RESTORING THE HISTORICAL RULE OF LENITY AS A CANON

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In criminal law, the venerated rule of lenity has been frequently, if not consistently, invoked as a canon of interpretation. Where criminal statutes are ambiguous, the rule of lenity generally posits that courts should interpret them narrowly, in favor of the defendant. But the rule is not always reliably used, and questions remain about its application. In this article, I will try to determine how the rule of lenity should apply and whether it should be given the status of a canon.

First, I argue that federal courts should apply the historical rule of lenity (also known as the rule of strict construction of penal statutes) that applied prior to the 1970s, when the Supreme Court significantly weakened the rule. The historical rule requires a judge to consult the text, linguistic canons, and the structure of the statute and then, if reasonable doubts remain, interpret the statute in the defendant's favor. Conceived this way, the historical rule cuts off statutory purpose and legislative history from the analysis, and places a thumb on the scale in favor of interpreting statutory ambiguities narrowly in relation to the severity of the punishment that a statute imposes. As compared to the modern version of the rule of lenity, the historical rule of strict construction better advances democratic accountability, protects individual liberty, furthers the due process principle of fair warning, and aligns with the modified version of textualism practiced by much of the federal judiciary today.

Second, I argue that the historical rule of lenity should be deemed an interpretive canon and given stare decisis effect by all federal courts. If courts consistently applied historical lenity, it would require more clarity from Congress and less guessing from courts, and it would ameliorate some of the worst excesses of the federal criminal justice system, such as overcriminalization and overincarceration.

 This Article greatly benefited from the wise counsel of Jeffrey Bellin, Steven H. Goldblatt, Carissa Byrne Hessick, Victoria F. Nourse, Paul J. Larkin, Jr., and Margo Rusconi. I would like to thank the next legal superstar, Nicholas Mecsas-Faxon, for his invaluable and excellent research assistance and editorial guidance on this Article. I would also like to thank the *New York University Law Review* editors, who made this Article many times better. Lastly, no amount of writing happens at my house with two young children without the sacrifice of my wife (and now attorney) Ann Marie Hopwood.

Introduction

A well-worn debate between textualism and purposivism has dominated the literature on statutory construction for decades.[1] From

[1] *See, e.g.*, William N. Eskridge Jr., Interpreting Law: A Primer on How to Read Statutes and the Constitution 2–31 (2016); 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 (2018) (observing the long-running debate about textualism versus purposivism); David S. Louk, *The Audiences of Statutes*, 105

the silt of that contentious debate, the federal judiciary has largely settled on a middle-ground approach. Judges seeking to interpret a law will look first to the statutory text and try to surmise its meaning by drawing on dictionary definitions, caselaw, and linguistic canons of construction; if the meaning remains unclear, judges consider the law's general purpose and legislative history; and finally, in a criminal case, if ambiguity remains after all other tools have been exhausted, judges may apply the rule of lenity and give the defendant the benefit of the doubt as to the statute's meaning. But this middle-ground form of textualism[2] has by no means quieted scholarly debate about the appropriate methods and priorities of statutory interpretation. It has merely changed its focus.[3]

Much of the focus in scholarship on statutory interpretation has shifted to the proper use of individual rules and canons of interpretation. As Abbe R. Gluck and Judge Richard Posner have noted, "canons are back at the forefront of academic attention."[4] In this Article, I make two contributions to this discussion, both concerning the rule of lenity, which posits that ambiguous criminal statutes must be construed narrowly to favor criminal defendants. First, this Article answers a question asked by Justice Brett Kavanaugh about how the rule of lenity should be applied.[5] Federal courts should apply the historical rule of lenity—also known as the "rule of strict construction of penal statutes"—that applied prior to the 1970s, when the Supreme

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CORNELL L. REV. 137, 148 (2019) (noting that the "debates about textualism and purposivism . . . have often dominated (and sometimes exhausted) the field" of interpretation).

[2] *See* Abbe R. Gluck, *Justice Scalia's Unfinished Business in Statutory Interpretation: Where Textualism's Formalism Gave Up*, 92 NOTRE DAME L. REV. 2053, 2058 (2017) ("All sides have significantly moderated and largely have converged on a middle-ground, text-focused position that, for most practitioners and judges . . . includes recourse to broader context, including, in disciplined fashion . . . legislative materials.").

[3] In this Article, I set aside the larger jurisprudential debates about statutory interpretation theory. Instead, I focus on how judges currently use canons of construction as a doctrinal matter in a new landscape where modified and moderated textualism appears to be practiced by much of the federal bench. *See* Gluck & Posner, *supra* note 1, at 1300–01 ("[T]he Court and many academics have been mired for decades in a by-now boring debate about 'textualism' versus 'purposivism.' That debate, while ostensibly about the judge's relationship to Congress and its work, has centered in practice on little more than the most appropriate evidentiary tools of interpretation . . . .").

[4] Gluck & Posner, *supra* note 1, at 1322.

[5] Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2145 n.136 (2016) (reviewing ROBERT A. KATZMANN, JUDGING STATUTES (2014)) ("I do not have a firm idea about how to handle the rule of lenity."). *But see* Shular v. United States, 140 S. Ct. 779, 789 (2020) (Kavanaugh, J., concurring) ("[T]he rule of lenity applies when a court employs all of the traditional tools of statutory interpretation and, after doing so, concludes that the statute still remains grievously ambiguous, meaning that the court can make no more than a guess as to what the statute means.").

Court considerably weakened the rule. Second, this Article argues that the historical rule should be deemed an interpretive "canon" and given stare decisis effect.

As I have detailed elsewhere, the Supreme Court's current rule of lenity diverges significantly from historical practice.[6] The current rule only applies after a court has canvassed every possible interpretive rule or shred of evidence for congressional intent and, even then, only in cases in which that multitude of evidence leaves "grievous ambiguity" about the statute's meaning.[7] As a result, the canon rarely applies because judges have a nearly endless set of interpretive tools to resolve ambiguity. At best, the current rule is a makeweight, invoked after the judge has already decided on the best reading of a criminal statute—similar to Justice Elena Kagan's description of legislative history as "extra icing on a cake already frosted."[8] At its worst, the invocation of lenity provides only atmospherics; it neither decides cases nor protects defendants from convictions and long prison sentences when a statute is unclear.

The historical rule of lenity, or the rule of strict construction of penal statutes, functions differently. It resolves the ordering problem by requiring a judge to consult the text, linguistic canons, and the structure of the statute, and then, if reasonable doubts remain, interpret the statute in the defendant's favor. Unlike the modern rule, the historical rule cuts off statutory purpose and legislative history from the analysis. The historical rule also places a thumb on the scale in favor of interpreting statutory ambiguities narrowly vis-à-vis the severity of the punishment that a statute imposes. As compared to the modern version of the rule of lenity, the historical rule of strict construction better advances democratic accountability, protects individual liberty, furthers the due process principle of fair warning, and aligns with the modified version of textualism practiced by much of the federal judiciary today.

Applying the historical rule of lenity is of more than academic importance; it has significant human impact. In 1993, the Supreme Court issued a decision in *Deal v. United States*[9] interpreting a statute that prohibits using or carrying a firearm during a crime of violence or a drug crime. Deal had committed multiple robberies while using a gun and faced six charges under 18 U.S.C. § 924(c) for using a firearm

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[6] *See* Shon Hopwood, *Clarity in Criminal Law*, 54 AM. CRIM. L. REV. 695, 720 (2017) (explaining that the current rule of lenity is a "significant erosion" of past practices).

[7] Abramski v. United States, 573 U.S. 169, 188 n.10 (2014) (quoting Maracich v. Spears, 570 U.S. 48, 76 (2013)).

[8] Yates v. United States, 574 U.S. 528, 557 (2015) (Kagan, J., dissenting).

[9] 508 U.S. 129 (1993).

during a crime of violence.[10] Under the statute, each "second or subsequent conviction" imposed a twenty-year mandatory minimum sentence; the sentences would run consecutively to each other and to a five-year sentence for the first offense.[11] This provision triggered a 105-year prison sentence for Deal.[12] Lower courts had noted that the statute was "not a model of clarity" and that it was ambiguous whether it was meant to penalize a first-time offender who commits multiple violations over the course of several offenses or only a second-time offender who commits a violation after having previously been convicted and sentenced under the provision.[13]

Justice Scalia, writing for the Court, acknowledged that the term "conviction" in § 924(c) was susceptible to multiple meanings.[14] Yet he interpreted the statute in favor of the prosecution and concluded that the requisite "second or subsequent conviction" could occur in the same prosecution.[15] The Court thus construed § 924(c) in favor of the government,[16] even though the statute was unclear and imposed long sentences.[17] This single interpretive misstep caused many defendants to receive draconian sentences for stacked § 924(c) convictions.[18] For example, Adam Clausen received a 213-year sentence for

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[10] *Id.* at 130.

[11] 18 U.S.C. § 924(c)(1) (1988).

[12] *Deal*, 508 U.S. at 137.

[13] United States v. Godwin, 758 F. Supp. 281, 283 (E.D. Pa. 1991) (declining to impose a twenty-year sentence on a first-time offender who pled guilty to two violations under 18 U.S.C. § 924(c)(1), noting the ambiguity of the statute); *see also* Rachel E. Moore, *Giving It Another Shot: A Reexamination of the "Second or Subsequent Conviction" Language of the Firearm Possession Sentencing Statute*, 64 VAND. L. REV. 1005, 1011–16 (2011) (describing a circuit split on the question of whether the twenty-year mandatory minimum applied to first-time offenders with multiple violations).

[14] *Deal*, 508 U.S. at 131.

[15] *Id.* at 131–32.

[16] *Id.* at 135 ("[I]t cannot possibly be said that it requires a criminal act after the first conviction. What it requires is a *conviction* after the first conviction. There is utterly no ambiguity in that, and hence no occasion to invoke the rule of lenity.").

[17] *See* Hopwood, *supra* note 6, at 740–41.

[18] In 2016 alone, 156 people received multiple and stacked § 924(c) convictions. U.S. SENTENCING COMM'N, MANDATORY MINIMUM PENALTIES FOR FIREARMS OFFENSES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 19 (2018); *see also* Paul Cassell, *How Mandatory Minimum Reform Will Work with "Stacked" Charges*, REASON: VOLOKH CONSPIRACY (Nov. 19, 2018, 10:32 AM), https://reason.com/2018/11/19/how-mandatory-minimum-reform-will-work-w (lamenting that the author, as a federal judge, was obliged to impose excessively harsh punishments on first-time offenders, noting that "a single episode of criminal behavior could earn a defendant 55 years (or more) of stacked up federal prison time, even when virtually no one thought that such a sentence was appropriate"); Jason Pye, *"Unjust, Cruel, and Even Irrational": Stacking Charges Under 924(c)*, FREEDOMWORKS (Jan. 29, 2018), https://www.freedomworks.org/content/%E2%80%9Cunjust-cruel-and-even-irrational%E2%80%9D-stacking-charges-under-924c (describing congressional attempts to prevent the stacking of charges under § 924(c)).

using firearms during nine robberies in which no one was physically harmed,[19] and Weldon Angelos received a fifty-five-year sentence for carrying a firearm while he made three small sales of marijuana.[20] Twenty-five years later, Congress finally overrode the Supreme Court's interpretation with the First Step Act of 2018.[21] Had the Court properly applied the rule of strict construction, § 924(c) would have been construed more narrowly, and scores of people would not have received unspeakably harsh sentences.[22]

The rule of lenity should also be recognized as an interpretive "canon," which means that it would apply to all cases of statutory ambiguity in federal criminal law and be given stare decisis effect in lower courts. There is some disagreement about which of the current interpretive rules should receive the special status of "canon."[23] Anita Krishnakumar and Victoria Nourse have provided several factors to determine whether a particular interpretive rule deserves canon status, including frequency of invocation, longevity, justification, and whether the Supreme Court has declared it to be generally applicable.[24] Justice Kavanaugh, in an article authored while a judge on the D.C. Circuit, was skeptical of the judiciary's overdependence on canons of construction that could increase, rather than decrease, the consistency and predictability of statutory interpretation.[25] By any of

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[19] Hopwood, *supra* note 6, at 707.

[20] *See* United States v. Angelos, 345 F. Supp. 2d 1227, 1230–31 (D. Utah 2004), *aff'd*, 433 F.3d 738 (10th Cir. 2006).

[21] *See* First Step Act of 2018, Pub. L. No. 115-391, sec. 403, 132 Stat. 5194, 5221–22 (2018) (replacing "second or subsequent conviction under this subsection" with "violation of this subsection that occurs after a prior conviction under this subsection has become final"). The First Step Act reduced the penalties of several federal sentencing provisions and provided a new earned time provision for those in federal prison who successfully complete rehabilitation programs. *See id.* sec. 401 (reducing mandatory penalties under the Controlled Substances Act and Controlled Substances Import and Export Act from twenty to fifteen years); *id.* sec. 101, § 3632(d)(4) (providing earned time credits for prisoners who complete recidivism reduction programming).

[22] *See* Hopwood, *supra* note 6, at 740–41.

[23] *See* Anita S. Krishnakumar & Victoria F. Nourse, *The Canon Wars*, 97 TEX. L. REV. 163 (2018) (describing divergences between two different volumes on canonical interpretations); *see also* Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109 (2010) (arguing that substantive canons are reconcilable with the faithful agency model of judging only to the extent that they advance values expressed in the Constitution and respect the outer limits of statutory language).

[24] Krishnakumar & Nourse, *supra* note 23, at 179–90.

[25] Kavanaugh, *supra* note 5, at 2135–44 (arguing against the application of canons which require a threshold finding of ambiguity, noting that the indeterminacy of the clear/ambiguous determination leads to unpredictable outcomes). *See generally* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989) ("Rudimentary justice requires that those subject to the laws must have the means of knowing what it prescribes. . . . Predictability . . . is a needful characteristic of any law worthy of the name."); Adrian Vermeule, *Interpretive Choice*, 75 N.Y.U. L. REV. 74, 145 (2000) ("[T]he

these measures, the rule of lenity deserves the special status of an interpretive "canon."

This Article proceeds in four parts. Part I describes the current rule of lenity and contrasts it with the historical rule. Part II explains that the historical rule of lenity is normatively superior to the current version because it better advances democratic accountability, protects individual liberty, furthers the due process principle of fair warning, and aligns with the modified version of textualism. Part III argues that the Supreme Court should treat the historical rule of lenity as a canon, applying it to all cases of statutory ambiguity and giving it stare decisis effect in lower courts. Part IV concludes by suggesting that a stricter rule of lenity would help to resolve some of the most vexing questions that arise in interpreting federal criminal statutes.

I
The Historical Rule of Lenity Differs Substantially from the Supreme Court's Present-Day Rule of Lenity

The modern-day rule of lenity derives from a historical rule of interpretation known as the "strict construction of penal statutes," which I will refer to as the rule of strict construction or the historical rule of lenity. As I have explained elsewhere, the historical rule of lenity functioned differently and better safeguarded a defendant's liberty and the separation of powers than the Supreme Court's current, weakened version.[26]

A. The History of the Rule of Lenity in Early American Courts

The historical rule of lenity derives from an even earlier doctrine called the benefit of clergy—a doctrine of leniency that originated in thirteenth-century England, where the death penalty was imposed for many, even non-violent, crimes.[27] Courts developed the "benefit of clergy" doctrine to spare those charged with trivial offenses from capital punishment. Under the doctrine, the judge would ask a defendant to recite a few verses from the Bible.[28] If the defendant did so successfully, his case would be transferred to an ecclesiastic jurisdiction, where he would be sentenced to one year in prison instead of execu-

maxims and techniques of interpretive choice should push judges toward applying a small, cheap, relatively stable, and inflexible set of interpretive sources and doctrines in a rule-bound (formalist) way.").

[26] Hopwood, *supra* note 6, at 738–42.

[27] *Id.* at 714.

[28] *Id.*

tion.[29] The benefit of clergy doctrine allowed courts to mitigate what they viewed as overly punitive sanctions.[30]

During the reign of Henry VIII, who executed thousands of his subjects, Parliament passed numerous statutes that excluded the benefit of clergy.[31] To compensate, courts—unwilling to see pickpockets hung—created the rule of strict construction.[32]

The rule of strict construction crossed the Atlantic into American statutory interpretation and was first acknowledged by the Supreme Court in a 1795 opinion.[33] The Marshall Court, however, was the first to meaningfully discuss it, in *United States v. Wiltberger*,[34] which addressed the scope of Sections 8 and 12 of the Crimes Act of 1790. Section 8 established the death penalty for certain felonies committed "upon the high seas, or in any river, haven, basin or bay, out of the jurisdiction of any particular state."[35] Section 12, enacted later, mandated a sentence of up to three years for manslaughter committed on the "high seas."[36] The government charged Wiltberger with committing manslaughter on the river Tigris, raising the question of whether the river was included in "the high seas" within the meaning of Section 12.[37]

Writing for the Court, Chief Justice John Marshall acknowledged that Congress may not have intended to create a loophole for manslaughter by limiting the Court's jurisdiction over it to only the "high

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[29] *Id.*; *see also* Mullaney v. Wilbur, 421 U.S. 684, 692 (1975).

[30] Hopwood, *supra* note 6, at 714.

[31] Livingston Hall, *Strict or Liberal Construction of Penal Statutes*, 48 HARV. L. REV. 748, 749 (1935) (describing that principals and accessories before the fact were excluded from the benefit of the clergy in a number of serious felonies).

[32] *See id.* at 750 ("It was against this background of unmitigated severity in serious crimes that the doctrine of strict construction emerged."); John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 198 & n.23 (1985) ("Faced with a vast and irrational proliferation of capital offenses, judges invented strict construction to stem the march to the gallows. Sometimes aptly called the rule of lenity, strict construction was literally 'in favorem vitae'—part of a 'veritable conspiracy for administrative nullification' of capital penalization." (quoting Hall, *supra* note 31, at 751)); Paul J. Larkin, Jr., *Oversized Frauds, Undersized Fish, and Deconstruction of the Sarbanes-Oxley Act*, 103 GEO. L.J. ONLINE 17, 20 n.24 (2014) ("The king could commute a sentence, but Henry VIII is reputed to have executed 72,000 subjects . . . so any gathering of his clemency recipients would have fit into a Mini Cooper.").

[33] *See* United States v. Lawrence, 3 U.S. (3 Dall.) 42, 45 (1795) ("[W]henever a new remedy is so introduced, (more especially in a case so highly penal) it must be strictly pursued."). The earliest case invoking lenity appears to be 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.").

[34] 18 U.S. (5 Wheat.) 76 (1820).

[35] Crimes Act of 1790, ch. 9, § 8, 1 Stat. 112, 113–14 (1790).

[36] *Wiltberger*, 18 U.S. at 93–94.

[37] *See id.* at 77, 84.

seas."[38] But, applying the rule of strict construction of penal statutes, he refused to fix the statute by "engrafting" the language from Section 8—in which the Court's jurisdiction extended to "any river, haven, basin or bay, out of the jurisdiction of any particular state"—onto Section 12.[39] Marshall also argued that legislative intent should not be consulted in a case, such as this one, in which the "plain meaning of words" leaves "no ambiguity."[40] He warned that it was "dangerous" to add extratextual elements to a statute simply because the conduct "is of equal atrocity, or of kindred character, with those [crimes] which are enumerated."[41] Chief Justice Marshall explained that the rule of strict construction prevented courts from creating common law crimes and described it as being "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."[42] As a result, the Court held that it did not have jurisdiction over Wiltberger's manslaughter charge.[43]

Following *Wiltberger*, the Supreme Court continued to apply the rule of strict construction, holding that a criminal statute could not be interpreted to extend "beyond the plain meaning of its words"[44] and that a statute's intention "must be gathered from the words."[45] By the end of the nineteenth century, treatise writers had settled on an understanding of how the rule would apply. The rule reflected a strong preference for individual liberty and against excessive punishments, and it protected these values by narrowly construing a statute anytime the "plain meaning" of the statutory language was "reason-

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[38] *Id.* at 99.

[39] *Id.* at 94, 99, 105.

[40] *Id.* at 95–96 ("The case must be a strong one indeed, which would justify a Court in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves did not suggest.").

[41] *Id.* at 96.

[42] *Id.* at 95 ("It is the legislature, not the Court, which is to define a crime, and ordain its punishment."); *see also, e.g.*, Rogers v. Tennessee, 532 U.S. 451, 476 (2001) (Scalia, J., dissenting) (stating that "the notion of a common-law crime is utterly anathema today"); United States v. Bass, 404 U.S. 336, 348 (1971) ("[L]egislatures and not courts should define criminal activity."). The rule traces its lineage to an earlier Marshall Court decision, United States v. Hudson, 11 U.S. (7 Cranch) 32, 34 (1812) (holding that, in order for the federal courts to exercise criminal jurisdiction, "[t]he legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence").

[43] *Wiltberger*, 18 U.S. at 105–06.

[44] United States v. Morris, 39 U.S. (14 Pet.) 464, 475 (1840).

[45] United States v. Hartwell, 73 U.S. 385, 396 (1867).

ably open to question," especially in cases where the punishment was particularly harsh.[46] In the words of Joel Prentiss Bishop:

> [S]tatutes which subject one to a punishment or penalty, or to forfeiture, or a summary process calculated to take away his opportunity of making a full defen[s]e, or in any way deprive him of his liberty, are to be construed strictly. And the degree of strictness will depend somewhat on the severity of the punishment they inflict.[47]

J.G. Sutherland further explained that the rule of strict construction prohibited courts from interpreting otherwise clear statutes with reference to the legislature's purpose for enacting them.[48] But unlike the English benefit-of-clergy rule, the American rule of strict construction was thought to be consistent with legislative intent on the view that a legislature "does not intend the infliction of punishment, or to interfere with the liberty or rights of the citizen," except where it "express[es] itself clearly."[49]

The rule of strict construction typically applied as follows. First, a court would consult the statutory text, linguistic canons, and structure. Then, if there was a reasonable doubt[50] about the statute's meaning

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[46] *See* J.G. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 349–50, at 438–41 (1891) (noting that the rule of strict construction mandates that "every provision affecting any element of a criminal offense involving life or liberty is subject to the strictest interpretation," and that "this consideration presses with increasing weight according to the severity of the penalty").

[47] JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF STATUTORY CRIMES; INCLUDING THE WRITTEN LAWS AND THEIR INTERPRETATION IN GENERAL. WHAT IS SPECIAL TO THE CRIMINAL LAW, AND THE SPECIFIC STATUTORY OFFENCES AS TO BOTH LAW AND PROCEDURE § 193, at 186 (2d ed. 1883); *see also id.* § 196, at 189 ("While the parts of a penal statute which subject to punishment or a penalty are, from their odious nature, to be construed strictly, those which exempt from penal consequences will, because of their opposite character, receive a liberal interpretation.").

[48] *See* SUTHERLAND, *supra* note 46, § 350, at 439–40 ("Although a case may be within the mischief intended to be remedied by a penal act, that fact affords no sufficient reason for construing it so as to extend it to cases not within the correct and ordinary meaning of its language.").

[49] *Id.*; *see also* BISHOP, *supra* note 47, § 189(c), at 179 ("It being a primary function of all laws to maintain the rights of individuals and the public, statutes taking any of them away, even where not unconstitutional, are to be strictly construed.").

[50] *See, e.g.*, *Hartwell*, 73 U.S. at 396 (noting that whether an action violates a statute must be based on the statute's words, and that "they must be such as to leave no room for a reasonable doubt upon the subject"); Harrison v. Vose, 50 U.S. (9 How.) 372, 378 (1850) ("In the construction of a penal statute, it is well settled . . . that all reasonable doubts concerning its meaning ought to operate in favor of the [defendant]."); *see also* BISHOP, *supra* note 47, § 218, at 205 ("If, in a criminal case requiring the strict construction of a statute, the court entertains a reasonable doubt of its meaning, this doubt will prevail in favor of the accused."); SUTHERLAND, *supra* note 46, § 348, at 437–38 n.6 ("[W]e are thus far bound to a strict construction in a penal statute, that if there be a fair and reasonable doubt, we must act as in revenue cases, where the rule is, that the subject is not to be taxed without clear words for that purpose." (quoting Nicholson v. Fields (1862) 158 Eng. Rep. 695, 699; 7 H. & N. 810, 817 (Pollock, C.B.))).

and ambiguity remained about what Congress intended, the court would construe it in favor of the defendant.[51] Stated differently, a court would not contemplate the likely purpose of the statute or its legislative history[52] in resolving ambiguity.[53] Courts would also apply a thumb on the scale in favor of a narrow interpretation if the punishment was more severe.[54] In cases where the punishment was great, lenity would require a closer "degree of strictness" from Congress.[55]

B. The Supreme Court's Current Approach to the Rule of Lenity

At least in name, the rule of strict construction lasted until 1943, when Justice Felix Frankfurter rebranded it as the "rule of lenity" and changed it into the rule that the Supreme Court (along with many lower courts) employs today. Writing for the majority in *Callanan v. United States*, Frankfurter asserted that the rule of lenity should only come "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."[56] He suggested that the his-

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[51] *See, e.g.*, Erbaugh v. United States, 173 F. 433, 435 (8th Cir. 1909) ("[T]he punishment [the penal statute] prescribes is severe, and a penal statute which creates and denounces a new offense should be strictly construed. . . . [O]ne who was not beyond reasonable doubt within the class . . . may not be brought within that class after the event by interpretation."); *see also* BISHOP, *supra* note 47, § 194, at 187 ("Such statutes are to reach no further in meaning than their words; no person is to be made subject to them by implication, and all doubts concerning their interpretation are to preponderate in favor of the accused."); SUTHERLAND, *supra* note 46, § 353, at 443–44 ("[I]f there is such an ambiguity in a penal statute as to leave reasonable doubts of its meaning, it is the duty of a court not to inflict the penalty.").

[52] To be clear, there was no mention of legislative history likely because it was "not widely used prior to the twentieth century." Note, *Why Learned Hand Would Never Consult Legislative History Today*, 105 HARV. L. REV. 1005, 1008 (1992).

[53] *See, e.g.*, United States v. Sheldon, 15 U.S. (2 Wheat.) 119, 121 (1817) (concluding that penal laws should not be expansively construed to cover cases outside those reached by the ordinary meaning of the language); The Ben R., 134 F. 784, 786 (6th Cir. 1904) (stating that penal statutes cannot be extended beyond their plain meaning); *see also* BISHOP, *supra* note 47, § 194, at 187 (explaining that strict interpretation requires reading statutes to only cover acts "which are within *both their spirit and their letter*" (emphasis added)); SUTHERLAND, *supra* note 46, § 350, at 439–40 ("[A penal statute] cannot be made to embrace cases not within the letter, though within the reason and policy, of the law.").

[54] *See* BISHOP, *supra* note 47, § 193, at 185–87 (noting that because lenity's purpose was to limit excessive punishments, the "degree of strictness" a court employed would "depend somewhat on the severity of the punishment" that a statute inflicted); SUTHERLAND, *supra* note 46, § 347, at 436 ("The construction will be more or less strict according to . . . the severity of the penalty . . . ."); *see also* Randolph v. State, 9 Tex. 521, 523 (1853) (noting that misdemeanor statutes need not be constructed as strictly as statutes that permit more severe punishment); Commonwealth v. Fisher, 17 Mass. 46, 49 (1820) (construing the same language in one statute less strictly than the court had with another statute because the penalty in one statute did not include the possibility of death).

[55] *See supra* note 54 and accompanying text.

[56] 364 U.S. 587, 596 (1961).

torical version of strict construction was antithetical to legislative supremacy; interpreting laws in such a way as to protect defendants from too-harsh punishment was "not the function of the judiciary."[57] But the rule of lenity that Frankfurter described was not the rule applied in American courts; his description more accurately referred to the English rule in which strict construction or benefit-of-clergy applied as "an overriding consideration of being lenient to wrongdoers" and sometimes led to narrowing even unambiguous criminal laws.[58] The American rule of strict construction, by contrast, posed no problem to legislative supremacy because it only came into play if, after an examination of statutory text and structure, ambiguity remained.[59]

In the years since Justice Frankfurter modified the rule of lenity, the Court has inconsistently applied and further weakened the rule. Some Justices apply lenity if a "reasonable doubt" remains about the meaning of a statute,[60] while others apply it only when there is "grievous ambiguity"[61] or "when the equipoise of competing reasons cannot otherwise be resolved."[62] These various formulations seem to match with familiar standards of proof, such as reasonable doubt, clear and convincing evidence, and a preponderance of the evidence. Relatedly, the Court has also been inconsistent about when courts should invoke the rule of lenity. In most cases, the Court has said that lenity only applies "after 'seiz[ing] every thing from which aid can be derived'"[63] in resolving ambiguity, including text, "'structure, legislative history, and motivating policies' of the statute."[64] On the other hand, some justices have argued, typically in dissent, that lenity should apply before resort to statutory purpose or legislative history.[65] As

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[57] *Id.*

[58] *See* Hopwood, *supra* note 6, at 718 (quoting *Callanan*, 364 U.S. at 596).

[59] *Id.*

[60] *See, e.g.*, Abramski v. United States, 573 U.S. 169, 204 (2014) (Scalia, J., dissenting) (quoting Moskal v. United States, 498 U.S. 103, 108 (1990) (Marshall, J.)).

[61] *See, e.g.*, Chapman v. United States, 500 U.S. 453, 463 (1991) (quoting Huddleston v. United States, 415 U.S. 814, 831 (1974)); *Abramski*, 573 U.S. at 188 n.10 (quoting Maracich v. Spears, 570 U.S. 48, 76 (2013)).

[62] *See, e.g.*, Johnson v. United States, 529 U.S. 694, 713 n.13 (2000) (Souter, J.) (posing the "equipoise of competing reasons" threshold but finding that it had not been met in the particular case).

[63] *See, e.g.*, United States v. Bass, 404 U.S. 336, 347 (1971) (quoting United States v. Fisher, 6 U.S. (2 Cranch) 358, 386 (1805) (alteration in original)).

[64] *Moskal*, 498 U.S. at 108 (quoting Bifulco v. United States, 447 U.S. 381, 387 (1980)).

[65] *See, e.g.*, United States v. Hayes, 555 U.S. 415, 436–37 (2009) (Roberts, C.J., dissenting) (arguing that lenity, rather than legislative history, should have applied); *Moskal*, 498 U.S. at 132 (Scalia, J., dissenting) ("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 . . . .").

Intisar Rabb has noted, this "canon drift"—a shift in the doctrine of a canon—has long characterized lenity jurisprudence.[66]

The Court's decision in *United States v. Santos*[67] illustrates the inconsistent application of lenity. The Court addressed whether "proceeds" in the federal money laundering statute included only transactions involving criminal profits or also those involving criminal receipts.[68] Justice Antonin Scalia applied the rule of lenity from the outset of his plurality opinion and noted that lenity "vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed."[69] "From the face of the statute," Justice Scalia said, there were doubts as to what Congress intended by the word "proceeds."[70] He rejected what he referred to as "the impulse to speculate regarding a dubious congressional intent," and instead insisted that the Court "interpret ambiguous criminal statutes in favor of defendants, not prosecutors."[71] Justice John Paul Stevens, concurring only in the judgment, disagreed with this analysis and would have looked to legislative history before the rule of lenity.[72] Justice Samuel Alito, joined by Chief Justice John Roberts and Justices Anthony Kennedy and Stephen Breyer, argued in dissent that statutory context and purpose removed all ambiguity and thus the rule of lenity did not apply.[73]

Despite *Santos*, where the plurality applied something closer to strict construction, the current Supreme Court has largely applied the weaker version of lenity. It uses the rule of lenity only "after seizing everything from which aid can be derived,"[74] including a statute's text, structure, purpose, and legislative history, and even then only if "grievous ambiguity" (rather than "reasonable doubt") remains.[75] And, in practice, modern lenity has been applied to all penal statutes

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66 Intisar A. Rabb, *The Appellate Rule of Lenity*, 131 HARV. L. REV. F. 179, 193 (2018).

67 553 U.S. 507 (2008).

68 *Id.* at 514.

69 *Id.*

70 *Id.*

71 *Id.* at 515, 519.

72 *See id.* at 528 (Stevens, J., concurring) (applying the rule of lenity only after concluding that the legislative history was unclear).

73 *Id.* at 531 (Alito, J., dissenting).

74 Ocasio v. United States, 136 S. Ct. 1423, 1434 n.8 (2016). Prior to *Santos* the Court applied the weakened version of lenity with regularity. *See, e.g.*, Muscarello v. United States, 524 U.S. 125, 138 (1998); Smith v. United States, 508 U.S. 223, 239 (1993); Moskal v. United States, 498 U.S. 103, 108 (1990); Callanan v. United States, 364 U.S. 587, 596 (1961).

75 *See, e.g.*, *Ocasio*, 136 S. Ct. at 1434 n.8; Salman v. United States, 137 S. Ct. 420, 429 (2016) (quoting Barber v. Thomas, 560 U.S. 474, 492 (2010)); Shaw v. United States, 137 S. Ct. 462, 469 (2016) (quoting *Muscarello*, 524 U.S. at 138–39).

the same way regardless of their sentencing consequences.[76] In *Deal*, for instance, Justice Scalia acknowledged that the term "conviction" has multiple meanings—but found that in the context of 18 U.S.C. § 924(c) the meaning of "conviction" was clear and interpreted the statute in favor of the prosecution.[77] He did so even though the statute, so interpreted, resulted in the defendant being sentenced to 105 years in prison.[78]

The Supreme Court's current version of lenity is significantly weaker than the historical rule of strict construction. With the court required to exhaust every other interpretive resource before applying it, lenity plays almost no role in deciding cases of statutory ambiguity. As Dan Kahan has remarked, "if lenity invariably comes in 'last,' it should essentially come in never."[79] Put differently, if judges possess every interpretive tool at their disposal to construe away ambiguity, they will, inevitably, never reach the rule of lenity. And that's largely what recent cases illustrate, with the Court refusing to apply the rule of lenity because it had already resolved any ambiguity by consulting the text, structure, purpose, legislative history, and all other sources.[80]

II
The Historical Rule of Lenity Is Normatively Superior to the Modern Rule

The modern rule of lenity rarely decides cases today because judges construe away even considerable textual ambiguity through myriad other methods of interpretation. Strict construction is normatively superior to the modern rule because it better advances democratic accountability, preserves separation of powers, furthers the due

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[76] *See, e.g.*, Lockhart v. United States, 136 S. Ct. 958, 961, 968 (2016) (rejecting a rule of lenity argument despite the broad interpretation resulting in a ten-year mandatory minimum sentence); Abbott v. United States, 562 U.S. 8, 12–13, 28 n.9 (2010) (rejecting a rule of lenity argument despite the broad interpretation resulting in a mandatory five-year sentence stacked on a fifteen-year mandatory-minimum sentence); Deal v. United States, 508 U.S. 129, 137 (1993) (rejecting the contention that the rule of lenity should be employed because the resulting 105-year sentence was "glaringly unjust"); *Smith*, 508 U.S. at 239–41 (1993) (rejecting the rule of lenity argument proposed by defendant and the dissent despite the broad interpretation resulting in a thirty-year mandatory minimum sentence).

[77] *Deal*, 508 U.S. at 131–32.

[78] *Id.* at 137.

[79] Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 Sup. Ct. Rev. 345, 386.

[80] *See, e.g.*, Shaw v. United States, 137 S. Ct. 462, 469 (2016); *Lockhart*, 136 S. Ct. at 968; Abramski v. United States, 573 U.S. 169, 188 n.10 (2014); Robers v. United States, 572 U.S. 639, 646 (2014); United States v. Castleman, 572 U.S. 157, 172–73 (2014); Barber v. Thomas, 560 U.S. 474, 488 (2010); *Smith*, 508 U.S. at 239–40; Callanan v. United States, 364 U.S. 587, 596 (1961).

process principle of fair warning, safeguards defendants' liberty, and aligns with the modified form of textualism practiced by much of the federal judiciary.

A. The Historical Rule of Lenity Advances Democratic Accountability

The rule of strict construction advances democratic accountability principles better than the modern, weakened rule of lenity. A stronger rule of lenity appropriately places the burden of fixing unclarity on the party most capable of addressing it—the federal government. As Justice Scalia and Bryan Garner write in *Reading Law*, "when the government means to punish, its commands must be reasonably clear," and "[w]hen they are 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 (DOJ) or its state equivalent."[81] In the federal realm, the DOJ has had unusually great success in convincing Congress to expand the scope of criminal statutes that the Supreme Court had interpreted narrowly.[82] Matthew Christiansen and William Eskridge found that, from 1967 to 2011, a significant percentage of congressional overrides of Supreme Court decisions were lobbied for by the DOJ.[83] These overrides were "decidedly one-sided," because "[i]f the Department of Justice believes the Court's stingy interpretation of a criminal prohibition, penalty, or procedural rule stands in the way of effective implementation of a criminal law regime, it can typically gain the attention of Congress and can often secure an override."[84] By contrast, criminal defendants and criminal justice advocacy groups do not have the same sway in Congress to push for overrides of Supreme Court interpretations that favor the government.[85] A stronger rule of lenity is thus needed to "place[ ] the weight of inertia upon the party that can best induce Congress to speak more clearly."[86]

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

[82] *See* Shon Hopwood, *The Misplaced Trust in the DOJ's Expertise on Criminal Justice Policy*, 118 MICH. L. REV. 1181, 1190 (2020) (explaining how the Department of Justice (DOJ) has enormous lobbying power in Congress).

[83] Matthew R. Christiansen & William N. Eskridge, Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967–2011*, 92 TEX. L. REV. 1317, 1321 (2014) (stating that the DOJ and other federal agencies were involved in seventy percent of the overrides that were studied).

[84] *Id.* at 1383.

[85] *See* Shon Hopwood, *The Effort to Reform the Federal Criminal Justice System*, 128 YALE L.J.F. 791, 793–95 (2019) (detailing how difficult federal criminal justice reform has been to obtain in Congress).

[86] United States v. Santos, 553 U.S. 507, 514 (2008).

B. The Historical Rule of Lenity Preserves the Separation of Powers

Strict construction ensures that the power to define crimes resides with democratically elected legislatures, rather than courts.[87] Federal courts lack the ability to create common-law crimes.[88] This is because "criminal punishment usually represents the moral condemnation of the community," and so, under separation-of-powers principles, "legislatures and not courts should define criminal activity."[89] Since Congress is far more representative than courts, it is the appropriate branch to speak for the community in condemning certain conduct.

Strict construction supports rather than undermines legislative supremacy. Because strict construction has a long history, Congress has always legislated with it as a background principle.[90] The rule is not inconsistent with legislative supremacy because it only applies when a statute is ambiguous.[91] And unlike several states, Congress has never legislated away the rule of lenity;[92] instead, it has required liberal rather than strict construction for only a handful of statutes, which implies that it has consented to lenity more generally.[93]

Strict construction also removes the ability of judges to use "an ill-defined general purpose" to expand or add to the statutory text.[94] That was the principal danger that Chief Justice Marshall warned against in *Wiltberger*: courts employing statutory purpose to create crimes "of equal atrocity, or of kindred character, with those which are enumerated."[95] Practically, this is always a concern. By the time a federal appellate judge is faced with an issue about the scope or breadth of a federal criminal law, the defendant has already been convicted and sentenced. Once the justice system already has some forward momentum in adjudging someone guilty, there is an inevitable inertia to affirm the conviction, even if the statutory text has to be

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87 *See* ESKRIDGE JR., *supra* note 1, at 14–15.

88 *See* United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32 (1812) (holding that federal courts have no criminal jurisdiction, except what is given by statute).

89 United States v. Bass, 404 U.S. 336, 348 (1971).

90 *Cf.* John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399, 411 (2010) (explaining that the nonretroactivity canon has deep roots and can be considered a background expectation against which American legislatures have always enacted legislation).

91 *See* John F. Stinneford, *Dividing Crime, Multiplying Punishments*, 48 U.C. DAVIS L. REV. 1955, 2000 (2015).

92 *See* Zachary Price, *The Rule of Lenity as a Rule of Structure*, 72 FORDHAM L. REV. 885, 902–03 (2004) (explaining how many states have explicitly done away with lenity by directing that statutory provisions be "liberally construed").

93 Kahan, *supra* note 79, at 382 (citing Pub. L. No. 91-452, § 904(a), 84 Stat. 947 (1970)).

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

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

stretched to fit the particular circumstances. Returning to the rule of strict construction would take away the reviewing judge's temptation to affirm and "stretch the law to fit the evil."[96]

C. The Historical Rule of Lenity Furthers the Due Process Principle of Fair Warning

The rule of strict construction also advances the due process principle that compels Congress to give "fair warning," in "language that the common world will understand, of what the law intends to do if a certain line is passed."[97] It is a "fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed."[98] Requiring Congress to supply fair warning through statutory text and without resort to other evidence is consistent with Congress's intended first-order audience when it drafts criminal laws—the general public.[99] It is also consistent with the textualism practiced by much of the federal judiciary, which focuses on how the "ordinary English speaker . . . would understand the words of a statute."[100] When the intended audience is the general public, legislative history—an "obscure and inaccessible source of legal knowledge for lay audiences"—does not help communicate a statutory term's meaning.[101] That is especially true since the average layperson does not have a college degree, let alone a law degree.[102] An audience of laypeople should not have to consult extraordinary and largely inaccessible non-textual sources, such as committee reports, to understand what the law prohibits and punishes.[103] And a weaker rule of lenity

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96 *Moskal*, 498 U.S. at 132 (Scalia, J., dissenting).

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

98 United States v. Santos, 553 U.S. 507, 514 (2008); *see also* Liparota v. United States, 471 U.S. 419, 427 (1985) ("[T]he rule of lenity ensures that criminal statutes will provide fair warning concerning conduct rendered illegal . . . .").

99 Louk, *supra* note 1, at 160 (stating that criminal statutes are broadly directed at the general public).

100 Amy Coney Barrett, *Congressional Insiders and Outsiders*, 84 U. CHI. L. REV. 2193, 2194 (2017) ("[I]f the conventions of legislative history or the legislative process reveal that Congress used language in something other than its natural sense, a textualist court should not necessarily defer to that meaning. What matters . . . is how the ordinary English speaker . . . would understand the words of a statute.").

101 Louk, *supra* note 1, at 177.

102 *See* Paul J. Larkin, Jr., *The Folly of Requiring Complete Knowledge of the Criminal Law*, 12 LIBERTY U. L. REV. 335, 344–45 (2018) (noting that less than half of adults in the United States, according to the Census Bureau, had received some kind of college degree and concluding that a person of ordinary intelligence was not a lawyer, judge, or law professor).

103 *See* United States v. R.L.C., 503 U.S. 291, 308–10 (1992) (Scalia, J., dissenting) ("[I]n most cases the proposition that the words of the United States Code or the Statutes at

makes it easier for judges to assert their own views and idiosyncrasies in interpreting statutes, which can lead to inconsistent applications of law antithetical to fair notice.[104]

The Supreme Court's decision in *McBoyle v. United States*[105] provides a good example of how historical lenity provides fair warning. There, the Court confronted the question of whether the defendant's conviction (and three-year prison sentence) for transporting a stolen airplane was valid under the National Motor Vehicle Theft Act.[106] The Act provided the following: "The term 'motor vehicle' shall include an automobile, automobile truck, automobile wagon, motor cycle, or any other self-propelled vehicle not designed for running on rails."[107] Writing for the Court, Justice Oliver Wendell Holmes Jr. held that the statute's definition of motor vehicle could technically apply to an airplane because it is a "self-propelled vehicle not designed for running on rails."[108] But he noted that "in everyday speech 'vehicle' calls up the picture of a thing moving on land."[109] Justice Holmes explained thusly:

> [F]air warning . . . [must be] in language that the common world will understand . . . . When a rule of conduct is laid down in words that evoke in the common mind only the picture of vehicles moving on land, the 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.[110]

Large give adequate notice to the citizen [may be] . . . a fiction, albeit one required . . . but necessary fiction descends to needless farce when the public is charged even with knowledge of Committee Reports." (citations omitted)); Robert H. Jackson, *The Meaning of Statutes: What Congress Says or What the Court Says*, 34 A.B.A. J. 535, 538 (1948) (arguing against the use of legislative history because most people, and even many lawyers, do not have easy access to legislative history). It is not just laypeople who are unaware of committee reports. *See* Kavanaugh, *supra* note 5, at 2125–26 ("Given that the President and the White House staff are not necessarily aware of the committee reports, and given that Members of Congress in one House may not be aware of reports from the other[,] . . . it is difficult to call those reports 'authoritative' in any formal or functional sense.").

104 "[T]he decision whether to resort to legislative history is often indeterminate. The indeterminacy of the trigger greatly exacerbates the problems with the use of legislative history." *See* Kavanaugh, *supra* note 5, at 2149 ("As a judge, if all you need to . . . pick out the result that you find most reasonable . . . is a finding of ambiguity, and if there is no . . . principled way to determine clarity versus ambiguity, then some judges are going to be more likely to find ambiguity in certain cases.").

105 283 U.S. 25 (1931).

106 *Id.* at 25–26.

107 *Id.* at 26 (citing Act of October 29, 1919, ch. 89, § 2, 41 Stat. 324 (current version at 18 U.S.C. § 2312 (2018))).

108 *Id.* ("No doubt etymologically it is possible to use the word to signify a conveyance working on land, water or air . . . .").

109 *Id.*

110 *Id.* at 27.

The Court in *McBoyle* considered legislative history and found that it did not address whether Congress intended for airplanes to be covered under the statute.[111] Had the Court applied the modern rule of lenity, it would have been forced to scour committee reports and floor action to see whether Congress intended to criminalize the theft and transport of an airplane under a statute applied to motor vehicles.

Legislative history does not provide fair warning. Requiring laypeople to do that level of legal research to ascertain what the law criminalizes is similar to 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 of it.'"[112] Because only the text of the statute is the law, fair warning should be provided by the text in language that laypeople can understand. Had the rule of strict construction been applied in *McBoyle*, it would have foreclosed resort to legislative history and required the Court to address whether the statutory language and structure made it clear to laypeople that the statute covered the theft and transport of airplanes, which is ultimately what the Court held (even though it did not mention lenity or strict construction).

D. The Historical Rule of Lenity Better Safeguards Defendants' Liberty

Because the more robust rule of strict construction requires a lower standard of ambiguity, especially when the punishment is severe, it protects defendants from unfairly harsh sentences, similarly to how the due process reasonable doubt requirement protects them at trial.[113] A rule that protects defendants' liberty is of ever greater importance in an era in which Congress has criminalized huge swaths of conduct in over 4500 federal laws that often mandate long terms of imprisonment.[114] Congress routinely drafts unclear criminal laws.[115] It sometimes omits key information and fails to define key terms.[116] And members of Congress are often thinking about the worst offenders when they draft criminal laws, which is why federal statutes are some-

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111 *Id.* at 26 ("Airplanes were well known in 1919, when this statute was passed; but it is admitted that they were not mentioned in the reports or in the debates in Congress.").

112 Larkin, Jr., *supra* note 102, at 340 n.23 (quoting Screws v. United States, 325 U.S. 91, 96 (1945) (plurality opinion)).

113 *See In re* Winship, 397 U.S. 358, 363–64 (1970) (stressing the immensely important interests at stake in criminal prosecutions for the accused—such as liberty and potential social stigma—and extolling the requirement of proof beyond a reasonable doubt).

114 *See* Hopwood, *supra* note 6, at 695, 703.

115 *See id.* at 695–96.

116 *See* Carissa Byrne Hessick & Joseph E. Kennedy, *Criminal Clear Statement Rules*, 97 WASH. U. L. REV. 351, 360 (2019).

times written so broadly they include trivial or innocent conduct unrelated to the harms they intend to criminalize.[117] Members rely on prosecutors to use the criminal law's stiff penalties against only the "really bad" offenders. Given this drafting dysfunction, one would think that the federal judiciary would be more careful when interpreting such broad and unclear criminal laws. But the judiciary has been careless or indifferent, and it has applied a version of lenity so weak that it rarely decides cases.[118]

E. The Historical Rule of Lenity Aligns with Modified Textualism

Lastly, the rule of strict construction is consistent with the modified form of textualism. Justice Kavanaugh, a proponent of modern textualism, has called on judges to seek the "best reading of the statute"[119] by "interpreting the words of the statute, taking account of the context of the whole statute, . . . applying the agreed-upon semantic canons, . . . discern[ing] the best reading of the text . . . [and then] depart[ing] from that baseline if required to do so by any relevant substantive canons."[120] Justice Kavanaugh's view of statutory interpretation is entirely consistent with the rule of strict construction. A judge applying strict construction would look at the statute's text and structure (including linguistic canons) to find the best reading of the statute. The judge would then decide whether that reading would be clear to laypeople.[121] If reasonable doubt remained, the judge would apply lenity to interpret the statute in favor of the defendant, especially if the punishment was severe. Applying historical lenity would provide more predictability and consistency than the current rule of lenity, where judges have a never-ending amount of information to construe away even considerable ambiguity in a criminal statute.

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Criminal law deserves to be interpreted differently than other kinds of law.[122] As F. Andrew Hessick and Carissa Byrne Hessick

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117 *See id.*

118 *See* Hopwood, *supra* note 6, at 702–09.

119 Kavanaugh, *supra* note 5, at 2121.

120 *Id.*

121 *See id.* at 2144 ("Courts should try to read statutes as ordinary users of the English language might read and understand them. That inquiry is informed by both the words of the statute and conventional understandings of how words are generally used by English speakers.").

122 Statutory purpose and legislative history are appropriate in interpreting other kinds of laws, where fair warning need not be as great because the consequences to an individual and their liberty interests are not as great.

have argued, "[t]he text of the Constitution and various legal doctrines demonstrate that our legal system regularly treats criminal laws differently from other laws."[123] Criminal law is treated differently under our constitutional system because of the deprivation of liberty at stake and the need to warn citizens (and not just other lawyers) about the breadth of conduct that is criminal.[124] When someone is convicted of a felony and sentenced to prison, their life and liberty are forever altered. American prisons are incredibly violent and depressing places that largely return people to society worse off than they were when they entered.[125] Even when convicted individuals finish serving their sentences, the collateral consequences of a felony are severe and often include legal discrimination in employment, housing, public benefits, and voting.[126] With such great stakes, a judge trying to determine whether a person's actions are covered by a criminal statute must take particular care. The historical rule of lenity (i.e. the rule of strict construction of penal statutes) ensures that judges do so in a principled and consistent way.

III
The Historical Rule of Lenity Should Receive Canonical Status

"Canons of interpretation are rules of construction that courts apply in the interpretation of statutes."[127] They are properly regarded as "presumptions about what an intelligently produced [statutory] text conveys,"[128] and they constitute an "interpretive regime," that act as a "set of conventional considerations relevant to statutory interpretation."[129] These strong rules, if followed uniformly, are thought to ensure "predictability, neutrality, objectivity, and transparency in statutory interpretation."[130]

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123 F. Andrew Hessick & Carissa Byrne Hessick, *Nondelegation and Criminal Law*, 107 Va. L. Rev. (forthcoming 2020) (manuscript at 19) (on file with authors).

124 *Id.*

125 *See* Shon Hopwood, *Improving Federal Sentencing*, 87 UMKC L. Rev. 79, 81–83 (2018) (explaining the harshness of a federal prison sentence).

126 *See* Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. Pa. L. Rev. 1789, 1790 (2012) ("A person convicted of a crime, whether misdemeanor or felony, may be subject to disenfranchisement (or deportation if a noncitizen), criminal registration and community notification requirements, and the ineligibility to live, work, or be present in a particular location." (citations omitted)); Hopwood, *supra* note 125, at 82 ("People with felony convictions may be legally discriminated against in employment, housing, federal benefits, and voting rights.").

127 Barrett, *supra* note 23, at 117.

128 Scalia & Garner, *supra* note 81, at 51.

129 Eskridge Jr., *supra* note 1, at 20.

130 *Id.* at 16.

Does it matter whether an interpretive rule is considered a canon? The short answer is yes. When an interpretive principle is labeled a canon, "it inevitably becomes imbued with an aura of legitimacy."[131] Once an interpretive rule becomes a legitimate and respected canon, judges generally apply the canon uniformly going forward.[132] When Abbe Gluck and Judge Richard Posner interviewed forty-two circuit court judges about their methods of interpreting statutes, they found that "[e]ven though most judges told us they were not bound to use canons, and many disparaged them, *all* use them."[133]

Not every interpretive rule has attained the status of a canon, and no one standard has taken hold for deciding which among them should. Anita Krishnakumar and Victoria Nourse have argued that canons are defined by their longevity or historical pedigree, their frequency of invocation, their justification, and whether the Supreme Court has declared them to be generally applicable.[134] Justice Kavanaugh has argued that judges should decide "*in advance*" which interpretive rules deserve the status of a canon, and that those selected should further the principles of consistency and predictability, because "[l]ike cases should be treated alike by judges of all ideological and philosophical stripes, regardless of the subject matter and regardless of the identity of the parties to the case."[135] Under any of these metrics, historical lenity should be given the status of a canon.

Canon status should not be bestowed to just any formulation of the rule of lenity, but specifically to the historical rule of lenity. That is, once a judge has reviewed the text and structure of a statute and a reasonable doubt about the scope of the statute remains, lenity should apply to interpret the statute narrowly in favor of the defendant without resort to statutory purpose or legislative history.

A. Lenity Has a Long History and Pedigree

Krishnakumar and Nourse have argued that "[h]ow long an interpretive rule has been in effect may be one of the most important factors in determining whether it qualifies as a canon of statutory construction."[136] If history and pedigree are the principle bases for

131 Krishnakumar & Nourse, *supra* note 23, at 177.

132 *See infra* Section III.E (noting that the Supreme Court applies lenity as a rule of general applicability and that lower courts apply lenity in the same way as the Supreme Court).

133 Gluck & Posner, *supra* note 1, at 1334 (emphasis added).

134 *See* Krishnakumar & Nourse, *supra* note 23, at 179–90.

135 Kavanaugh, *supra* note 5, at 2120–21.

136 Krishnakumar & Nourse, *supra* note 23, at 184.

determining what constitutes a canon, lenity is validated by its "sheer antiquity."[137]

Lenity is one of the oldest canons of interpretation.[138] It derives from the rule of strict construction of penal statutes, which itself developed out of the thirteenth-century benefit-of-clergy doctrine.[139] The interpretive principle was well-established and recognized by English treatise writers William Blackstone and Thomas Coke at the time of America's founding.[140] American courts adopted the doctrine and modified it into the rule of strict construction of penal statutes.[141] The rule was never questioned by the Founders[142] and was first cited by the federal judiciary in 1794.[143] A few decades later, in *Wiltberger*, Chief Justice Marshall provided the Supreme Court's first extended discussion of the rule's benefits and application,[144] and the Court has employed it ever since.[145]

Lenity's antiquity is unquestioned. Chief Justice Marshall described it as "perhaps not much less old than construction itself"[146] and Justice Scalia as "almost as old as the common law itself."[147] The Supreme Court has referred to the rule as "venerable"[148] and "well-recognized."[149] Scalia and Garner suggest that lenity is "so deeply ingrained, it must be known to both drafter and reader alike so that

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137 Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 29 (1997).

138 Barrett, *supra* note 23, at 128.

139 *See* JEROME HALL, THEFT, LAW, AND SOCIETY 110–11, 117–18 (2d ed. 1952); 1 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 457–59 (1883).

140 *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *88 (establishing that statutory interpretation of "remedial statutes" limits the remedy to only that which is appropriate to correct for the initial mischief); THOMAS COVENTRY, A READABLE EDITION OF COKE UPON LITTLETON §§ 54b, 153b, 238b (London, Saunders & Benning 1830) (distinguishing the penal law from the common law in statutes concerning "tenant[s]," "rent," and "descents that toll entry").

141 *See supra* Section I.A.

142 *See* William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990, 1057 (2001).

143 Bray v. Atalanta, 4 F. Cas. 37, 38 (D.S.C. 1794) (No. 1819).

144 United States v. Wiltberger, 18 U.S. 76 (1820).

145 *See, e.g.*, Yates v. United States, 574 U.S. 528, 547 (2015) ("Finally, if our recourse to traditional tools of statutory construction leaves any doubt about the meaning of 'tangible object,' as that term is used in § 1519, we would invoke the rule that 'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.'").

146 *Wiltberger*, 18 U.S. at 95.

147 Scalia, *supra* note 137, at 29.

148 United States v. R.L.C., 503 U.S. 291, 305 (1992).

149 United States v. Rodgers, 466 U.S. 475, 484 (1984).

[it] can be considered inseparable from the meaning of the text."[150] Seventh Circuit Judge Amy Coney Barrett has noted that the "long pedigree" of substantive canons like lenity "makes it difficult to dismiss their use as fundamentally inconsistent with the limits that the Constitution imposes upon the exercise of judicial power."[151] Perhaps for this reason, some lower-court judges view lenity as "special" and distinguish it from other canons "in terms of [its] mandatory application."[152]

B. Lenity Has Been Frequently Invoked by the Supreme Court and Lower Courts

Frequency of invocation is another sign that a rule is "well-established and even ingrained in the legal community," because the "number or frequency of citations to a rule or other legal source often is used as a proxy for its status in the legal community."[153] Lenity easily meets this criterion.

In the decades following the founding, few interpretive rules were cited with more frequency than the historical rule of lenity. In a recent article, Judge Barrett reviewed early federal case law that "yielded far more cases applying the rule of lenity than any other canon," leaving "one with the distinct impression that lenity was the most commonly applied substantive cannon of construction."[154] And starting with *Lawrence*[155] and running through last year's decision in *United States v. Davis*,[156] the rule of lenity has been cited frequently by the Supreme Court. In fact, Krishnakumar conducted an empirical analysis of the Roberts Court's invocation of substantive canons in its first six-and-a-half terms and found that the rule of lenity was the second most cited behind constitutional avoidance.[157] A search for "strict

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150 SCALIA & GARNER, *supra* note 81, at 31; *see also* Abbe R. Gluck, *The Federal Common Law of Statutory Interpretation:* Erie *for the Age of Statutes*, 54 WM. & MARY L. REV. 753, 765 (2013) ("Some substantive canons, such as the rule of lenity . . . have been justified based on their pedigree. Perhaps one can argue that such rules are so ingrained that they can be assumed to have been incorporated into congressional drafting practice—and, in fact, Justice Scalia makes precisely this argument." (footnote omitted)).

151 Barrett, *supra* note 23, at 128; *see also* William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1127 (2017) ("We . . . would ask whether the canons were rules of law at the Founding or have validly become law since, pursuant to rules of legal change that were themselves valid in this way. . . . The rule of lenity probably passes our test, as it appears to date back to the Founding.").

152 Gluck & Posner, *supra* note 1, at 1331–32.

153 Krishnakumar & Nourse, *supra* note 23, at 181.

154 Barrett, *supra* note 23, at 129 n.90.

155 United States v. Lawrence, 3 U.S. (3 Dall.) 42, 45 (1795).

156 139 S. Ct. 2319, 2333 (2019).

157 *See* Anita S. Krishnakumar, *Reconsidering Substantive Canons*, 84 U. CHI. L. REV. 825, 856 (2017) (noting that when the Roberts Court invoked substantive canons, it

construction" in the same paragraph as "penal" on Westlaw Next returned seventy-seven Supreme Court cases. A search for "rule" in the same paragraph of "lenity" returned 174. By contrast, a Westlaw Next search for citations to the "Charming Betsy" canon[158] returned only thirty-three Supreme Court cases. In addition, a search for "rule" in the same paragraph as "lenity" in every federal circuit court of appeals database returned 2802 cases. Lenity has, and continues to be, frequently invoked.

C. Lenity Is Constitutionally Derived from the Due Process Clause

Another factor that Krishnakumar and Nourse use to determine whether an interpretive rule should be considered a canon is its justification.[159] They contend that one justification for receiving canon status is if a rule is "grounded in a constitutional principle."[160]

The rule of lenity helps implement the Due Process Clause's fair warning requirement as well as a preference that legislatures, rather than courts, define crimes.[161] Given the seriousness of criminal penalties, people should not languish in prison unless Congress has plainly and unmistakably provided notice. Because lenity flows from due process requirements, scholars have argued that lenity is constitutionally inspired or derived.[162] Even if not mandated by the Due Process Clause, Gluck has argued that lenity could be viewed as a

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"referenced one of just six well-established canons—the avoidance canon (sixteen), the rule of lenity (eleven), the presumption against preemption (eight), a federalism clear statement rule (six), the presumption against retroactivity (five), or the narrow construction of waivers of sovereign immunity (four)").

158 The "Charming Betsy" canon is the principle that statutes should be interpreted to avoid conflicting with international law and was introduced in *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

159 Krishnakumar & Nourse, *supra* note 23, at 185.

160 *Id.* at 187.

161 *See* Liparota v. United States, 471 U.S. 419, 427 (1985) (stating that lenity helps to ensure fair warning and that, because crimes have serious consequences, their definition should be the province of the legislature, not the judiciary); United States v. Bass, 404 U.S. 336, 348 (1971) (same). Lenity is often said to be rooted in constitutional norms of procedural due process. *See, e.g.*, William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 600 (1992). For another view, see William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1122 (2017) ("Legal canons don't need to be recast as a form of quasi-constitutional doctrine, because they don't need to outrank the statutes to which they apply. Instead, the canons stand on their own authority as a form of common law.").

162 *See* WILLIAM N. ESKRIDGE ET AL., CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 907 (4th ed. 2007) (arguing that the rule of lenity has constitutional underpinnings in the Due Process Clause); Manning, *supra* note 90, at 406 & n.26 (2010) (arguing that lenity is constitutionally inspired).

"Constitution-implementing law."[163] Under such an interpretation, lenity takes "inspiration and authority from, but is not required by, various constitutional provisions."[164] On either theory, it is clear that lenity has constitutional underpinnings.

Lenity is also justified by the instrumental effect it has on the drafting of legislation. Consistent and robust use of lenity encourages Congress to clearly specify what conduct is prohibited and what punishments should be imposed.[165] Lenity advances the value of democratic legitimacy because it forces Congress to write criminal laws, rather than leaving it to judges, and requires the legislature to take responsibility for how broadly or narrowly it criminalizes particular conduct. Finally, lenity places the onus of convincing Congress to modify unclear criminal statutes on the DOJ, which is in the best position to use its enormous lobbying power to push for clearer criminal laws.[166]

D. Lenity Is a Rule that Reflects Agreements of Justices Across Ideological Divides

Another factor that Krishnakumar and Nourse consider in determining when to bestow canon status is whether a rule "reflects the agreement of Supreme Court justices appointed by different parties and across ideological divides."[167] Justices appointed by presidents of both parties and across the spectrum of theories and methodologies of statutory interpretation—among them, Justices Scalia, Souter, Ginsburg, Blackmun, and O'Connor—have applied the rule of

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163 Gluck, *supra* note 150, at 758.

164 Henry P. Monaghan, *Constitutional Common Law*, 89 HARV. L. REV. 1, 3 (1975).

165 *See* Hopwood, *supra* note 6, at 732.

166 *See* SCALIA & GARNER, *supra* note 81, at 299 ("When [criminal statutes] are 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 or its state equivalent.").

167 Krishnakumar & Nourse, *supra* note 23, at 189 (emphasis omitted).

lenity.[168] Perhaps that is why lenity tends to be widely accepted and rarely condemned.[169]

E. Lenity Is a Rule of General Applicability Given Stare Decisis Effect

The last factor that Krishnakumar and Nourse look at is whether the Supreme Court has declared the rule generally applicable "as opposed to merely making a comment about its reasoning in the particular case in front of it."[170] Not only has the Supreme Court declared lenity a rule that is generally applicable to a host of different cases,[171] but lower courts have also given it stare decisis effect.[172]

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168 *See, e.g.*, United States v. Santos, 553 U.S. 507, 514 (2008) (Scalia, J.); United States v. Granderson, 511 U.S. 39, 54 (1994) (Ginsburg, J.) ("In these circumstances—where text, structure, and history fail to establish that the Government's position is unambiguously correct—we apply the rule of lenity and resolve the ambiguity in Granderson's favor."); United States v. Thompson/Ctr. Arms Co., 504 U.S. 505, 518 (1992) (Souter, J.) ("It is proper, therefore, to apply the rule of lenity and resolve the ambiguity in Thompson/Center's favor."); Crandon v. United States, 494 U.S. 152, 168 (1990) (Stevens, J.) ("Finally, as we have already observed, we are construing a criminal statute and are therefore bound to consider application of the rule of lenity."); United States v. Kozminski, 487 U.S. 931, 952 (1988) (O'Connor, J.) ("The purposes underlying the rule of lenity—to promote fair notice to those subject to the criminal laws, to minimize the risk of selective or arbitrary enforcement, and to maintain the proper balance between Congress, prosecutors, and courts—are certainly served by its application in this case."); Dixson v. United States, 465 U.S. 482, 491 (1984) (Marshall, J.) (noting that if legislative history failed to clarify the statutory text, the "rule of lenity would compel us to construe the statute in favor of petitioners, as criminal defendants"); Bifulco v. United States, 447 U.S. 381, 400 (1980) (Blackmun, J.) ("Of course, to the extent that doubts remain, they must be resolved in accord with the rule of lenity.").

169 *See, e.g.*, Kahan, *supra* note 79, at 349 ("Lenity is almost universally celebrated among commentators."); Richard A. Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263, 280 (1982) ("Although the canons of statutory construction have received well-merited criticism on grounds of fatuity and inconsistency, the 'rule of lenity' . . . usually escapes criticism as long as unnatural constructions are avoided.").

170 Krishnakumar & Nourse, *supra* note 23, at 189.

171 *See supra* Section III.B.

172 *See* Rabb, *supra* note 66, at 182 (stating that some appellate judges "saw [the canon of lenity] as binding, based on certain 'constitutional principles' or 'rules' to which judges must defer"). Many circuit courts employ the rule of lenity that is currently used by the Supreme Court today, in that lenity only applies after "seizing everything from which aid can be derived," and then only if serious ambiguity remains. United States v. Hampton, 633 F.3d 334, 342 (5th Cir. 2011) (quoting Reno v. Koray, 515 U.S. 50, 65 (1995)); *see, e.g.*, United States v. Baldwin, 774 F.3d 711, 733 (11th Cir. 2014) (stating that lenity can only be used when a court decides a statute is ambiguous or uncertain); United States v. Burwell, 690 F.3d 500, 515 (D.C. Cir. 2012) (same); United States v. Plotts, 347 F.3d 873, 876 (10th Cir. 2003) (same).

F. Lenity, and Particularly the Historical Rule, Advances the Rule of Law

Justice Kavanaugh has argued that judges should try to settle the use of interpretive rules "*in advance*" to make the rules more "predictable in application" and "make judges more neutral and impartial."[173] In his view, rules should rely primarily on those canons most "beneficial to the neutral and impartial rule of law, and to the ideal and reality of a principled, nonpartisan judiciary."[174] The rule of lenity promotes these goals. Because it can only produce one outcome—the interpretation most favorable to the defendant—it eliminates a judge's ability to interpret a statute idiosyncratically to advance a judge's own policy preferences. In a similar vein, it is predictable in application, because it is applied in every case of ambiguity.

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In sum, whether construed as constitutional law or as a Constitution-implementing rule, justified by its antiquity or general applicability, the rule of lenity has been frequently invoked by judges interpreting criminal statutes since the founding of the republic. It should therefore be treated as a canon that *all* judges must employ when interpreting ambiguous federal criminal laws.

IV
Applying the Historical Rule of Lenity to the Most Difficult Statutory Interpretation Questions in Federal Criminal Law

Applying a rule of lenity that is closer to the historical rule of strict construction helps resolve some of the most vexing questions that arise in interpreting criminal statutes. It can, for instance, resolve conflicts between dueling canons, provide clear interpretations of statutes with open-texture ambiguities, and prevent courts from construing away considerable textual ambiguity using statutory purpose or legislative history.

A. Historical Lenity Can Resolve the Ordering Problem

One problem in statutory interpretation is that there is no consistent order in which courts apply various interpretive rules.[175] And while the modern rule has solved the ordering problem by placing

[173] Kavanaugh, *supra* note 5, at 2121.
[174] *Id.*
[175] Krishnakumar & Nourse, *supra* note 23, at 169.

lenity last, that means that lenity almost never applies in practice, an undesirable result for the reasons explained above. The historical rule of lenity provides a response to this dilemma by firmly placing lenity after a review of the statutory text (with the application of linguistic canons) and statutory structure, and definitively resolving the question prior to considering statutory purpose and legislative history.[176]

United States v. R.L.C.[177] provides an example of how historical lenity would narrow an ambiguous statute. In *R.L.C.*, all the Justices concluded that, based simply on the statutory text and structure, the statute at issue was ambiguous.[178] The case addressed a provision of the Juvenile Delinquency Act that requires the length of juvenile detention to be limited to "the maximum term of imprisonment that would be authorized if the juvenile had been tried and convicted as an adult . . . ."[179] A minor was convicted of involuntary manslaughter, and the question presented was whether the maximum term of imprisonment was the three-year statutory maximum for involuntary manslaughter under statute or the maximum permitted under the then-mandatory Sentencing Guidelines range.[180] The majority looked to the word "authorized" to determine whether the statutory maximum or Guideline maximum applied, and, after "examining the text," found the statute ambiguous.[181] The three dissenters agreed.[182] The majority, however, proceeded to canvass legislative history and held that it resolved the ambiguity.[183]

Justice Scalia dissented, saying that he would have applied a rule of lenity akin to the historical rule. He noted that this was an unusual case in which "something said in a Committee Report causes the criminal law to be stricter than the text of the law displays."[184] Under previous formulations of lenity, he explained that statutory ambiguity precludes resolution of ambiguity "on the basis of general declarations of policy" and "legislative history."[185] The Court's watered-down ver-

176 *See supra* Section II.C.

177 503 U.S. 291 (1992).

178 *Id.* at 298; *id.* at 307 (Scalia, J., Kennedy, J., and Thomas, J., dissenting).

179 18 U.S.C. § 5037(c)(1)(C) (2018).

180 At the time, the maximum sentence for involuntary manslaughter was three years. *See* 18 U.S.C. § 1112(b) (2012). By contrast, given R.L.C.'s criminal history score of Category I, his Guideline range under the Guidelines was fifteen to twenty-one months. *See R.L.C.*, 503 U.S. at 296.

181 *R.L.C.*, 503 U.S. at 298.

182 *See id.* at 307 (Scalia, J., Kennedy, J., and Thomas, J., dissenting).

183 *Id.* at 298–305 ("The legislative history thus reinforces our initial conclusion that § 5037 is better understood to refer to the maximum sentence permitted under the statute requiring application of the Guidelines.").

184 *Id.* at 308.

185 *Id.* (quoting Hughey v. United States, 495 U.S. 411, 422 (1990)).

sion of lenity risked the result that justifies lenity in the first place: failure to provide fair warning and prevent courts from sending people to prison on the basis of judge-made law. As to fair warning, Justice Scalia noted that while resort by average citizens to the United States Code to determine whether their conduct is criminalized "is something of a fiction," that fiction "descends to needless farce when the public is charged even with knowledge of Committee Reports."[186] As for separation-of-powers concerns, he questioned whether a text that is ambiguous could be made more harsh by resort to legislative history because committee reports are not "authoritatively adopted" and do not express the "moral condemnation of the community" in the same way as the text does.[187] Thus, "[w]here it is doubtful whether the text includes the penalty, the penalty ought not be imposed."[188]

The historical rule of strict construction could also resolve the tension that arises when two linguistic canons conflict to produce reasonable doubts about the meaning of a statute. The Supreme Court's decision in *Lockhart v. United States*[189] is a good example. *Lockhart* required the Court to interpret an enhanced sentencing provision of the Child Pornography Prevention Act of 1995, which applied to defendants with a "prior conviction" arising "under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward . . . ."[190] The case presented the question of whether the limitation "involving a minor or ward" applied to every item on the list. The defendant had a prior conviction for abusing his then-53-year-old girlfriend, but he argued that the phrase "involving a minor or ward" modified the entire list and thus exempted his prior sexual abuse conviction involving an adult.[191] The government argued that "involving a minor or ward" applied only to the last item on the list of predicate offenses ("abusive sexual conduct"), and thus the defendant's prior sexual abuse conviction triggered the sentencing enhancement.[192]

Justice Sonia Sotomayor, writing for the Court, sided with the government. She invoked the "rule of the last antecedent" canon, which provides that a limiting clause or phrase "should ordinarily be read as modifying only the noun or phrase that it immediately fol-

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186 *Id.* at 309.

187 *Id.*

188 *Id.*

189 136 S. Ct. 958 (2016).

190 18 U.S.C. § 2252(b)(2) (2018).

191 *Lockhart*, 136 S. Ct. at 962.

192 *Id.*

lows."[193] In dissent, Justice Elena Kagan instead found that the case turned on a different canon, the "series-qualifier canon," which provides a presumption that "a modifier at the end of the list 'normally applies to the entire series.'"[194]

The historical rule of lenity, which applies after consulting the text and other linguistic canons, would help resolve conflicts like the one in *Lockhart* by producing a definitive answer. When the statutory text and linguistic canons leave a reasonable doubt about the statute's meaning, lenity would require courts to interpret the statute in favor of the defendant, in this case by applying the modifier to the entire list. And the rule of lenity, unlike many of the other canons and rules of interpretation, does not have an antithesis. The series-qualifier canon and the last-antecedent canon at issue in *Lockhart* invariably point in opposite directions,[195] but there is no equivalent and opposite rule from the rule of lenity—when it applies, it produces an uncontested outcome.

B. Historical Lenity Resolves Reasonable Doubts Even as to Open-Textured Criminal Laws and Considers the Intended Audience of Criminal Laws

Historical lenity narrows a statute when it is ambiguous, meaning that it has more than one possible meaning. There are, however, different kinds of ambiguity. The problem of "open texture" ambiguity, so identified by H.L.A. Hart,[196] arises when people are incapable of defining concepts in a way that covers all imaginable possibilities of fact and law.[197] To illustrate this concept, Hart provided the now-famous example of a law mandating "no vehicles in the park."[198] Drafters of such a law probably would not intend to prohibit ambulances from entering the park, but an ambulance would indeed be prohibited under a literal application of the statute. Open-texture ambiguity describes the idea that when drafters enact statutory text,

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193 *Id.* at 962–63 (quoting Barnhart v. Thomas, 540 U.S. 20, 26 (2003)).

194 *Id.* at 970 (Kagan, J., dissenting) (quoting SCALIA & GARNER, *supra* note 81, at 147).

195 *See* Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401–06 (1950) (claiming that for every canon there is a dueling canon that points in the opposite direction); Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 805–17 (1983) (agreeing with Llewellyn that every canon has an equal and opposite canon and further arguing that most canons are "just plain wrong").

196 *See* H.L.A. HART, THE CONCEPT OF LAW 128 (2d ed. 1994).

197 *See* H.L.A. HART, *Jhering's Heaven of Concepts and Modern Analytical Jurisprudence*, *in* ESSAYS IN JURISPRUDENCE AND PHILOSOPHY 265, 275 (1983).

198 *See* H.L.A. HART, *supra* note 196, at 128–29.

they cannot anticipate all of the circumstances to which it will be applied.[199]

One real-life example of an open-textured statute is the provision of the Sarbanes-Oxley Act that imposes criminal penalties for intentionally impeding a federal investigation by concealing a "tangible object."[200] That statute, enacted in an effort to punish corporate fraud, was at issue in *United States v. Yates*, a case in which commercial fishing captain John Yates ordered his crew to throw undersized fish overboard to hide the evidence of illegal possession.[201] The appeal presented the question of whether the fish counted as "tangible object[s]" under the statute.

Justice Ruth Bader Ginsburg, writing for a plurality of the Court, conceded that the ordinary meaning of tangible object would include a fish but refused to interpret the statute "beyond the principle evil motivating [the statute's] passage."[202] She concluded that the statute was ambiguous as applied to Yates's fish, and applied the rule of lenity.[203] Justice Elena Kagan cited, in dissent, dictionary definitions for the words "tangible" and "object," and concluded that fish were quintessentially tangible objects.[204] She argued that it was irrelevant whether Congress had fish in mind when it passed the Sarbanes-Oxley Act, and insisted that Congress was allowed to write a statute with a "wide scope."[205]

Most commentators cite Justice Ginsburg's plurality opinion as representing a purposivist approach and Justice Kagan's dissent in *Yates* as representing standard textualism.[206] But there is another way to think about *Yates*: the problem was simply that drafters could not have foreseen that a statute enacted to deal with corporate fraud would ever apply to throwing out fish, any more than the hypothetical drafter would have understood an ambulance to be a "vehicle" prohibited from the park. In both cases, lenity provides a clear solution to the problem of open ambiguity: If the Court is left with a reasonable doubt about which interpretation was right, lenity applies to narrow

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[199] *See* Friedrich Waismann, *Verifiability*, *in* LOGIC AND LANGUAGE 117, 122–23 (Anthony Flew ed., 1955) (discussing the open texture of empirical concepts).

[200] *See* 18 U.S.C. § 1519 (2018).

[201] 574 U.S. 528, 531 (2015).

[202] *Id.* at 536.

[203] *Id.* at 547–48.

[204] *Id.* at 553, 555 (Kagan, J., dissenting) (citing DR. SEUSS, ONE FISH TWO FISH RED FISH BLUE FISH (1960)).

[205] *Id.* at 555–56.

[206] *See, e.g.*, Richard M. Re, *The New Holy Trinity*, 18 GREEN BAG 2D 407, 412 (2015); Jonathan R. Siegel, *The Legacy of Justice Scalia and His Textualist Ideal*, 85 GEO. WASH. L. REV. 857, 881 (2017).

the statute. And employing historical lenity to narrow the statute in *Yates* to what a reasonable reader would view as a "tangible object" is consistent with Congress's intent to draft laws for an audience of laypeople.

The Supreme Court's decision in *Bond v. United States*[207] is another example of a broad and open-textured statute that is ambiguous as applied to the facts of the case. Carol Bond was prosecuted for seeking revenge against her husband's paramour by spreading chemicals on the paramour's mailbox.[208] The paramour suffered minor chemical burns on her hand.[209] Bond was charged with violating the Chemical Weapons Convention Implementation Act, which makes it unlawful for "any person knowingly" to "use . . . any chemical weapon."[210]

Chief Justice John Roberts concluded that the statute was ambiguous because Congress likely was not thinking about low-scale, relatively unharmful actions like Bond's when it enacted the Chemical Weapons Convention Implementation Act.[211] Interestingly, Justice Roberts cited to a number of lenity cases that also applied the federalism canon to narrow broad criminal laws that would sweep so broadly as to make a federal crime out of conduct that is usually prosecuted locally.[212] But rather than apply lenity to the Chemical Weapons Act, the Court employed the federalism canon and insisted "on a clear indication that Congress meant to reach purely local crimes, before interpreting the statute's expansive language in a way that intrudes on the police power of the States."[213]

Although it reached the proper conclusion, the Court should have used lenity, not the amorphous federalism canon, to narrow the statute in *Bond*. When it enacted the Chemical Weapons Act, Congress used the language "chemical weapon," which laypeople would not understand as applying to Carol Bond's actions. The statute was ambiguous because it was open-textured and left reasonable doubts about whether Congress intended it to apply so broadly. The statute should have been narrowly interpreted not because it intruded upon states' rights, but because a broader application would have exposed defendants to life imprisonment for conduct that Congress

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207 572 U.S. 844 (2014).

208 *Id.* at 852.

209 *Id.*

210 *Id.* at 851 (quoting 18 U.S.C. § 229(a)(1) (2018)).

211 *Id.* at 860–61.

212 *Id.* at 859 (citing United States v. Bass, 404 U.S. 336 (1971) and Jones v. United States, 529 U.S. 848 (2000)).

213 *Id.* at 860.

did not clearly intend to cover and of which citizens were not provided notice.

Conclusion

Academic and judicial discussions have moved away from the purposivism-versus-textualism debate to the question of how interpretive rules should be applied and which of them should be treated as canons. In the realm of criminal law, where the liberty interests are strongest, the rule of lenity should be strengthened and treated as an interpretive canon. Lenity has a long and ancient pedigree and has been frequently cited by American courts since the country's founding, and its consistent application would advance the principles of fairness and predictability.

But not just any version of lenity should be canonized. Courts should apply the historical rule of strict construction of penal statutes, whereby judges look to statutory text and structure, consider the audience and the severity of the punishment, and then resolve any reasonable doubts in favor of the defendant. Only the historical rule, consistently and robustly applied, can protect defendants from unclear laws and judges who guess about their scope. In an age where Congress has enacted over 4500 criminal laws that all too often carry too-harsh penalties, a canon of lenity would mandate that judges take great care when determining whether Congress intended to punish the defendant's conduct.