, infra note 154} (discussing state legislatures’ treatment of legislative history).
\item \textsuperscript{167} \textit{HUEFNER, supra} note 68, at 322.
\item \textsuperscript{168} \textit{N.Y. STAT. LAW} § 92 (McKinney 2016).
\item \textsuperscript{169} \textit{See infra Part III.A.}
\end{itemize}
\end{footnotesize}
Interpretation,” similar to the Federal Rules of Civil Procedure, and a nonlegislative “Restatement of Statutory Interpretation” modeled after restatements such as the Restatement of Contracts. 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. In statutory interpretation, the “role of the judge is arguably more cabined” than compared to “common law or constitutional interpretation.” This is especially true because of the superior role of the legislature and “the nature of legislation itself” when interpreting statutes.

Alternatively, other scholars argue that the legislature veers into unconstitutional territory under the separation of powers doctrine when it attempts general “interpretive directives.” General interpretive directives are statutes that apply generally to all or a large part of the laws created by Congress. The Dictionary Act, referenced above, is such a statute because it “provides definitions and interpretive instructions for ‘any Act of Congress.’” General directives can be further divided into retrospective and prospective categories. 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. These are valid considerations—however, there are strong responses to them.


171. Rosenkranz, supra note 170, at 2089.
172. O’Connor, supra note 170, at 334.
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.
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

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

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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.”\footnote{Price, \textit{supra} note 23, at 925.}

1. \textit{Uniformity in the Courts}. Consistency is “central[\textit{]} to the rule of
law in general,” but it also “has a special role to play in judge-made
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.\footnote{David S. Romantz, \textit{Reconstructing the Rule of Lenity}, 40 \textit{Cardozo L. Rev.} 523, 573 (2018).} In the criminal context, this lack of
uniformity could potentially make the defendant’s outcome dependent
on the judge’s interpretive preferences.\footnote{\textit{See, e.g.}, \textit{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”).}

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.\footnote{\textit{See supra} note 152 and accompanying text.} 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.”\footnote{Romantz, \textit{supra} note 191, at 574.} 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.\footnote{\textit{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”).}

The application of a codified clear statement rule of lenity under
the lenity-second approach would provide a consistent method of
statutory interpretation in criminal law that would allow the legislature to clarify the language of the underlying statute.\textsuperscript{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.\textsuperscript{197} Especially given the ever-increasing number of federal laws, codified lenity would ensure more reliable notice for the defendant.\textsuperscript{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.\textsuperscript{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:

\textsuperscript{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.

\textsuperscript{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.ussc.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).

\textsuperscript{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.”).

\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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.”\textsuperscript{203} Congress could “no longer obscure its political choices behind vague or ambiguous provisions,” a result which would “better express[]” society’s will.\textsuperscript{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.”\textsuperscript{205} Currently, empirical data suggests that congressional staffers responsible for drafting legislation “try hard to legislate within constitutional bounds” but “demonstrate[]” little

\textsuperscript{200.} McBoyle v. United States, 283 U.S. 25, 27 (1931).


\textsuperscript{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).

\textsuperscript{203.} Price, supra note 23, at 915.

\textsuperscript{204.} Hopwood, supra note 28, at 732.

knowledge of . . . the rule of lenity.”

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. 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.”

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.

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.” This built-in directive would not undermine lenity’s notice justification because defendants would have notice that this specific statute provides for wide application.

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

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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

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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 (2013); 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.”).


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

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222. See e.g., Reinstein, 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.


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).

of lenity a “fundamental tenet of Florida law regarding the construction of criminal statutes, which weighs in favor of the defendant,”

though it has also called legislative intent “the polestar that guides’ the Court’s inquiry.”

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.”

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, defendant Christopher Weeks pled no contest to being a felon in possession of a firearm when he was caught using a firearm for hunting. 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.”

The trial court found Weeks guilty. 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. The Florida Supreme Court examined the statute’s text, applied textual canons, and looked to the legislative history and intent. 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.

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

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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”).
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.
237. Weeks, 202 So. 3d at 7–8, 9.
238. Id. at 8–9.
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confines of the law by researching the felon-in-possession statute.\footnote{See id. at 9 (describing Weeks’s efforts in researching and applying the relevant statutes to his conduct).} He sought out information to be on notice of the law. But, because lenity is a “canon of last resort,”\footnote{Id. at 8 (quoting Kasischke v. State, 991 So. 2d 803, 814 (Fla. 2008)).} 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.\footnote{Id. at 9–10.} 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.”\footnote{O HIO 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).} 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.”\footnote{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.”).} 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.\footnote{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*, the Ohio Supreme Court—without first turning to other methods of interpretation—resolved in favor of defendants charged under a textually ambiguous statute. The two defendants, Zachary Bondurant and Jeffrey Stevens, were involved in low-level drug sales that amounted to just $460 and $250 respectively. 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. The statutory ambiguity was whether the $500 threshold applied to the criminal enterprise as a whole or to each individual involved in the enterprise. 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.” 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. This principle protected the two alleged “small-time drug dealers” from serving seven and nine years in prison respectively, 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, and commentators have called the statute “far more explicit and demanding than its counterparts in Florida and Ohio.” To prevent “the erosion of [the rule of lenity]” and “to ensure uniform, consistent application throughout the state,”

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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.
254. Id. at 4.
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.  

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. 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.

However, given the statute’s limited reach to only criminal statutes outside of Texas’s Penal Code and the Texas Controlled Substances Act, its impact has thus far not been large. One published case, State v. Cortez, involved a defendant, Jose Luis Cortez, whose car tires allegedly touched the white painted line on the road separating it from the shoulder. A state trooper pulled him over for the traffic infraction and found drugs in Cortez’s vehicle. 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. 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.” The concurrence agreed, citing Texas’s leniency 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 leniency rule] does not apply to a criminal offense or penalty under the Penal Code or under the Texas Controlled Substances Act.”).
261. Id. at 200.
262. Id.
263. Id. at 206.
“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

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.” 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.” 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.