A Unified Approach to Lenity: Reconnecting Strict Construction with Its Underlying Values

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Introduction

The rule of lenity is special.[1] A canon of statutory interpretation that calls for the strict construction of criminal statutes, lenity[2] is ancient, "perhaps not much

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1. Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*, 131 Harv. L. Rev. 1298, 1331 (2018).

2. The rule of lenity has not always gone by the same name. For much of its history, it was known as the "strict construction of penal statutes." John F. Stinneford, *Dividing Crime, Multiplying Punishments*, 48 U.C. Davis L. Rev. 1955, 1995 (2015). Lenity was first referred to by its modern name in *Gore v. United States*. *Id.* at 1995 n.233; *see* Gore v. United States, 357 U.S. 386, 391 (1958). For the sake of readability and consistency, this Note will refer to "lenity" throughout.

less old than construction itself."[3] It was first invoked by a United States federal court in 1794[4] and by the Supreme Court in 1820.[5] It has been cited hundreds of times, throughout the history of the republic, by judges and Justices across ideological divides.[6] In a recent survey of forty-two federal appellate judges, even those most skeptical of canons in general tended to single out lenity as authoritative, deriving its power not only from its frequent use but from the Constitution itself.[7]

But lenity is broken. As a substantive canon of interpretation, lenity's legitimacy depends on its association with two constitutional values—legislative supremacy (only Congress has the power to define crimes)[8] and fair notice.[9] Regrettably, as operationalized by modern courts, lenity has become painfully disaggregated from those underlying values—a phenomenon that has both weakened its utility and undermined its legitimacy.

Since the mid-twentieth century, lenity has been invoked solely as the second step in a rigid, two-step process.[10] In step one, the court determines, as an abstract matter, whether the meaning of a criminal statute is ambiguous.[11] Only once that question is answered in the affirmative does the court proceed to step two, in which lenity directs the interpreter to resolve the ambiguity by selecting the narrower reading.[12] This two-step approach to lenity (which I refer to as the "modern" approach) has two unfortunate characteristics. First, the modern approach

3. United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95 (1820). Scholars have traced lenity as far back as thirteenth-century England. *See* Shon Hopwood, *Restoring the Historical Rule of Lenity as a Canon*, 95 N.Y.U. L. REV. 918, 924–25 (2020) (drawing a connection between lenity and an early doctrine called benefit of clergy, which "allowed courts to mitigate what they viewed as overly punitive sanctions"); *see also* Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 128–29 (2010) (discussing lenity's historical roots).

4. *See* Bray v. Atalanta, 4 F. Cas. 37, 38 (D.S.C. 1794) (No. 1819) ("[I]t is a penal law and must be construed strictly.").

5. *See Wiltberger*, 18 U.S. (5 Wheat.) at 76.

6. *See* Hopwood, *supra* note 3, at 940–41, 943–44; *see also* Zachary Price, *The Rule of Lenity as a Rule of Structure*, 72 FORDHAM L. REV. 885, 901–06 (2004) (surveying the extensive invocation of lenity by state courts).

7. Gluck & Posner, *supra* note 1, at 1331–32; *see also* John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751, 764 (2009) ("If one asked the enactors whether a legal interpretive rule that was widely accepted as applying to the Constitution—say, perhaps, *ejusdem generis* or the rule of lenity—we have no doubt that the enactors would have regarded it as binding.").

8. Concededly, "legislative supremacy" is an imprecise term given that, in practice, the strict construction of criminal statutes might actually go against the wishes of Congress. *See infra* notes 47–55 and accompanying text. However, legislative supremacy is the term used most frequently in the literature, and so I will use it here as well.

9. *See, e.g.*, United States v. Davis, 139 S. Ct. 2319, 2333 (2019); *see also* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 296 (1st prtg. 2012) ("Some authorities consider the rule to be based on constitutional requirements of fair notice . . . ."); Lawrence M. Solan, *Law, Language, and Lenity*, 40 WM. & MARY L. REV. 57, 58 (1998) ("The motivating purpose of the rule is to provide adequate notice to defendants (due process) . . . .").

10. *See, e.g.*, Chapman v. United States, 500 U.S. 453, 463 (1991).

11. *See, e.g.*, *id.*

12. *See* Muscarello v. United States, 524 U.S. 125, 138–39 (1998) (stating lenity is only applicable after a court has seized "everything from which aid can be derived" and yet there remains "grievous

treats lenity as a tiebreaker, invoked only conditionally and excluded from the principal act of interpretation.[13] This has reduced lenity to a "makeweight,"[14] most often cited only to bolster a conclusion already reached on other grounds[15] or in dissent.[16] Second, even in those rare cases where lenity is decisive, the modern approach treats it as a rote on-off switch,[17] an abstraction that alienates the canon from its underlying values and its animating purpose. These characteristics weaken lenity's actual effect, increasing the likelihood a defendant will be convicted under a statute that does not clearly criminalize her actions—a failure of the judiciary to honor Congress's exclusive power to make criminal law, and (therefore) an exercise of judicial power beyond the legitimate bounds of Article III.

This Note will argue that the modern approach to lenity should be abandoned, and the rule reconceptualized as a single inquiry—not as a tiebreaker invoked only after a finding of ambiguity but a lens through which the statutory text is viewed and interpreted in the first place. Part I will describe the constitutional values underlying lenity, with particular focus on legislative supremacy, which I argue has been misapplied under the modern approach. Part II will show how the modern approach to lenity, which treats ambiguity as a threshold and reduces lenity to a tiebreaker, fails to protect the values that legitimize its existence. Part III will turn to potential solutions, outlining three potential "fixes" to lenity—each inspired by recent scholarly work—then exploring the strengths and shortcomings of each. Finally, Part IV will propose a new, unified approach to lenity that combines many of the strengths of the proposals discussed in Part III but more effectively connects lenity to the values it is intended to protect. A conclusion follows.

I. LENITY'S UNDERLYING VALUES

When the meaning of a statute is unclear, judges turn to canons of statutory interpretation.[18] These canons are traditionally divided into two categories—semantic and substantive.[19] Semantic canons are rules about language; they are intended to reflect how legislators actually use words and how ordinary readers

ambiguity or uncertainty" (first quoting United States v. Wells, 519 U.S. 482, 499 (1997); and then quoting Staples v. United States, 511 U.S. 600, 619 n.17 (1994))).

13. *See infra* Section II.B.

14. David S. Romantz, *Reconstructing the Rule of Lenity*, 40 CARDOZO L. REV. 523, 525 (2018).

15. *See, e.g.*, Yates v. United States, 574 U.S. 528, 547–48 (2015) (plurality opinion) (noting that if "traditional tools of statutory construction leave[] any doubt," then ambiguity "should be resolved in favor of lenity" (quoting Cleveland v. United States, 531 U.S. 12, 25 (2000))); Crandon v. United States, 494 U.S. 152, 168 (1990) (citing lenity in the final paragraph, after arriving at a narrow interpretation on other grounds: "To the extent that any ambiguity . . . remains, it should be resolved in the petitioners' favor . . . .").

16. *See, e.g.*, United States v. Hayes, 555 U.S. 415, 436–37 (2009) (Roberts, C.J., dissenting).

17. *See infra* Section II.B.

18. *See generally* Anita S. Krishnakumar, *Dueling Canons*, 65 DUKE L.J. 909 (2016) (surveying the frequent use of various canons by members of the Roberts Court).

19. *See* Barrett, *supra* note 3, at 117.

actually understand those words in context.[20] Semantic canons are meant to reveal meaning already contained in the text, not to impose external values.[21] Although empirical work has cast some doubt on semantic canons' actual relationship to language,[22] judges mostly accept them as legitimate interpretive tools.[23]

Substantive canons are different. Canons such as constitutional avoidance, the presumption against preemption, and the rule of lenity do more than simply interpret language; they nudge the inquiry toward a particular result based on normative values that exist *outside* of the text.[24] Substantive canons raise significant concerns about judicial power because they appear to instruct judges to second-guess the legislature rather than serve as its faithful agent.[25] In an influential article published before she joined the Seventh Circuit, then-Professor Amy Coney Barrett argued that substantive canons can be legitimate tools of statutory interpretation (even for a committed textualist), but only insofar as they protect constitutional values.[26] Barrett contended that because constitutional values are derived from higher law, the Supremacy Clause justifies their invocation, even if they sometimes run counter to the legislature's intent. That substantive canons often "overenforce" the values with which they are associated is permissible because Congress retains the authority to override any results it does not like via subsequent legislation, at least until it crosses the line into actual unconstitutionality.[27]

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20. *See id.* Examples of semantic canons include *expressio unius est exclusio alterius* (the express mention of one thing excludes all others), *ejusdem generis* (of the same kinds, class, or nature), and *noscitur a sociis* (a word is known by the company it keeps). *See* SCALIA & GARNER, *supra* note 9, at 107–11, 195–213.

21. *See* Barrett, *supra* note 3, at 117; Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 113–14 (2010) (describing the difference between "canons of interpretation" and "canons of construction" (emphases omitted)).

22. *See* Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 926–27, 927 fig.1 (2013).

23. *See* Barrett, *supra* note 3, at 117; Gluck & Posner, *supra* note 1, at 1327–34.

24. *See* Barrett, *supra* note 3, at 117–18; Solum, *supra* note 21, at 114.

25. *See* Barrett, *supra* note 3, at 117–18. Some scholars have tried to reconcile the problem of faithful agency and substantive canons by justifying rules like lenity as honorary linguistic canons, with such deep historical roots they function as background rules to the legislative process, and therefore gain "prescriptive validity." *See* Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE W. RSRV. L. REV. 581, 583 (1990). Empirical research has cast considerable doubt on this argument. *See* Gluck & Bressman, *supra* note 22.

26. *See* Barrett, *supra* note 3, at 174–77; *see also* Richard H. Fallon, Jr., *The Supreme Court 1996 Term—Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 57 (1997) ("Identifying the 'meaning' of the Constitution is not the Court's only function. A crucial mission of the Court is to *implement* the Constitution successfully. In service of this mission, the Court often must craft doctrine that is driven by the Constitution, but does not reflect the Constitution's meaning precisely.").

27. *See* Barrett, *supra* note 3, at 174–77. Barrett distinguishes "overenforcing doctrines of *statutory* interpretation" (for example, the clear statement rule requiring Congress to expressly invoke its authority to abrogate state sovereign immunity) from "overenforcing doctrines of *judicial* review" (for example, the prophylactic rule of *Miranda*). *Id.* at 174 (emphases added). She notes that the former do not act as "permanent constitutional constraints," *id.* at 175, but merely "guard against the inadvertent congressional exercise of extraordinary constitutional powers," *Id.* at 176. Such "'stop and think' measures"—fully reversible by the legislature—substitute a "softer" form of judicial review (statutory

If lenity, as Justice Barrett suggests, draws its legitimacy from the constitutional values it protects, then it should be evaluated based on how effectively it provides that protection. The first step in any examination of lenity, therefore, is to define those values. The two constitutional values most frequently cited in support of lenity are legislative supremacy and fair notice.[28] To these, scholars have added a third—democratic accountability.[29]

A. LEGISLATIVE SUPREMACY

The Supreme Court first invoked the rule of lenity in 1820. In *United States v. Wiltberger*, an American sailor was charged with manslaughter committed on a private vessel on a river in China.[30] One provision of the charging statute criminalized murder (and various other crimes) on the "high seas, or in any river, haven, basin, or bay."[31] However, in an apparent oversight, a separate provision criminalized manslaughter only on the "high seas."[32] The government argued that murder and manslaughter were "kindred crimes," and that it was "almost impossible to believe that there could have been a deliberate intention" by Congress to limit the geographical jurisdiction of federal courts solely in the latter case.[33] The government therefore asked the Court to interpret the statute to reach manslaughter committed on a foreign river.

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interpretation) for a less flexible one (hard constitutional limits). *Id.* at 172, 175. In Barrett's view, it is a legitimate use of judicial power to overenforce a value via statutory review that the court has chosen to underenforce via judicial review. *See id.* at 172 (applying this argument to sovereign immunity).

28. *See, e.g.*, United States v. Davis, 139 S. Ct. 2319, 2333 (2019); *see also* SCALIA & GARNER, *supra* note 9 (contending that "[s]ome authorities consider [lenity] to be based on constitutional requirements of fair notice and separation of powers"); Solan, *supra* note 9, at 59 (identifying criticism of lenity "on the grounds that its application does not further its stated rationales—legislative primacy and fair notice").

29. *See* Price, *supra* note 6, at 887. A few scholars have argued lenity should also be understood to protect a general liberty interest—a normative commitment toward tenderness to defendants. *See, e.g.*, Stinneford, *supra* note 2, at 1997–2001 (pointing out that lenity was frequently invoked by judges in seventeenth-century England to protect defendants from the proliferation of capital crimes and that early American thinkers sometimes adopted this view as well). And there is certainly a bias toward this kind of leniency in the Constitution. *See* AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY 431–32 (2012) (pointing out that the power of judges to overrule juries only in favor of defendants, jury nullification, the presidential pardon power, and prosecutorial discretion all favor leniency).

That said, there is a distinction between leniency—shown to a defendant in a particular case—and lenity, which changes the meaning of the law itself. Notwithstanding the Court's assertion in *United States v. Wiltberger* that lenity is based on the "tenderness of the law for the rights of individuals," 18 U.S. (5 Wheat.) 76, 95–96 (1820), the American legal tradition (beginning with *Wiltberger* itself) moved quickly away from the liberty-based rationale, conceptualizing lenity as a tool of judicial restraint, not pro-defendant intervention, *see* Barrett, *supra* note 3, at 131–37. While there is clearly *some* relationship between the constitutional bias towards leniency—as described by Amar—and the structural values that underlie the rule of lenity, this Note will accept that lenity is not best viewed as a tool of mercy. In other words, lenity, as a canon of statutory interpretation, protects the legitimacy of the law, not the liberty of the defendant.

30. 18 U.S. (5 Wheat.) at 77.

31. *Id.* at 79.

32. *Id.* at 93–94.

33. *Id.* at 97, 99.

Chief Justice Marshall, writing for the Court, declined to do so. He agreed it was "extremely improbable" Congress had intended to criminalize different crimes on different bodies of water,[34] but nevertheless found he could not give the statute the broader reading. He explained:

> The rule that penal laws are to be construed strictly . . . . [I]s 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. It is the legislature, not the Court, which is to define a crime, and ordain its punishment.[35]

Thus, Marshall framed *Wiltberger* as an exercise in judicial restraint—a necessary extension of the Court's deference to Congress in all criminal matters.[36] In this sense, *Wiltberger* is a companion case to *United States v. Hudson & Goodwin*, in which the Court had, eight years earlier, forsworn the power of federal courts to craft criminal common law.[37] If the power to criminalize conduct belongs to Congress alone, then federal courts must be careful not to appropriate that power through the overbroad interpretation of criminal statutes.

Marshall warned, however, that neither strict construction nor "tenderness of the law for the rights of individuals" should lead the court to stray from the meaning of the text:

> The maxim is not to be so applied as to narrow the words of the statute to the exclusion of cases which those words, in their ordinary acceptation, or in that sense in which the legislature has obviously used them, would comprehend. The intention of the legislature is to be collected from the words they employ. *Where there is no ambiguity in the words, there is no room for construction*.[38]

Thus, in *Wiltberger*, what is today glossed as legislative supremacy was actually a synthesis of two competing concerns, which I will refer here to as (1) faithful agency and (2) forbearance. Naturally a court should strive to faithfully interpret a criminal statute as it would any other.[39] Accuracy is a universal value. However, in the special case of criminal statutes, the general concern of faithful agency is tempered by an additional caution: the court should be more willing to

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34. *Id*. at 105.

35. *Id*. at 95.

36. It has been observed that Marshall's rationale for lenity stood in sharp contrast to its use at common law, where it had been used not in deference to the legislature's will but as a tool of judicial defiance—an antidote to the proliferation of capital crimes. *See* Hopwood, *supra* note 3, at 924–26.

37. 11 U.S. (7 Cranch) 32, 34 (1812).

38. *Wiltberger*, 18 U.S. (5 Wheat.) at 95–96 (emphasis added).

39. Although there are some applications of lenity that perhaps strain the most obvious meaning of the text, the history of lenity includes no case like *Church of the Holy Trinity v. United States*, in which the Court expressly contradicts the plain meaning of the text. 143 U.S. 457 (1892). For further discussion of *Holy Trinity*, see *infra* note 174.

err on the side of overly narrow construction than overly broad.[40] This caution—the value of forbearance—thus directs the court (at least in some close cases) to place a thumb on the scale in favor of a substantive outcome. Forbearance is what distinguishes legislative supremacy in the context of lenity from the general ideal of faithful agency. Unfortunately, as we shall see, it has been increasingly marginalized.

The transformation of lenity into its modern form was led by Justice Felix Frankfurter. Frankfurter, a federal prosecutor in his early career and a pioneer of what would become known as the legal process school, was as devoted a believer in the supremacy of the political branches as he was a skeptic of policymaking by unelected judges.[41] In a series of cases in the 1950s and early 1960s, Frankfurter applied these beliefs to lenity, advocating that the Court should not resort to the judge-made rule of lenity until after it first deploys every possible tool to resolve statutory ambiguity in accord with legislative intent.[42] Frankfurter believed that through a meticulous examination of text, purpose, and legislative evidence, a judge could divine the intended meaning of even highly ambiguous legislation,[43] and, accordingly, that courts should be wary of "employ[ing] canons of artificial construction to restrict the transparent scope of criminal statutes."[44] Frankfurter therefore advocated that lenity operate solely as a second step, invoked only after all other attempts to determine meaning had failed:

> [Lenity] only serves as an aid for resolving an ambiguity; it is not to be used to beget one. . . . The rule [of lenity] comes into operation at the end of the process of construing what Congress has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers. That is not the function of the judiciary.[45]

Thus, Frankfurter subtly shifted lenity's relationship to legislative supremacy. Whereas early courts had conceived lenity as a balance of forbearance and faithful agency, Frankfurter disaggregated the two, preferring to deplete every resource in service of faithful agency and only turning to forbearance in the event of indeterminacy. The Rehnquist Court in particular seized on Frankfurter's

40. *See Wiltberger*, 18 U.S. (5 Wheat.) at 90–91 ("In criminal cases, a strict construction is always to be preferred; and if there be doubt, that is of itself conclusive.").

41. *See* Wallace Mendelson, *Mr. Justice Frankfurter and the Process of Judicial Review*, 103 U. PA. L. REV. 295, 300–02 (1954); *see also* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 647 (1943) (Frankfurter, J., dissenting) ("It can never be emphasized too much that one's own opinion about the wisdom or evil of a law should be excluded altogether when one is doing one's duty on the bench. The only opinion of our own even looking in that direction that is material is our opinion whether legislators could in reason have enacted such a law.").

42. *See, e.g.*, Callanan v. United States, 364 U.S. 587, 596 (1961).

43. *See* Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 544 (1947) ("We cannot avoid what Mr. Justice Cardozo deemed inherent in the problem of construction, making 'a choice between uncertainties.' . . . But to the careful and disinterested eye, the scales will hardly escape appearing to tip slightly on the side of a more probable meaning.").

44. Singer v. United States, 323 U.S. 338, 346 (1945) (Frankfurter, J., dissenting).

45. *Callanan*, 364 U.S. at 596 (footnote omitted).

approach, stating that lenity should be reached only after a heightened finding of "grievous ambiguity."[46]

But if forbearance is considered only as a last resort, to be avoided if at all possible, what is the purpose of lenity? Lenity only affects the outcome of a case if it places a thumb on the scale—counseling more caution about overshooting congressional intent than would be appropriate in a noncriminal context. The modern approach, as pioneered by Justice Frankfurter, continues to associate lenity with the value of legislative supremacy but places no such thumb on the scale, approaching the primary act of interpretation just as it would with any other statute.

This disconnect has led some scholars to question whether lenity serves any useful function at all. Professor Kahan, for example, has suggested that the concept of lenity runs counter to the will of Congress.[47] Research has shown that legislators are inclined to have a tough-on-crime stance and are frustrated when criminal statutes are narrowly construed.[48] Many state legislatures have enacted statutes specifically barring courts from invoking strict construction.[49] Congress itself has twice considered similar legislation,[50] and has regularly exercised its authority in individual cases to "override" narrow constructions imposed by courts.[51] Kahan argues—in the name of legislative supremacy—that congressional preference should rule the day; Congress should have the freedom to pass broad criminal laws if it likes, leaving others to flesh them out.[52] Lenity, he complains, has the opposite effect, "forcing Congress to shoulder the entire burden of criminal lawmaking even when it prefers to cede some part of that task to courts."[53]

If lenity is justified only on grounds of deference to the legislature, then evidence it cuts against the wishes of Congress is indeed grounds for its elimination. But arguments like Kahan's are based on an incomplete conception of legislative supremacy. Because legislative supremacy incorporates forbearance, and forbearance

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46. *See, e.g.*, Chapman v. United States, 500 U.S. 453, 463 (1991) (quoting Huddleston v. United States, 415 U.S. 814, 831 (1974)) (holding lenity is only applicable "after a court has 'seize[d] every thing from which aid can be derived,' [and] is still 'left with an ambiguous statute'" (first alteration in original) (quoting United States v. Bass, 404 U.S. 336, 347 (1971))). Nor has the Roberts Court shown any interest in adopting a looser standard, particularly in the years since the death of Justice Scalia. *See, e.g.*, Ocasio v. United States, 136 S. Ct. 1423, 1434 n.8 (2016).

47. *See* Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345, 347, 397 (arguing that lenity is, in practice, a "'nondelegation doctrine' in criminal law," devised and enforced against the will of Congress).

48. *See* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 529–32, 549 (2001); *see also* Price, *supra* note 6, at 911 (referring to the "hydraulic pressure pushing criminal legislation towards unreasonable extremes").

49. *See* Price, *supra* note 6, at 902–03.

50. Congress considered legislation to bar the strict construction of criminal statutes in 1977 and 1979. *See* Kahan, *supra* note 47, at 382–83.

51. *See* Matthew R. Christiansen & William N. Eskridge, Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967–2011*, 92 TEX. L. REV. 1317, 1321 (2014).

52. *See* Kahan, *supra* note 47, at 347.

53. *Id.* at 350.

is rooted in a *structural* responsibility to be careful in criminal cases,[54] it is not decisive that Congress generally prefers broader constructions. If lenity is a legitimate substantive canon, then courts are constitutionally justified in invoking the rule to err on the side of forbearance even when Congress might choose otherwise. In some cases, at least, lenity should counsel forbearance when faithful agency alone would suggest the opposite.[55]

B. FAIR NOTICE & DUE PROCESS

For a criminal defendant, seemingly trifling questions of statutory interpretation can make the difference between freedom and imprisonment—even life and death.[56] In *Yates v. United States*, a commercial fisherman faced up to twenty years in prison, depending on whether the undersized grouper he had thrown overboard was a "tangible object" as defined by a statute intended to criminalize document shredding.[57] In *Ebeling v. Morgan*, a defendant was sentenced to fifteen years of additional imprisonment when a court determined that cutting open six mail sacks in a single robbery could be charged as six offenses rather than one.[58]

Given the stakes, one might expect lawmakers to be especially precise when drafting criminal law. Yet, in practice, the criminal code is rife with ambiguity.[59] Legislators repeatedly enact broad and overlapping statutes, often to make a political show of imposing yet more severe punishments on already-criminal behavior.[60] There are both electoral and structural explanations for this behavior. People in prison are nearly all prohibited from voting.[61] And officials in the

54. This caution extends beyond lenity. Consider, for example, the reasonable doubt standard, which the Court has held to be constitutionally required. *In re* Winship, 397 U.S. 358, 364 (1970) ("[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."). Indeed, it is possible to think of lenity simply as the extension of that principle to questions of law—the requirement that the legal meaning of a statute must also be demonstrated beyond a reasonable doubt.

55. Another potential response to Kahan's argument centers on democratic accountability. *See infra* Section I.C. The legislature's exclusive power to craft criminal law necessarily includes the responsibility to articulate it fully. Electoral incentives break down if Congress is allowed to speak in crowd-pleasing generalities and leave it to other, less accountable officials to fill in the gaps.

56. *See* Robert M. Cover, Essay, *Violence and the Word*, 95 YALE L.J. 1601, 1601 (1986) ("Legal interpretation takes place in a field of pain and death." (footnote omitted)).

57. 574 U.S. 528, 547–48 (2015) (plurality opinion) (quoting 18 U.S.C. § 1519); *see also* William N. Eskridge, Jr. & Victoria F. Nourse, *Textual Gerrymandering: The Eclipse of Republican Government in an Era of Statutory Populism*, 96 N.Y.U. L. REV. 1718, 1783 (2021) (showing that despite the plausible textualist case made by the dissent in *Yates*, legislative evidence shows that Congress intended the statute to apply only to documents).

58. 237 U.S. 625, 627, 629, 631 (1915) (determining that "it was the intention of the lawmakers to protect each and every mail bag," and upholding a fifteen-year sentence).

59. *See* Shon Hopwood, *Clarity in Criminal Law*, 54 AM. CRIM. L. REV. 695, 702–03 (2017). At the same time, there are more federal criminal statutes than ever—more than 4,500 spread across fifty-one titles of the U.S. Code. *Id.* at 703.

60. Stuntz, *supra* note 48, at 529–33.

61. Nicole D. Porter, *Voting in Jails*, SENT'G PROJECT 12 (2020), https://www.sentencingproject.org/publications/voting-in-jails/ [https://perma.cc/2FNG-J3RT] ("People in prison are banned from voting in all but two states – Maine and Vermont.").

coordinate branches do not have much reason to push back. Prosecutors, incentivized to convert as many cases as possible into plea bargains, exploit the breadth and ambiguity of the code to charge defendants with multiple, overlapping crimes, often stretching the text beyond its intuitive, core meaning.[62] Judges—particularly appellate judges who are by definition hearing only cases in which a conviction has already been sought and obtained—face a powerful temptation to ignore the warnings of *Wiltberger* and read new meaning into the text to achieve results that *feel* analogous to those contemplated by lawmakers. This temptation may be especially strong when a morally culpable defendant could otherwise escape punishment.[63]

Due process, in principle, protects against such abuses. Amongst the core guarantees of due process is fair notice—the principle that a person may not be punished under a law that fails to clearly criminalize that person's actions.[64] Fair notice is audience-centric; it focuses on meaning as understood by the reader, not as intended by the legislator. Thus, for criminal statutes, where the lay public is the expected audience,[65] fair notice counsels against reliance on interpretive tools that require extensive research or legal expertise to understand. To derive meaning from such obscure sources would be "like sanctioning the practice of Caligula who 'published the law, but it was written in a very small hand, and posted up in a corner, so that no one could make a copy.'"[66]

The canonical case at the intersection of lenity and fair notice is *McBoyle v. United States*.[67] In *McBoyle*, an airplane thief was convicted under a statute punishing the theft of a "motor vehicle"—defined as "an automobile, automobile truck, automobile wagon, motor cycle, or any other self-propelled vehicle not designed for running on rails."[68] The government argued that because an airplane was a "self-propelled vehicle not designed for running on rails" the conviction should stand.[69] Writing for the Court, Justice Holmes acknowledged that the

62. Stuntz, *supra* note 48, at 537–38; *see also Yates*, 574 U.S. at 570 (Kagan, J., dissenting) (expressing concern that the criminal code is "too broad and undifferentiated, with too-high maximum penalties, which give prosecutors too much leverage and sentencers too much discretion").

63. *See* SCALIA & GARNER, *supra* note 9, at 301 ("The defendant has almost always done a bad thing, and the instinct to punish the wrongdoer is a strong one.").

64. *See* Johnson v. United States, 576 U.S. 591, 595 (2015) ("Our cases establish that the Government violates this guarantee by taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement.").

65. *See* David S. Louk, *The Audiences of Statutes*, 105 CORNELL L. REV. 137, 181 (2019) ("[C]riminal law generally seems to expect that the primary audience is laypeople themselves . . . .").

66. Screws v. United States, 325 U.S. 91, 96 (1945) (plurality opinion) (citation omitted) (rejecting a statute that "did not define what it desired to punish but referred the citizen to a comprehensive law library in order to ascertain what acts were prohibited"). Fair notice is a value reaching back to the origins of the republic. *See* THE FEDERALIST NO. 62, at 381 (James Madison) (Clinton Rossiter ed., 1961) ("It will be of little avail to the people that the laws are made by men of their own choice if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood . . . .").

67. 283 U.S. 25 (1931).

68. *Id.* at 25–26. *McBoyle* is, incidentally, the inspiration for the famous "no vehicles in the park" case study. Solan, *supra* note 9, at 81.

69. *McBoyle*, 283 U.S. at 26.

government's argument was "etymologically" plausible.[70] However, he was not convinced that an ordinary reader, confronted with a statute about "motor vehicles," would understand it so broadly. Holmes noted that the phrase "other self-propelled vehicle" appeared at the end of a list of vehicles (automobiles and motorcycles) that run on land—a characteristic also implied by the exclusion of vehicles "not designed for running on rails" (trains).[71] It seemed to Holmes that an ordinary reader would understand the statute to refer only to a "vehicle in the popular sense, that is a vehicle running on land."[72] He continued:

> 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.[73]

Holmes also rejected any argument that the Court should choose the broader interpretation based on inferred legislative intent,[74] even if that inferred intent could be reconciled with the text.[75]

This final point illustrates the relationship between the judge's choice of interpretive tool and the ability of an ordinary person to understand (or predict) legal meaning. The modern approach to lenity requires the court to "seiz[e] everything from which aid can be derived" to resolve statutory ambiguity.[76] But consider

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70. *Id.* (further acknowledging that a broader interpretation would be consistent with how the word "vehicle" is used elsewhere in the code).

71. *Id.*

72. *Id.*

73. *Id.* at 27; *see also* Crandon v. United States, 494 U.S. 152, 160 (1990) ("Because construction of a criminal statute must be guided by the need for fair warning, it is rare that legislative history or statutory policies will support a construction of a statute broader than that clearly warranted by the text."); Dixson v. United States, 465 U.S. 482, 511 (1984) (O'Connor, J., dissenting) ("The rule of lenity rests on the notion that people are entitled to know in advance whether an act they contemplate taking violates a particular criminal statute . . . .").

74. *McBoyle*, 283 U.S. at 27 ("[T]he statute should not be extended to aircraft, simply because it may seem to us that a similar policy applies, or upon the speculation that, if the legislature had thought of it, very likely broader words would have been used." (citation omitted)).

75. On several occasions, the Court has hinted at the deeper relationship between lenity and due process. For example, in *Liparota v. United States*, Justice Brennan invoked lenity as justification to read a *mens rea* requirement into a criminal statute, even though none appeared in the text. 471 U.S. 419, 427 (1985) ("In addition, requiring *mens rea* is in keeping with our longstanding recognition of the principle that 'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.'" (quoting Rewis v. United States, 401 U.S. 808, 812 (1971))); *see also* SCALIA & GARNER, *supra* note 9, at 303 ("The *mens rea* canon still applies to criminal statutes that do not explicitly contain a *mens rea* requirement."). In *United States v. Kozminski*, the Court narrowly interpreted a statute enforcing the Thirteenth Amendment, for fear that criminalizing the use of "psychological coercion" to compel labor would allow prosecutors to charge unsuspecting individuals with crimes, beyond those a reasonable person would think is covered by the statute. 487 U.S. 931, 944, 949 (1988); *see also* Hopwood, *supra* note 59, at 705 (discussing the relationship between overbroad prosecutors and the Armed Career Criminal Act).

76. Muscarello v. United States, 524 U.S. 125, 138–39 (1998) (quoting United States v. Wells, 519 U.S. 482, 499 (1997)).

whether it is consistent with fair notice for a judge to convict a defendant based on, for example, detailed research into the Congressional Record.[77]

On the other hand, there are some categories of criminal statutes drafted with a more sophisticated audience in mind. It may be appropriate for a court to take a more legalistic approach to a criminal provision in a securities law than a general provision in the criminal code. After all, an "ordinary" securities trader would be expected to have more familiarity with the nuances of the law than a member of the general public. If fair notice is an audience-based mode of understanding, it seems only natural to consider the identity of the audience. However, just as the modern rule prevents any consideration of forbearance until after the primary act of interpretation,[78] it likewise defers any special consideration of fair notice—severing any possible link between the defendant's identity and the choice of interpretive method.

Some scholars have argued this is a good thing, and lenity's protection of fair notice in the criminal context is misguided. These scholars point out that giving special weight to fair notice makes little sense in the many criminal cases where the underlying conduct is "deep within the interior of what is socially undesirable."[79] For example, the thief in *McBoyle* would be hard-pressed to claim that, due to the ambiguous language in the statute, he lacked fair notice it was wrong to steal an airplane.[80] Likewise, the fisherman in *Yates* should have known perfectly well that throwing evidence overboard was wrong, whether or not he was familiar with the precise contours of Sarbanes-Oxley.[81] Why should a court allow a defendant who engaged in self-evident criminal behavior to escape punishment based on the tenuous fiction of fair notice? These concerns have led some to advocate abandoning lenity entirely,[82] or at least limiting its use to borderline cases "when a broad interpretation would penalize 'innocent' conduct."[83]

The moral appeal of these arguments only highlights lenity's importance as a legal safeguard. Even if most defendants do not research the relevant statute before taking potentially criminal action, some do.[84] Would it be fair to treat a defendant who can prove they read the statute to a more forgiving standard than one who cannot? Consider also that in many cases, lenity is not applied to determine guilt or innocence at all. As discussed above, the code contains a multitude of overlapping statutes criminalizing the same underlying conduct.[85] Prosecutors frequently charge a single defendant multiple times, stacking punishments to

77. Justice Scalia did not think so. *See infra* Section III.A.

78. *See supra* Section I.A.

79. Kahan, *supra* note 47, at 400; *see* Note, *The New Rule of Lenity*, 119 HARV. L. REV. 2420, 2438 (2006).

80. *See generally* McBoyle v. United States, 283 U.S. 25 (1931).

81. *See generally* Yates v. United States, 574 U.S. 528 (2015) (plurality opinion).

82. *See* Kahan, *supra* note 47, at 425.

83. *See The New Rule of Lenity*, *supra* note 79, at 2421.

84. Consider, for example, that a large corporation would be more likely to consult a lawyer about Sarbanes-Oxley before deciding whether to dispose of potentially incriminating evidence.

85. Stuntz, *supra* note 48, at 537–38.

create outlandish sentences.[86] Even if there are cases where the perpetrator of a socially undesirable act does not need fair notice as to its illegality, there is no reason the law should not be required to speak clearly as to the severity of her punishment.

C. DEMOCRATIC ACCOUNTABILITY

Several commentators have suggested a more instrumental justification for lenity—that a more robust lenity would inspire Congress to legislate more carefully, which in turn would lead to fewer ambiguous cases and a healthier relationship between the legislature and the judiciary.[87] Professors Christiansen and Eskridge have shown that, following narrow judicial interpretations, the Department of Justice has had remarkable success lobbying Congress to revise criminal statutes to restore the broader meaning.[88] Defendants do not enjoy the same influence. Thus, one benefit of lenity is that it assigns the burden of judicial uncertainty to the party most able to bear the cost.[89] Moreover, Congress should bear the responsibility of "building majorities for explicit prohibitions,"[90] rendering the legislative process more transparent and understandable to voters.[91]

A more robust lenity would also change incentives for prosecutors. The majority of local district attorneys are elected, which creates an electoral imperative to maximize convictions while limiting costs.[92] This manifests as a drive to "convert potential trials into guilty pleas," often by threatening defendants with a "range of

86. *See id*. at 520, 531–33; Hopwood, *supra* note 59, at 699 & n.26 (noting prosecutors "exploit the redundancy of federal criminal law to drive up the penalties Congress prescribed for a particular offense" (quoting Stephen F. Smith, *Proportionality and Federalization*, 91 VA. L. REV. 879, 908 (2005))); Erik Eckholm, *Prosecutors Draw Fire for Sentences Called Harsh*, N.Y. TIMES (Dec. 5, 2013), http://nyti.ms/1bKpGsr ("Using their discretionary power to apply lengthy 'enhancements' on top of required terms . . . federal prosecutors are strong-arming defendants into pleading guilty and overpunishing those who do not – undermining the fairness and credibility of the justice system."). In *Deal v. United States*, the application of lenity to an ambiguous statute (as the dissent advocated) would have shortened the defendant's sentence by seventy-five years. 508 U.S. 129, 135–37 (1993); *see id*. at 143 (Stevens, J., dissenting).

87. *See* Hopwood, *supra* note 59, at 727. There is some empirical reason to doubt that Congress is sufficiently attuned to courts' behavior to adjust its approach to legislating. *See* Gluck & Bressman, *supra* note 22, at 946–47 (noting that a majority of congressional staffers do not even know of lenity by name). However, Gluck and Bressman also note that staffers on the "House or Senate Judiciary Committees—the committees generally charged with jurisdiction over criminal law" appeared to be more aware of lenity than others, at least leaving open the possibility that lenity is special in this context as well, and that its more robust implementation could have an ex ante effect on legislation. *Id*. at 947.

88. Christiansen & Eskridge, Jr., *supra* note 51.

89. *See* SCALIA & GARNER, *supra* note 9, at 299 ("When [a statute is] not clear, the consequences should be visited on the party more able to avoid and correct the effects of shoddy legislative drafting—namely, the federal Department of Justice . . . ."). This observation juxtaposes nicely with then-Professor Barrett's characterization of substantive canons as overprotecting constitutional values, counting on Congress to correct any "errors." *See* Barrett, *supra* note 3, at 174–76.

90. Price, *supra* note 6, at 915.

91. Moreover, to the extent that Congress does acquiesce to narrow, lenity-inspired interpretations of criminal statutes (whether by conscious choice or simple failure to make a change), it would provide some counterweight to the larger trend of overcriminalization. *See* Hopwood, *supra* note 59, at 706.

92. Stuntz, *supra* note 48, at 533–34.

overlapping charges that produce a severe sentence."[93] The modern approach to lenity—by failing to sufficiently protect the values of forbearance and fair notice—increases prosecutors' leverage at the charging stage,[94] leading to more guilty pleas and keeping some cases that might falter under judicial scrutiny out of the courtroom altogether. A more robust lenity would make it more difficult for prosecutors to prevail on charges outside the core meaning of criminal statutes.[95] This would change incentives for defendants faced with such charges, potentially striking a blow against overcriminalization.

Finally, lenity can be viewed as an expression of the judiciary's unique role as protector of disenfranchised minorities.[96] It has been well-documented that, in the United States, criminal law disproportionately affects racial minorities and the economically disadvantaged[97]—an imbalance that is deepened by broadly drafted statutes that grant police and prosecutors wide discretion in their enforcement.[98] If Professor Stuntz is correct, and electoral incentives drive the political branches toward overcriminalization at the expense of underrepresented groups,[99] then the judiciary has a fundamental duty of vigilance.

II. SHORTCOMINGS OF THE MODERN APPROACH

Since the mid-twentieth century, the rule of lenity has been operationalized as a two-step process, under which a court must first determine whether a statute is ambiguous, and then—only after the first question is answered in the affirmative—apply lenity to choose the narrowest remaining interpretation.[100] The modern approach is attractive to judges who are uncomfortable with naked appeals to policy or normative values. It appears to insulate the actual process of interpretation from the influence of external considerations, preserving a sense of objectivity and reserving lenity mostly for rhetorical effect once a decision has already been made.

But the modern approach to lenity has failed. As discussed in Part I, the modern rule bifurcates the idea of legislative supremacy, then prioritizes faithful agency (step one) over forbearance (step two). It also deprioritizes fair notice, removing it from the primary act of interpretation. The two-step architecture of

93. *Id.* at 536–37.

94. *See id.* at 538.

95. *See* United States v. Standard Oil Co., 384 U.S. 224, 236 (1966) (Harlan, J., dissenting) ("Moreover, this requirement of clear expression is essential in a practical sense to confine the discretion of prosecuting authorities . . . .").

96. *See generally* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (12th prtg. 1998) (proposing that the Court should assure majority governance while protecting minority rights); John Hart Ely, *Toward a Representation-Reinforcing Mode of Judicial Review*, 37 MD. L. REV. 451 (1978) (analyzing the Warren Court's approach to a representative government).

97. *Report to the United Nations on Racial Disparities in the U.S. Criminal Justice System*, SENT'G PROJECT (2018), https://www.sentencingproject.org/publications/un-report-on-racial-disparities/ [https://perma.cc/HT27-PLEL].

98. *Id.*

99. *See* Stuntz, *supra* note 48, at 533–39.

100. *See, e.g.*, Chapman v. United States, 500 U.S. 453, 463 (1991).

the modern approach further exacerbates this disconnect. First, lenity's step one —the ambiguity–clarity inquiry—is fundamentally indeterminate. In practice, this enables judges (in many if not all cases) to circumvent lenity as a decisive factor. Second, even when lenity is invoked, its relegation to tiebreaker status means judges have no occasion to actually consider the values it is intended to protect.

A. THE AMBIGUITY OF AMBIGUITY

Determining whether statutory language is ambiguous is not a straightforward task.[101] Professor Farnsworth and coauthors have demonstrated that individuals often disagree whether legal language is ambiguous, and are prone to change their minds depending on how they are asked.[102] The authors presented 900 law students with the following scenario, based on the facts of *Chapman v. United States*:

> A federal statute, 21 U.S.C. § 841(b), provides for a mandatory minimum sentence of five years for anyone who distributes more than one gram of a "mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD)." The defendant was caught distributing LSD that had been dissolved and sprayed onto blotter paper. The weight of the LSD alone was 50 milligrams, well below the statutory threshold. But if the weight of the blotter paper was included, the total weight was five grams, well above the statutory threshold.[103]

Not only was there significant disagreement amongst the students as to whether the statute's application was ambiguous; it turned out that students' opinions about ambiguity correlated strongly with their personal policy preferences regarding the case.[104]

As an initial matter, these findings cast an uneasy light on the *Chapman* Court's holding that 21 U.S.C. § 841(b) unambiguously included the weight of the paper.[105] The vehemence of the *Chapman* dissent points to another

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101. Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2118 (2016) (book review) ("Several substantive principles of interpretation . . . depend on an initial determination of whether a text is clear or ambiguous. But judges often cannot make that initial clarity versus ambiguity decision in a settled, principled, or evenhanded way."); *see also, e.g.*, Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1758 (2020) (Alito, J., dissenting) (stating the majority's holding that the language of Title VII unambiguously extends to sexual orientation "is not only arrogant, it is wrong").

102. *See* Ward Farnsworth, Dustin F. Guzior & Anup Malani, *Ambiguity About Ambiguity: An Empirical Inquiry into Legal Interpretation*, 2 J. LEGAL ANALYSIS 257, 271–72 (2010).

103. *Id.* at 260; *see Chapman*, 500 U.S. at 455–56.

104. Farnsworth et al., *supra* note 102, at 271. Justice Kavanaugh agrees that background preferences can shape perceptions of ambiguity, observing that "textualists tend to find language to be clear rather than ambiguous more readily than purposivists do." Kavanaugh, *supra* note 101, at 2129.

105. *Chapman*, 500 U.S. at 462, 468; *see also id.* at 476 (Stevens, J., dissenting) (arguing the statute was ambiguous and the result reached by the majority was so absurd "that Congress could not have intended such an outcome").

phenomenon—what Professor Solan has dubbed "pernicious ambiguity."[106] Pernicious ambiguity occurs when two readers are each confident that the meaning of a text is unambiguous, but fail to recognize that they disagree about what that meaning actually is. Where there is pernicious ambiguity, disagreement is often invisible. Worse, Solan has shown that each side has a strong tendency, when confronted with the contrary interpretation of another party, not to reconsider its own interpretation but to dig in further, dismissing the other's as insincere.[107] This suggests that judges, even when confronted with evidence that other parties read a statute differently, may be disinclined to accept that fact as evidence of actual ambiguity.[108]

The identification of ambiguity becomes yet more complicated in a legal context. Even when a judge recognizes some uncertainty in the meaning of a statute, she must determine what level of uncertainty is sufficient to constitute *legal* ambiguity.[109] Should the judge attempt to assign a numerical value? Justice Kavanaugh has written that he uses "something approaching a 65-35 rule."[110] However, he acknowledges that this is merely a personal preference, noting that some of his colleagues appear to apply a 90-10 rule, while others prefer 55-45.[111] Even assuming agreement as to the appropriate number, how would it be measured? What standard should an appellate court use to review a lower court's determination of ambiguity?

With regard to lenity, the Court has struggled to even articulate a consistent test for ambiguity. By one count, the Court has identified at least nine different standards to trigger lenity,[112] sometimes expressing conflicting standards within the same case.[113] What's more, the Court often disagrees whether some tools of interpretation should be available to consider the question.[114] As a result, there

106. Lawrence M. Solan, *Pernicious Ambiguity in Contracts and Statutes*, 79 CHI.-KENT L. REV. 859, 859 (2004).

107. *See id.* at 871–74.

108. This tracks with the behavior of judges when confronted with contrary interpretations of other courts. *See id.*; *see also, e.g.*, Moskal v. United States, 498 U.S. 103, 108 (1990) ("Nor have we deemed a division of judicial authority automatically sufficient to trigger lenity." (citation omitted)). On the other hand, courts do sometimes consider extrinsic evidence of ambiguity. *See, e.g.*, Loc. Union 1261 v. Fed. Mine Safety & Health Rev. Comm'n, 917 F.2d 42, 46 (D.C. Cir. 1990) ("[W]e observe that it would be unusual for a statute free from ambiguity to be subject to different interpretations by the Commission over time . . . .").

109. *See Moskal*, 498 U.S. at 108 ("Stated at this level of abstraction, of course, the rule 'provides little more than atmospherics, since it leaves open the crucial question—almost invariably present—of *how much* ambiguousness constitutes . . . ambiguity.'" (alteration in original) (quoting United States v. Hansen, 772 F.2d 940, 948 (D.C. Cir. 1985))).

110. Kavanaugh, *supra* note 101, at 2137 ("[I]f the interpretation is at least 65-35 clear, then I will call it clear and reject reliance on ambiguity-dependent canons.").

111. *Id.* at 2137–38.

112. Romantz, *supra* note 14, at 566–67.

113. *Compare* Muscarello v. United States, 524 U.S. 125, 139 (1998) ("grievous ambiguity or uncertainty" (quoting Staples v. United States, 511 U.S. 600, 619 n.17 (1994))), *with id.* at 148 (Ginsburg, J., dissenting) ("some doubt" (citation omitted)).

114. *See infra* Section III.A.

are multiple cases that appear to turn more on arguments about how to derive ambiguity than on the actual meaning of the statute.[115]

Finally, the ambiguity–clarity inquiry is entirely agnostic as to lenity's substantive values. By setting such a problematic, ideologically susceptible inquiry as the threshold to the consideration of more important questions, the modern rule of lenity gets it backward, ensuring that its underlying values often go unaddressed and have no impact on the outcome of the case. This transforms the ancient and revered rule of lenity into a curiosity, invoked when it supports a conclusion reached on other grounds and ignored when it does not. It is problematic for a rule that has the assurance of fair notice as one of its primary purposes to be so haphazardly applied.

B. LENITY AS TIEBREAKER

There are several categories of substantive canons, ranging from clear statement rules (deployed at the outset of the inquiry) to tiebreakers (applied only as a last resort). Lenity, in its modern form, is a tiebreaker,[116] a subordinated rule of decision considered only after a court has failed to resolve a controversy on other grounds.[117] A rule of decision may be treated as a tiebreaker for a number of reasons. For example, a rule that is particularly difficult to apply may be set in reserve as a tiebreaker to save effort when other, less burdensome rules are sufficient to reach a decision.[118] Or, as in the case of lenity, a rule may be designated as a tiebreaker as an expression of an agreed moral hierarchy[119]—a judgment that a normatively superior value should be the "preferred basis for merits decisions," while the less desirable rule "tidies up a small set of close calls."[120] As applied to lenity, the latter rationale has intuitive appeal. Indeed, the normative judgment that—when possible—the text alone should decide can be traced as far back as *Wiltberger* itself, in which Justice Marshall declared, "[w]here there is no ambiguity in the words, there is no room for construction."[121]

However, the demotion of even a disfavored rule to tiebreaker status is a drastic step. It represents a judgment that "no amount of gain or loss measured on the inferior value set could possibly alter a conclusion reached using the superior value set."[122] Thus, it is difficult to reconcile the propositions that a tiebreaker

115. *See, e.g.*, United States v. Hayes, 555 U.S. 415, 436–37 (2009) (Roberts, C.J., dissenting); *Muscarello*, 524 U.S. at 148 (Ginsburg, J., dissenting); Moskal v. United States, 498 U.S. 103, 108 (1990).

116. Barrett, *supra* note 3, at 117–18; *see also* United States v. Santos, 553 U.S. 507, 514 (2008) (plurality opinion) ("Under a long line of our decisions, the tie must go to the defendant.").

117. Adam M. Samaha, *On Law's Tiebreakers*, 77 U. CHI. L. REV. 1661, 1669 (2010).

118. *Id.* at 1677 n.41. Rules of decision may also be designated as tiebreakers due to political compromise or strategy. Consider, for example, the Founders' decision to resolve an indeterminate result in the electoral college (a phenomenon that was expected at the time to be far more common) with a vote in the House. *Id.* at 1681.

119. *See id.* at 1677.

120. *Id.* at 1669.

121. United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95–96 (1820).

122. Samaha, *supra* note 117, at 1677.

rule both (a) has value and (b) is appropriately relegated to tiebreaker status. If the tiebreaker rule has intrinsic value, or even if its consideration could shed light on (or alter the perception of) another variable, that information is lost. The primary danger is that "throwing out potentially valuable information" could lead to a "missed reversal"—a decision reached without realizing that the tiebreaker rule, if considered, would (or should) have changed the result.[123]

This is a real danger in the case of lenity. As discussed above, the forbearance aspect of legislative supremacy (that a court should be more cautious than it would otherwise be about reaching an overbroad interpretation) is best understood as a thumb on the scale favoring a defendant-friendly outcome.[124] The modern approach, by bifurcating the faithful agency and forbearance aspects of legislative supremacy, and then demoting the latter to tiebreaker status, ensures that a court will approach the question of ambiguity (and thus frame the meaning of the text) without any consideration of how one of lenity's primary values could affect its analysis.[125] In addition, the exclusion of the fair notice aspect of lenity from the primary inquiry could affect the weight given to a piece of interpretive evidence and thus change the meaning ascribed to a key term or provision in a statute.

For example, in *United States v. Hayes*, the Court upheld the defendant's conviction under a statute prohibiting possession of a firearm by persons previously convicted of a "crime of domestic violence," defined as "an offense that . . . has, as an element, the use . . . of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim."[126] The defendant argued that his prior conviction—under a generic battery statute that did not include domestic relationship as an element—fell outside the prohibition.[127] Justice Ginsburg, after a detailed examination of syntax, grammar, legislative evidence (contemporaneous and subsequent), and a state-by-state survey of the enforcement of domestic violence laws, concluded that "Congress' manifest purpose" was best served by reading the word "element" to modify only the phrase "physical force, or the threatened use of a deadly weapon"—not the relationship between the perpetrator and victim.[128] Therefore, the statute did not require that a domestic relationship be an element of the previous crime, and the defendant's prior conviction for an assault against a domestic partner fell within the prohibition. Justice Ginsburg declined to consider lenity at all; although she

123. *Id.* at 1691, 1694 (emphasis omitted).

124. *See supra* notes 38–40 and accompanying text.

125. Contrast this to, for example, the canon of constitutional avoidance, which is applied at the beginning of the process and therefore considered without regard for how it may interact with lenity. *See* United States v. Davis, 139 S. Ct. 2319, 2352 (2019) (Kavanaugh, J., dissenting) ("The canon of constitutional avoidance precedes the rule of lenity because the rule of lenity comes into play . . . only '*after* consulting traditional canons of statutory construction.'" (quoting United States v. Hayes, 555 U.S. 415, 429 (2009))).

126. 555 U.S. 415, 420–21 (2009) (quoting 18 U.S.C. § 921(a)(33)(A)).

127. *Id.* at 419.

128. *Id.* at 424–28 (citation omitted).

agreed the provision was "not a model of the careful drafter's art," it did not rise to the level of grievous ambiguity.[129]

In a dissent joined by Justice Scalia, Chief Justice Roberts objected: "If the rule of lenity means anything, it is that an individual should not go to jail for failing to conduct a 50-state survey or comb through obscure legislative history."[130] Roberts suggested that the values of lenity—specifically fair notice—should have informed the Court's choice of interpretive tools.[131] But the majority did not even consider this; it undertook its full analysis, arrived at its conclusion, and only then cited lenity (briefly) to reject its applicability.[132] Would the values of lenity—ignored due to the rule's relegation to tiebreaker status—have altered which interpretive evidence was given weight by the Court? Considering that all nine Justices acknowledged some ambiguity, would the incorporation of lenity into the primary act of interpretation have altered the analysis enough to change the result? There is no way to know for sure.

The Court's repeated references to lenity, even in cases where it does not affect the outcome, reflects an instinct—spanning dozens of Justices across the ideological divide—that it remains an important rule.[133] But it is not treated like one. The modern approach ensures the underlying values of lenity receive no meaningful consideration in the vast majority of cases. Even when invoked, lenity operates only as an on-off switch, pointing dumbly to the narrowest of a set of predetermined interpretations, themselves framed in its absence. If lenity has become so marginalized that it cannot protect the values with which it is associated, it cannot satisfy Justice Barrett's criteria for legitimacy.

The rule of lenity, if it is to be preserved, is in need of serious repair.

III. THREE POTENTIAL IDEAS FOR REFORM

This Part will briefly describe and evaluate three proposals to reform the rule of lenity. One idea, initially championed by Justice Scalia[134] and later expanded upon by Professor Shon Hopwood,[135] would retain the two-step operationalization of lenity but (a) focus solely on the text and (b) lower the standard for ambiguity, transforming lenity into a pseudo-clear-statement rule for criminal law. A second idea, based on a suggestion by then-Judge Kavanaugh, is more ambitious, eliminating the ambiguity–clarity inquiry altogether. Kavanaugh would reimagine the two-step process so that a court would first use the traditional tools of statutory interpretation to determine the best meaning of a statute, and then

129. *Id.* at 429 (citation omitted).

130. *Id.* at 437 (Roberts, C.J., dissenting).

131. *Id.* at 436–37.

132. *Id.* at 429 (majority opinion).

133. *See* Anita S. Krishnakumar & Victoria F. Nourse, *The Canon Wars*, 97 TEX. L. REV. 163, 189 (2018) ("[T]he ultimate test of a canon is one that reflects the stability of compromise, by which we mean that the canon reflects the agreement of Supreme Court Justices appointed by different parties and across ideological divides." (emphasis omitted)).

134. *See* SCALIA & GARNER, *supra* note 9, at 296–98.

135. *See* Hopwood, *supra* note 3, at 921; Hopwood, *supra* note 59, at 700.

consider "openly and honestly" whether substantive canons such as lenity justify departure.[136] A third idea, inspired by the recent work of Professor Anita Krishnakumar, proposes a new "metarule[]" of interpretation: a general directive that criminal statutes be interpreted according to their prototypical meanings.[137]

A. JUSTICE SCALIA & SHON HOPWOOD: CLEAR STATEMENT LENITY

Throughout his time on the Court, Justice Scalia advocated for a more robust rule of lenity,[138] retaining the two-step operationalization of the rule but rejecting the use of extratextual tools such as legislative evidence or statutory purpose to resolve ambiguity.[139] Under Scalia's approach, if the language of a statute (after the application of any relevant semantic canons) is ambiguous, the inquiry ends and lenity is invoked. An early articulation of this idea came in *Moskal v. United States*.[140] In *Moskal*, the issue was whether a defendant could be prosecuted under a statute barring the use of "falsely made" vehicular titles when he had submitted manipulated odometer readings to state authorities in exchange for genuine titles.[141] Justice Thurgood Marshall, writing for the Court, rejected Moskal's argument that the statute applied only to actual forgeries. Marshall reasoned that the narrower interpretation, though textually plausible, would contradict the motivating purpose of Congress, which was to broadly criminalize a "class of fraud."[142]

Justice Scalia, in dissent, invoked lenity, chastising the Court for reaching beyond the text: "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 . . . ."[143] Once the majority found the text ambiguous, Scalia believed, lenity required forbearance.[144]

That said, Scalia, like Chief Justice Marshall in *Wiltberger*, had little patience for "tenderness of the law for the rights of individuals"[145] when he found the text clear. In *Deal v. United States*, a defendant who had committed bank robberies on six separate occasions was arrested and charged with all six counts in a single

136. Kavanaugh, *supra* note 101, at 2144.

137. *See* Anita S. Krishnakumar, *Metarules for Ordinary Meaning*, 134 HARV. L. REV. F. 167, 177 (2021).

138. *See* Romantz, *supra* note 14, at 561.

139. *See, e.g.*, United States v. Santos, 553 U.S. 507, 515 (2008) (plurality opinion) (rejecting "the impulse to speculate regarding a dubious congressional intent").

140. 498 U.S. 103 (1990).

141. *Id.* at 105 (emphasis omitted) (citation omitted).

142. *Id.* at 111–12 (emphasis omitted).

143. *Id.* at 132 (Scalia, J., dissenting); *see also* United States v. R. L. C., 503 U.S. 291, 309 (1992) (Scalia, J., concurring) ("It may well be true that in most cases the proposition that the words of the United States Code or the Statutes at Large give adequate notice to the citizen is something of a fiction, albeit one required in any system of law; but necessary fiction descends to needless farce when the public is charged even with knowledge of Committee Reports." (citation omitted)).

144. *Moskal*, 498 U.S. at 132 (Scalia, J., dissenting) ("The temptation to stretch the law to fit the evil is an ancient one, and it must be resisted.").

145. United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95 (1820).

proceeding.[146] The government sought an enhanced sentence for counts two through six, arguing that the statutory phrase "second or subsequent conviction" should be read to encompass subsequent *offenses*, even those occurring prior to the initial conviction.[147] The dissenters disagreed, arguing that Congress had intended the statute to deter recidivism and that enhanced sentences should therefore apply only to offenses committed after an initial conviction, or that "[a]t the very least" the Court's prior constructions of similar statutes created enough ambiguity for lenity to apply.[148] Scalia ridiculed the minority, confidently declaring "[t]here is utterly no ambiguity in [the statute], and hence no occasion to invoke the rule of lenity."[149] He went on to summarily reject the idea that a 105-year sentence was so "glaringly unjust" it could not align with congressional intent.[150] Although Scalia felt on the whole that "the rule of lenity is underused in modern judicial decision-making"[151] and believed the step-one inquiry should be modified so that it could be invoked more often,[152] he still fundamentally saw lenity as a tiebreaker. Absent a finding of ambiguity, it does not enter into the analysis at all.

Justice Scalia's approach does not appear to have gained much traction on the Court.[153] However, Professor Hopwood has recently picked up on the idea, pairing it with an even lower threshold for ambiguity to generate a pseudo-clear-statement rule for criminal law.[154] Hopwood, like Scalia,[155] argues that focusing the inquiry solely on the text would advance the value of fair notice by removing abstractions such as legislative evidence and statutory purpose, which are inaccessible to the ordinary reader.[156] He further argues that a clear statement approach (more exacting than Scalia's proposed "reasonable doubt" threshold) would serve democratic account

146. 508 U.S. 129, 130–31 (1993).

147. *Id.* (quoting 18 U.S.C. § 924(c)(l)).

148. *Id.* at 142–43 (Stevens, J., dissenting).

149. *Id.* at 134–35 (majority opinion); *see also* SCALIA & GARNER, *supra* note 9, at 301 ("Naturally, the rule of lenity has no application when the statute is clear . . . .").

150. *Deal*, 508 U.S. at 137 (quoting Brief for Petitioner at 24, *Deal*, 508 U.S. 129 (No. 91-8199)). It is worth noting that Congress eventually overrode the Court's interpretation in *Deal* via the FIRST STEP Act of 2018. Pub. L. No. 115-391, § 403, 132 Stat. 5194, 5221; *see* United States v. Davis, 139 S. Ct. 2319, 2324 n.1 (2019).

151. SCALIA & GARNER, *supra* note 9, at 301.

152. *See id.* at 299 ("The criterion we favor is this: whether, after all the legitimate tools of interpretation have been applied, 'a reasonable doubt persists.'" (quoting Moskal v. United States, 498 U.S. 103, 108 (1990))).

153. *See, e.g.*, Shular v. United States, 140 S. Ct. 779, 787–88 (2020) (Kavanaugh, J., concurring) ("[T]his Court has repeatedly explained that the rule of lenity applies only in cases of 'grievous' ambiguity—where the court, even after applying all of the traditional tools of statutory interpretation, 'can make no more than a guess as to what Congress intended.'" (quoting Ocasio v. United States, 136 S. Ct. 1423, 1434 n.8 (2016))).

154. *See* Hopwood, *supra* note 3, at 921; Hopwood, *supra* note 59, at 700.

155. SCALIA & GARNER, *supra* note 9, at 296–98.

156. Hopwood, *supra* note 3, at 936.

ability by "forc[ing] Congress to define crimes . . . with sufficient specificity."[157] To these arguments I would add that Hopwood's proposal, by lowering the threshold for ambiguity and thus raising the bar for criminalization, would incorporate some measure of forbearance into step one. This would mitigate some of the problems created by lenity's relegation to tiebreaker status[158] and therefore better protect the underlying value of legislative supremacy, as originally understood. In short, I believe there is much to recommend in Hopwood's approach.[159]

That said, there are three ways clear statement lenity comes up short. First, it assumes that a textualist approach to step one would provide more constraint than a wider-ranging inquiry, "remov[ing] the ability of judges to use an 'ill-defined general purpose' to expand or add to the statutory text."[160] But it is far from certain textualism actually constrains judges as much as its proponents claim. Professor Nourse has argued that textualism does little to constrain judges because statutory terms can often be ascribed different content according to either their "prototypical" or "legalist" meanings.[161] Also, textualism allows judges to "gerrymander[]" the text—choosing words or phrases, removing them from context, and then ascribing them additional meaning before returning them to the text—a subjective and indeterminate process that often leads to interpretations that would surprise the drafters of the statute.[162] Professor Krishnakumar has raised further questions about the "consistency and predictability" of textualism, demonstrating that the same textualist canons are frequently invoked by the majority and dissent in the same case to argue for opposite results[163]—a phenomenon that is particularly pronounced in criminal law.[164] Professor Grove goes even further, citing the dueling opinions in *Bostock v. Clayton County* to argue that there are at least two different kinds of textualism, which are often the source of bitter disagreement amongst even committed textualists.[165] In short, there is ample reason to doubt that textualism provides much more constraint (or leads to many different outcomes) than any other mode of interpretation.

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157. Hopwood, *supra* note 59, at 701. Although there is some reason to doubt this would have much effect ex ante, forcing Congress to explicitly "overrule" those narrow constructions with which it disagrees would make the law more specific ex post.

158. *See supra* Section II.B.

159. Another strong point of Hopwood's proposal is that it, more than any other proposal discussed in this Note, leaves most of the architecture of the modern approach in place. *See* Hopwood, *supra* note 3, at 924. It therefore may have the most realistic chance of actually being adopted.

160. Hopwood, *supra* note 3, at 933 (quoting Moskal v. United States, 498 U.S. 103, 132 (1990) (Scalia, J., dissenting)).

161. Victoria F. Nourse, *Two Kinds of Plain Meaning*, 76 BROOK. L. REV. 997, 999–1001 (2011); *see infra* notes 181–85 and accompanying text.

162. Eskridge, Jr. & Nourse, *supra* note 57, at 1732.

163. Krishnakumar, *supra* note 18, at 918, 929–30 tbl.1; *see also* Anita S. Krishnakumar, *Backdoor Purposivism*, 69 DUKE L.J. 1275, 1306 (2020) (demonstrating that textualist canons "by their nature confer significant discretion on judges").

164. Krishnakumar, *supra* note 18, at 939–41 (hypothesizing this is due to the frequent borrowing of terms from other statutes and increased ideological investment on the part of judges).

165. Tara Leigh Grove, Comment, *Which Textualism?*, 134 HARV. L. REV. 265, 266–67 (2020).

Nor is there any reason to suspect a textualist step one would necessarily result in narrower interpretations. Consider that in *Deal*, Justice Stevens relied on legislative evidence to find that the statute was intended to address recidivism and therefore should be construed narrowly, while Justice Scalia relied solely on the text to confidently arrive at the broader interpretation.[166]

Second, both Scalia and Hopwood would retain the two-step architecture of the modern approach. Thus, their proposed reforms do nothing to alleviate the indeterminacy of the ambiguity–clarity inquiry. Nor do they address the issue of pernicious ambiguity. If empirical evidence suggests that interpreters recognize ambiguity mostly when it serves their ideological priorities,[167] then simply prescribing a new legal standard may not do much to affect real-world results.[168] Query whether there is any rewording of the legal standard for ambiguity that would have moved Scalia from his confident conclusions in *Deal*.

Finally, by continuing to treat lenity as a tiebreaker, the clear statement approach offers no guarantee that a court would actually consider the values of lenity in any given case.

B. JUSTICE KAVANAUGH: AVOIDING THE AMBIGUITY THRESHOLD

In 2016, then-Judge Kavanaugh noted that "[s]everal substantive principles of interpretation . . . depend on an initial determination of whether a text is clear or ambiguous," but that this determination is not one that judges are capable of making in a "settled, principled, or evenhanded way."[169] In response, he proposed a reconceptualization of the two-step process for ambiguity-canons as a category, eliminating the ambiguity threshold altogether:

> First, courts could determine the best reading of the text of the statute by interpreting the words of the statute, taking account of the context of the whole statute, and applying any other appropriate semantic canons of construction. Second, once judges have arrived at the best reading of the text, they can apply—openly and honestly—any substantive canons . . . that may justify departure from the text.[170]

This is an audacious proposal.[171] Under Kavanaugh's approach, the rule of lenity would no longer be relegated to tiebreaker status. Instead, it would become a

166. *See supra* notes 146–52 and accompanying text.

167. *See* Krishnakumar, *supra* note 18, at 940–41 & tbl.3b.

168. It is worth noting here that Professor Krishnakumar has attempted to offer a solution to this problem via an "objective" test for ambiguity. *See* Krishnakumar, *supra* note 137, at 167. She argues that discrepancies in meaning between dictionaries and corpus linguistics, or amongst judges, should be prima facie evidence of ambiguity. *Id.* at 169. In addition to the likely resistance from courts to this proposal, I would argue that it simply substitutes one set of questions for another. Which dictionaries? How much difference? With regard to which words? For more on the difficulties in defining standards for ambiguity, see *supra* Section II.A.

169. Kavanaugh, *supra* note 101.

170. *Id.* at 2144 (footnote omitted).

171. Justice Kavanaugh does not advocate for applying this reconceptualization to the rule of lenity in his article. *Id.* at 2145 & n.136. Moreover, in the time since he has joined the Court, he has gone out of

mandatory step two—an "open[] and honest[]" consideration of whether lenity's underlying values justify a departure from best meaning.[172]

There are two significant virtues to Justice Kavanaugh's method. First, it would eliminate the decontextualized inquiry into ambiguity, along with the uncertainty and subjectivity it brings. Second, Kavanaugh's method would require the frank consideration of lenity in each and every case, not simply as a static arrow pointing automatically to the narrowest of a predetermined set of interpretations, but on its own terms—a collection of principles that carry weight outside of the text, capable in some circumstances of tipping the balance *based on those principles*. This approach would facilitate the development of the law far better than the modern approach. One could imagine this approach would lead to the development of a space between "best" and "fair" meaning, where the court's initial interpretation is sufficiently uncertain to trigger forbearance. Precedents would accumulate and standards would form around the treatment of lenity's underlying values. Perhaps these values would apply differently depending on the nature of the offense, the characteristics of likely defendants, or the novelty of the government's application.

However, it is difficult to imagine that judges in the "we're all textualists now" era[173] would be comfortable separating text and effect in a manner so reminiscent of the much-disparaged *Church of the Holy Trinity*.[174] And Kavanaugh's proposal would mark a dramatic departure from lenity as traditionally understood by American courts.[175] Both textualists and purposivists conceive the judge as a "faithful agent"—examining the appropriate evidence not to achieve the judge's own policy preferences but to give effect to the intent of the legislature.[176] Granting permission for judges to invoke external values to overrule best

his way to reaffirm strict allegiance to the modern approach. *See* Shular v. United States, 140 S. Ct. 779, 787–88 (2020) (Kavanaugh, J., concurring). Nevertheless, I think the proposal he made in 2016 offers an interesting solution to the problems with lenity; I will discuss it here with the proviso that I am making no claim Justice Kavanaugh would agree with his own proposal, as applied to lenity, today.

172. Kavanaugh, *supra* note 101, at 2144.

173. Harvard Law School, *The 2015 Scalia Lecture | A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YOUTUBE, at 08:28 (Nov. 25, 2015), https://youtu.be/dpEtszFT0Tg.

174. Church of the Holy Trinity v. United States, 143 U.S. 457 (1892); *see* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (Amy Gutmann ed., 1997). Scalia, in one of his earliest and most famous arguments for textualism, singled out *Holy Trinity* for ridicule. *See id.* at 22. In *Holy Trinity*, the Court ruled that a statute prohibiting the importation of foreign workers for "labor or service of any kind" did not apply to a contract between a church and a foreign minister. 143 U.S. at 458, 472. The Court granted that the plain meaning of the text would bar the contract but held (despite the text) that such an anti-religious application was "not within the intention of the legislature." *Id.* at 472. Textualist scholars, following Scalia's lead, have often used *Holy Trinity* as a convenient punching bag in making their arguments against various extra-textual strategies of interpretation. *See, e.g.*, Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of* Holy Trinity Church, 50 STAN. L. REV. 1833, 1835, 1860–63 (1998); John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2424, 2429 (2003).

175. *See supra* note 29.

176. *See* Barrett, *supra* note 3, at 113.

meaning (even in service of constitutional values) is in clear tension with that ideal.[177] And even setting theoretical concerns aside, as a matter of psychology, it seems unlikely many judges, having reached (and articulated) a conclusion about best meaning, would be inclined to depart from that interpretation.[178]

Thus, as a matter of both interpretive ideology and psychology, one might expect Justice Kavanaugh's proposal to meet considerable resistance. This could trigger a sort of "nightmare scenario," in which lenity is routinely considered but actually invoked even more rarely than today. As such, framing lenity as a decision to overrule statutory meaning could be counterproductive, raising the bar to justify its application so high as to be entirely out of reach.

C. ANITA KRISHNAKUMAR: A METARULE FOR LENITY

Professor Krishnakumar has suggested a third approach, which avoids both the relegation of lenity to tiebreaker status and the treatment of lenity as a decision to overrule best meaning.[179] Krishnakumar proposes replacing lenity with a new metarule of statutory interpretation, incorporating the principle of strict construction (and, by implication, the values underlying lenity) directly into the determination of best meaning.[180]

Krishnakumar's approach builds on prior research describing the linguistic concepts of prototypical and legalist (or "expansive") meaning, as applied to legal interpretation.[181] A statute's prototypical meaning focuses narrowly "on a core example, rather than reaching the conceptual or logical extension" of the language.[182] In contrast, legalist meaning tends to be more broad; it "looks for all examples, [including] examples that might invite fringe or peripheral meanings."[183] Krishnakumar points to empirical research showing that judges and nonexperts, even when they agree about the meaning of a provision in an "easy

177. Professor Zachary Price has proposed a somewhat-related, two-step revision of lenity that could alleviate this problem. *See* Price, *supra* note 6, at 889. He suggests a variation of the two-step process: first, come up with a *range* of plausible readings, and second, pick the most defendant-friendly one. *Id.* at 894. This proposal avoids the trap of forcing judges to articulate a single best meaning only to select another interpretation, but (as Price acknowledges) it could be an invitation to judicial manipulation at the first stage (if a judge identifies only one plausible reading, lenity does not apply). *Id.* Further, Price's proposal lacks the characteristic that makes Kavanaugh's most appealing, which is to bring the values supporting lenity to the foreground and facilitate the open and honest consideration of their application.

178. This is not to say it would never happen. As Justice Kavanaugh points out, this is arguably what Chief Justice Roberts did in NFIB v. Sebelius, 567 U.S. 519 (2012)—first acknowledging that "the statute reads more naturally as a command to buy insurance than as a tax," then choosing a different interpretation based on the substantive canon of constitutional avoidance. *Id.* at 574.

179. *See* Krishnakumar, *supra* note 137, at 177.

180. *Id.* at 177–78. As with Justice Kavanaugh's proposal, Krishnakumar's proposal is not offered specifically for lenity, nor does she spend much time considering how it might work in lenity's particular context. This Note assumes that her approach would resolve ambiguity as part of the initial inquiry, creating a single-step rule of lenity. However, even if she would retain some version of the second step to resolve any residual ambiguity, the following analysis applies.

181. *Id.* at 168 & n.9; *see* Nourse, *supra* note 161, at 1000; Lawrence M. Solan, *The New Textualists' New Text*, 38 LOY. L.A. L. REV. 2027, 2039–44 (2005).

182. Nourse, *supra* note 161, at 1000.

183. *Id.* at 1001.

case[]" (prototypical meaning) will often disagree in a challenging or borderline case (legalist meaning).[184] Referring to the famous vehicles-in-the-park scenario, she explains:

> [W]hile there appears to be little disagreement between judges and nonexperts that 'cars,' 'trucks,' and 'buses' are vehicles—or that 'drones,' 'roller skates,' and 'baby carriers' are not vehicles—there is considerable variation between these groups regarding whether borderline items such as an 'electric wheelchair,' a 'baby stroller,' or a 'World War II Truck' that has been decorated as a World War II monument are vehicles.[185]

Based on these findings and others,[186] Krishnakumar contends that the "crucial question in statutory interpretation" is identifying "the relevant audience or 'ordinary reader' of the statute"—whether that reader is a nonexpert who tends to understand statutes according to their prototypical meaning, or the judge (a legal expert) who is more inclined to consider peripheral, legalist meanings.[187]

In answer, Krishnakumar proposes the development of a series of ex ante metarules "dictating that certain statutes, or certain categories of statutes or provisions, should be given their prototypical or expansive meaning."[188] In the case of criminal statutes—written uniquely with the ordinary reader in mind[189]—a court should default to prototypical meaning.[190] Under Krishnakumar's rule, the term "other self-propelled vehicle" in *McBoyle v. United States* would be interpreted to include cars and trucks, but not airplanes.[191] This would not depend on any prior finding of ambiguity nor would it be understood as a departure from best meaning. Narrow interpretation would simply be part of the interpretive approach that determines meaning in the first place.[192]

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184. *See* Krishnakumar, *supra* note 137, at 169–70 (citing Kevin P. Tobia, *Testing Ordinary Meaning*, 134 HARV. L. REV. 726, 766 & fig.5 (2020)).

185. *Id.* at 170 (citing Kevin P. Tobia, *Testing Ordinary Meaning*, 134 HARV. L. REV. 726, 766 & fig.5 (2020)).

186. Krishnakumar also points to her own research showing that, of the cases where members of the Roberts Court "dueled" over ordinary meaning, more than forty percent centered on disagreement about whether to focus on prototypical or legalist meaning. *See* Krishnakumar, *supra* note 18, at 963–64, 963 n.147.

187. Krishnakumar, *supra* note 137, at 170–71 (emphasis omitted).

188. *Id.* at 176.

189. *See* Louk, *supra* note 65.

190. *See* Krishnakumar, *supra* note 137, at 171 (contrasting "criminal statutes or statutes that deal with education, housing, or voting rights," with "statutes that govern cost-shifting among litigants, jurisdiction or other matters of court procedure, or remedies" that may be more appropriately interpreted with experts in mind).

191. *See* 283 U.S. 25, 25 (1931).

192. Krishnakumar argues that courts have shown themselves able to implement analogous rules in other areas of the law—for example "the canon calling for narrow interpretation of exemptions from federal taxation, the principle that veterans' benefits statutes should be liberally construed, the rule that ambiguities in criminal statutes should be construed in favor of the accused, and the rule that ambiguities in deportation statutes should be construed in favor of aliens." *See* Krishnakumar, *supra* note 137, at 172 n.21 (citations omitted).

Krishnakumar's proposal has obvious merit. First, because her analysis begins with the audience, her proposal significantly advances the value of fair notice. Aligning judicial interpretation of criminal statutes with nonexpert understanding would create a backdoor clear statement rule—eliminating the temptation to "stretch the law to fit the evil"[193] and matching the legal effect of a statute to its most intuitive meaning. This could motivate Congress to legislate with more specificity and discourage prosecutors from pursuing charges based on tenuous interpretations of law, thus fostering legal predictability and advancing the value of democratic accountability. Second, by providing a rule to resolve ambiguous terms without first having to label them as such, Krishnakumar's approach eliminates the indeterminacy of the ambiguity–clarity inquiry. Third, by incorporating narrow interpretation into the primary act of assigning meaning, it mitigates the marginalization of lenity that results from its relegation to tiebreaker status. Finally, Krishnakumar's metarule does not require judges to contradict a previously articulated best meaning. Rather, it incorporates the narrowing effect of lenity directly into the determination of that meaning.

However, Krishnakumar's proposal raises some difficult questions. Many of the tools she references, such as dictionaries and corpus linguistics, speak only to the meanings of individual words,[194] but relying on word-by-word definitions to construct broader meaning raises the problem of "textual gerrymandering."[195] Krishnakumar's approach also risks overshooting the mark by ignoring the possibility that surrounding context may point, in a way that would be understood even by an ordinary reader, to a broader interpretation of a given term. Default to prototypical meaning could also lead to decidedly non-defendant-friendly results; for example, should the terms in an *exception* within a criminal statute be construed broadly, or according to their narrowest, prototypical meaning?[196]

Even if the above questions could be answered, the main issue remains. The rule of lenity is not value-free, nor should it be; it is driven and legitimized by the

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

194. Corpus linguistics has come in for its share of criticism. *See generally* Donald L. Drakeman, *Is Corpus Linguistics Better than Flipping a Coin?*, 109 GEO. L.J. ONLINE 81 (2020) (questioning the accuracy of corpus linguistics databases and the reliability of its methodology); John S. Ehrett, *Against Corpus Linguistics*, 108 GEO. L.J. ONLINE 50 (2019) (questioning the flattening of historical authority, the potential bias of which materials are included in the database, and whether judges are competent to understand and responsibly deploy the method).

195. *See supra* note 162 and accompanying text.

196. One response to these questions would be to try and understand the prototypical meaning of the provision as a whole. In practice, this might resemble the "mischief rule," as recently described by Samuel Bray, under which a court would first identify the gap in the law that Congress was attempting to fill when it passed the statute, and then narrow the effect of the law accordingly. *See generally* Samuel L. Bray, *The Mischief Rule*, 109 GEO. L.J. 967 (2021). Although this might have a narrowing effect, the mischief rule is a legislator-focused rule of meaning (as opposed to lenity, which is audience-focused). Thus, although the mischief rule would prevent statutes from broadening over time—stretched to fit unforeseen circumstances—it does nothing to prevent (and indeed encourages) the consultation of interpretive tools that run counter to the value of fair notice or the adoption of legalistic meanings that would fall outside the understanding of an ordinary layperson.

"extraconstitutional value of fairness to the criminal defendant."[197] Attempting to smuggle lenity into the interpretive process under the guise of a facially neutral rule risks losing sight of its purpose. Professor Krishnakumar's proposal lacks precisely the characteristic that made Justice Kavanaugh's so appealing—the prospect of an "open[] and honest[]" consideration not just of lenity's effect but also its underlying values.[198]

IV. A UNIFIED RULE OF LENITY

A better rule of lenity would reform the modern approach in three ways: (1) eliminate the subjective-and-indeterminate ambiguity threshold; (2) avoid relegating the rule to tiebreaker status, incorporating it into the process of statutory interpretation rather than treating it as an easily avoided afterthought; and (3) openly embrace the underlying values that give lenity its purpose and legitimacy to encourage the development of the law and protect those values.

I propose collapsing the modern rule of lenity into a unified, values-forward principle of statutory interpretation: The best meaning of a criminal provision[199] is the most defendant-friendly interpretation the text will reasonably bear, such that an ordinary defendant would have fair notice of the illegality and potential consequences of their actions.

The unified approach would eliminate any abstract inquiry into ambiguity, avoiding a significant source of indeterminacy and (potential) bias.[200] It would advance the value of fair notice by centering the inquiry on the text itself, avoiding dependence on less accessible sources like legislative evidence. Also, by promoting lenity out of tiebreaker status, it would incorporate the rule into the primary act of interpretation so that its underlying values are not ignored or brushed aside.

The unified approach has several other advantages. Like Professor Krishnakumar's metarule, it would allow judges to consider the appropriate audience for a statute, only with far more precision. For example, over time courts might develop different standards for the interpretation of white-collar criminal

197. Barrett, *supra* note 3, at 177 & n.321.

198. *See supra* note 170 and accompanying text.

199. There is also a tradition of extending lenity to quasi-criminal civil cases, such as civil forfeitures. *See* Barrett, *supra* note 3, at 129 n.92 (citing cases). Justice Scalia has observed that limiting lenity to criminal statutes could lead to an absurd scenario where a defendant facing criminal charges and civil liability under a civil statute could be judged by two different standards in the same case. A full exploration of where the line between lenity and nonlenity should be drawn is beyond the scope of this Note, but the adoption of single-step lenity would require such a line.

200. One might object that the revised rule does nothing more than replace one subjective standard (the ambiguity threshold) with another (what the language will reasonably bear), equally prone to judicial manipulation. There is, of course, some truth to this. However, by tying the reasonableness standard to the value of fair notice (and therefore limiting the interpretive tools at the judge's disposal) the proposed rule would leave less room for interpretive shenanigans. Moreover, because the revised rule is built on an objective standard, any judicial determination of meaning would become empirically testable (and thus falsifiable)—for example, through surveys such as that conducted by Professor Farnsworth and his colleagues, see *supra* notes 101–08 and accompanying text.

statutes based on the expected sophistication of the law's subjects. The court would be free under the unified approach to consider the statute in context, accounting for the identity of the likely reader and recognizing any evidence suggesting that reader would understand the relevant provision more broadly. At first blush, the possibility of divergent standards for different statutes may appear to be a flaw in the unified approach—a recomplication of a purportedly simplified rule. But the purpose of the unified approach is not to simplify lenity; it is to reconnect the rule with the values that justify its existence. If the honest and open consideration of lenity's underlying values leads to a more nuanced approach to criminal law, that would at least demonstrate that those values are having an impact.

In addition, a unified approach to lenity would better achieve the instrumental goal of democratic accountability, pairing Congress's exclusive authority to criminalize conduct with the burden of doing so in a manner that is clear to its voters. A more faithful application of lenity could incentivize more precise drafting of criminal statutes—whether on the first attempt or later, when Congress is compelled to overrule a narrow interpretation with which it disagrees. Prosecutors—if aware exotic charging decisions will be rejected by courts—would have less incentive to bring the kind of cases that require lenity in the first place, leading to more predictable, legally consistent outcomes in the cases that do go to trial. The result would be a criminal code that is more transparent and honest, and in which charges and crimes are framed in a way the public can understand.

Finally, the revised rule would reunite and rebalance the faithful agency and forbearance prongs of legislative supremacy—limiting the court to reasonable interpretations of the text, while at the same time mandating an explicitly defendant-friendly lens.[201] As the branch of government best positioned to push back against legislative (and prosecutorial) encroachments into constitutional gray areas, the judicial branch has the duty and the authority to provide the protection the political branches cannot. However, this authority would be limited. Congress would retain authority to overrule the courts on matters of statutory interpretation—a power it has shown itself capable of putting to use.[202] Congress could also take more direct action. Although it is unclear whether Congress has the power to pass a law to overrule lenity itself (or whether courts would follow such a law),[203]

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201. As discussed above, this balance does not require that lenity account for Congress's general hostility to strict construction. *See supra* notes 47–55 and accompanying text; *see also* William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1127 (2017) ("The rule of lenity . . . isn't an empirical claim that a particular Congress meant to express solicitude for criminal defendants.").

202. Indeed, Congress's ability to reassert its prerogative and overrule courts on matters of statutory interpretation is fundamental to Justice Barrett's justification of substantive canons. *See supra* note 27 and accompanying text.

203. *See* Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1824–26 (2010) (documenting the "power struggle" between state legislatures that have attempted to overrule the rule of lenity and state

legislators can certainly include language in a given statute instructing courts to construe its terms broadly.[204] Such language could significantly limit the range of reasonable meanings in a particular case.

Would a revised rule of lenity help remedy overcriminalization? The answer is difficult to know. One could imagine Congress responding to a judicial outbreak of strict construction by simply passing a rash of more specific, severe criminal statutes. In this case, a more robust lenity could actually harm the liberty interests of defendants and contribute to further overcriminalization. So be it. Properly understood, lenity does not rise or fall on policy outcomes. Rather, a unified, values-forward lenity would ensure that whatever steps are taken by Congress are taken deliberately and with transparency. It would then be up to the voters—the ultimate source of the government's power—to respond.

CONCLUSION

Justice Kavanaugh, in the pages of the *Harvard Law Review*, wrote that "[f]or me, one overarching goal is to make judging a neutral, impartial process in all cases—not just statutory interpretation cases."[205] But of course, neutrality is not the overarching goal of interpretation; it is a means to an end. The goal of adjudication is to create a legal system that effectuates justice, serves the values of our constitutional order, and maintains and deserves the respect and faith of the public.

Substantive canons play a critical role in achieving that grand purpose. They ensure that our principal values are not lost amidst the day-to-day tussles of legal disputes. The value and legitimacy of substantive canons are an outgrowth of the fundamental values they protect, and therefore depend on their effectiveness in protecting those values. The rule of lenity is no different. Since the earliest days of the republic, lenity has been invoked by American courts to protect the constitutional values of legislative supremacy and fair notice in criminal law. In the name of those values, it explicitly places a thumb on the scale in favor of a substantive outcome.

But lenity cannot be effective—or legitimate—if it is divorced from its underlying values. Lenity deserves a more "open and honest" role in criminal jurisprudence. Courts should embrace the underlying values of lenity as an integral part of the interpretive process—not a rule applied only in the absence of best meaning, but an essential aspect of determining that meaning in the first place.

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courts that have pushed back). Congress did consider legislation to bar "strict construction" in 1977 and 1979, but it did not enact the proposals. *See* Kahan, *supra* note 47, at 382–83.

204. Consider, for example, the Racketeer Influenced and Corrupt Organizations Act (RICO), which specifically instructs that "[t]he provisions of this [law] shall be liberally construed to effectuate its remedial purposes." Pub. L. No. 91-452, § 904(a), 84 Stat. 922, 947 (1970).

205. *See* Kavanaugh, *supra* note 101, at 2120.