

THE RULE OF LENITY AS A RULE OF STRUCTURE

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Statutory construction is an area of notorious incoherence and flux.¹ While courts have veered toward a literalist focus on the dictionary meaning of terms,² they have failed to overrule the older conventions of interpretation, leaving a grab-bag of techniques available to support ad hoc departures from literal readings in uncomfortable cases.³ One such technique is the “rule of lenity”—the common law doctrine, also known as “strict construction,” that directs courts to construe statutory ambiguities in favor of criminal defendants.⁴ Though long accepted and venerated in American jurisprudence as a guarantor of notice and legislative supremacy in criminal law, the rule has lately fallen out of favor with both courts and commentators.

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1. See, e.g., John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 Va. L. Rev. 189, 199-200 (1985) (“[T]he construction of penal statutes no longer seems guided by any distinct policy of interpretation; it is essentially ad hoc.”); Bradley C. Karkkainen, “Plain Meaning”: *Justice Scalia’s Jurisprudence of Strict Statutory Construction*, 17 Harv. J.L. & Pub. Pol’y 401, 477 (1994) (“The jurisprudence of statutory interpretation remains seriously underdeveloped.”); William D. Popkin, *Law-Making Responsibility and Statutory Interpretation*, 68 Ind. L.J. 865, 865 (1993) (“The explosion of commentary about statutory interpretation in the 1980s has left judges without a common method for interpreting statutes.”).

2. See, e.g., *Smith v. United States*, 508 U.S. 223, 228-29 (1993) (relying on dictionary definition of “use” to hold that a ban on use of a firearm in the context of a narcotics trafficking offense covered uses of the firearm other than as a weapon); *Chapman v. United States*, 500 U.S. 453, 461-62 (1991) (citing dictionary definition of “mixture” to interpret sentencing guideline based on the weight of a “mixture” containing the drug LSD to include the weight of the blotter paper on which LSD doses are congealed); see generally Richard H. Fallon et al., *Hart & Wechsler’s The Federal Courts and the Federal System* 708 (5th ed. 2003).

3. See, e.g., *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 68-69 (1994) (rejecting the “most natural grammatical reading” of the statute); *Bifulco v. United States*, 447 U.S. 381 (1980) (interpreting statutory reference to “imprisonment” to include the possibility of parole based on an analysis of the statute’s policy and legislative history); see generally Nicholas S. Zeppos, *The Use of Authority in Statutory Interpretation: An Empirical Analysis*, 70 Tex. L. Rev. 1073, 1120 (1992) (describing the Supreme Court’s current approach as “eclectic”).

4. See *United States v. Bass*, 404 U.S. 336, 347 (1971).

Nowadays it appears occasionally as a supplemental justification for interpretations favored on other grounds; it never stands alone to compel narrow readings.

My goal in this Article is to make a case for the rehabilitation of lenity. The rule, I will suggest, has fallen out of favor not only because of the vogue for literalism, but also because of confusion about the purposes it serves and the method of its application. In this Article, I attempt solutions to both those problems, propose a stronger justification for the rule, and explore new approaches to applying it that could strengthen its methodological rigor.

On the normative level, the problem with the rule of lenity is that its classic rationales—notice and legislative supremacy—have proved inadequate. The notice theory presents the rule of lenity as an assurance that no criminal defendants will be caught off guard by broader statutory interpretations than they could reasonably anticipate.⁵ The theory is flawed because criminals do not read statutes, and because even if they did it would not be clear that the legal system should reward their efforts to skirt the law's borders.⁶ The legislative supremacy theory, meanwhile, presents lenity as a guarantee that courts will go no further than the legislature intended in interpreting criminal prohibitions.⁷ This argument fails, too, because narrow construction may in fact thwart legislative desires more than it advances them.⁸ Many state legislatures have passed statutes abrogating strict construction or urging alternative interpretive priorities;⁹ these laws suggest that legislatures prefer expansive readings to narrow ones. Even if legislatures lack such a generic preference, broad language in criminal statutes may reflect an effort to delegate the definition of terms to courts and executive officials, as is routinely done in many areas of civil and administrative law.¹⁰ Lenity, however, blocks expansive readings and impedes delegated discretion by requiring courts to choose narrow interpretations automatically.

A better justification for the rule of lenity may be found in its role

5. See *id.* at 348 (identifying one of the policies underlying the rule of lenity as the principle that “a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed” (quoting *McBoyle v. United States*, 283 U.S. 25, 27 (1931) (Holmes, J.))).

6. See Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 Sup. Ct. Rev. 345, 401-02.

7. See *Bass*, 404 U.S. at 348 (indicating that a second policy reason for the rule of lenity is that “because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity”).

8. See Einer Elhauge, *Preference-Eliciting Statutory Default Rules*, 102 Colum. L. Rev. 2162, 2193-94 (2002).

9. See *infra* notes 110-19 and accompanying text.

10. See Jeffries, *supra* note 1, at 233; Kahan, *supra* note 6, at 369-70.

in structuring the processes of criminal lawmaking and law enforcement. Whereas the conventional rationales have focused on the perspective of criminal defendants, seeking to guarantee them fair warning and political access, my analysis will shift to the perspective of voters, emphasizing lenity's role in advancing the democratic accountability of criminal justice. When liability rules are construed broadly, I argue, there is a risk of interpretations that conform to the letter of the statute but not to the understanding of the crime that an informed voter would have had at the time it was passed. To cite a recent example, the statutory ban on "schemes to defraud" may come to criminalize all fiduciary breaches, including some that probably would not support civil liability,¹¹ even though voters likely thought of "fraud" as something more nefarious at the time the statute was passed. Likewise, the enhanced penalties of a repeat-offender driving-while-intoxicated statute may apply to a drunken bicyclist,¹² though legislative watchdogs likely had automobiles in mind when they read the law's reference to "motor vehicles . . . or other means of conveyance."¹³ And prosecutors may convict a BB shooter of "armed violence,"¹⁴ though, again, that phrase probably connoted something more sinister in the mind of the electorate. Once propounded, such interpretations are likely to stick: The political obstacles to legalizing conduct that a court has labeled as criminal may be insurmountable.¹⁵

In this context, the rule of lenity serves an interest in disclosure. It compels legislatures to detail the breadth of prohibitions in advance of their enforcement, and it compels prosecutors to charge crimes with enough specificity to indicate to voters—and juries—what conduct has been treated as criminal. Without the rule, politicians might prefer to choose broad language that obscures the extent to which criminal laws encompass unremarkable conduct. Legislators who wished, for instance, to criminalize minor fiduciary breaches would surely face lesser political repercussions if they labeled the conduct "fraud" rather than "breaches of fiduciary duty, including those that would not support civil liability."¹⁶ Similarly, a prosecutor who wished to send a drunken bicyclist to jail would surely prefer to list the conviction as a penalty for "driving while intoxicated" rather than "bicycling while

11. See *United States v. Seigel*, 717 F.2d 9 (2d Cir. 1983).

12. See *State v. Carr*, 761 So. 2d 1271, 1274-75 (La. 2000) (citing the rule of lenity to reject this theory). For more detail on this case, see *infra* notes 314-19 and accompanying text.

13. *Carr*, 761 So. 2d at 1274-75 (internal citations omitted).

14. See *People v. Davis*, 766 N.E.2d 641, 643 (Ill. 2002) (again, citing the rule of lenity to reject this theory). For more detail on this case, see *infra* notes 321-26 and accompanying text.

15. See Elhauge, *supra* note 8, at 2194 (noting that with respect to criminal law decisions "the ability to secure legislative overrides is markedly one-sided" in the government's favor).

16. See *supra* note 11 and accompanying text.

drunk.” The rule of lenity blocks these outcomes; it compels lawmakers and enforcers to indicate explicitly what they are doing. The chief consequence is to enhance voters’ opportunity to assert their preferences.

Though this link between lenity and accountability may seem abstract, my discussion will show that questions of democratic legitimacy are often palpable in the reported state and federal cases. The three examples I gave above are not hypotheticals: Criminal fraud appears to include all fiduciary breaches, however minor, in federal courts;¹⁷ prosecutors in Louisiana and Illinois have pushed expansive interpretations of driving-while-intoxicated and armed violence all the way to their states’ courts of last resort.¹⁸ Cases like these raise serious questions about what conduct should be criminal. Even if voters approve of criminal prohibitions like those urged in these cases, that approval should be made explicit to ensure that the moral force of the community stands behind its criminal sanctions. My claim is that a toughened rule of lenity could help bring about that result.

In line with this normative argument, I also propose a means of strengthening the rule of lenity’s methodological rigor. The problem here is that the function of the rule of lenity relative to other interpretive conventions has never been entirely clear. Despite its simple formula—resolve ambiguities in the defendant’s favor—lenity is a complex and slippery doctrine. To resolve doubts, courts must first determine what doubts there are.¹⁹ Courts, however, have failed to establish a clear theory of qualifying ambiguities, leaving the doctrine open to manipulation.²⁰ Judges sometimes block disfavored interpretations on the theory that they are too implausible to create

17. See *United States v. Wallach*, 935 F.2d 445, 462 (2d Cir. 1991) (indicating that the mail fraud statute protects shareholders’ “right to control” corporate officers); *United States v. Seigel*, 717 F.2d 9 (2d Cir. 1983) (applying mail fraud statute to the creation of an off-book fund even though the defendants did not misappropriate assets); *id.* at 24 (Winter, J., dissenting) (accusing the majority of creating “a new crime—corporate improprieties—which entails neither fraud nor even a victim”); see generally John C. Coffee, Jr., *Does “Unlawful” Mean “Criminal”? Reflections on the Disappearing Tort/Crimes Distinction in American Law*, 71 B.U. L. Rev. 193, 204 (1991) (“[T]he criminal law has been cantilevered out beyond the civil law as defendants have been convicted of a federal felony on facts that would have been unlikely to support civil liability in a derivative suit.”).

18. See *State v. Carr*, 761 So. 2d 1271 (La. 2000); *Davis*, 766 N.E.2d at 641.

19. See Kahan, *supra* note 6, at 384-85.

20. See *id.*

ambiguity,²¹ while at other times they accept strained readings on the grounds that lenity compels a narrow reading.²²

While any number of theories of qualifying ambiguity could give shape to the rule, I will explore one of the most extreme possibilities, namely, that lenity could compel courts to adopt the narrowest plausible interpretation of any criminal statute. Under this approach, courts would first establish a set of plausible readings based on all accepted interpretive techniques, and then deploy lenity to select the narrowest reading in the set. The focus of interpretation in criminal cases would shift away from the selection of the best reading and towards a more flexible threshold determination of textual plausibility or reasonableness. Although support for this interpretive method is scant in the case law, I argue that it is both the most faithful rendering of strict construction's command to construe statutes narrowly and the best means of ensuring the accountability effects I identify with lenity in my normative argument.

The discussion that follows begins with the methodological issue, and proceeds from there to the normative problem. Part I describes a spectrum of possible meanings for the rule of lenity, ranging from the weak rendition favored in recent cases to the strong version I endorse. In Part II, I show that state and federal courts have universally adopted the weak version of the rule, despite classic precedents supporting a stronger approach. Part III turns to the normative issue. I first identify the conventional justifications for the rule and suggest that weaknesses in these rationales may afford at least a partial explanation for courts' unwillingness to apply lenity with rigor. Then, in Part IV, I lay out my argument for lenity and show that a strong version of the rule is necessary to achieve the benefits I associate with it. Finally, Part V outlines the implications of a toughened rule of lenity for several recurrent interpretive problems, and Part VI offers concluding reflections.

I. THREE VERSIONS OF THE RULE

Though the rule of lenity purports to be a rule about statutory interpretation, it is actually more of a meta-rule: It is a rule about the application of other rules of statutory construction. This fact is evident if one considers the rule's peculiar structure. As with other legal rules, a specific predicate (ambiguity) calls the rule of lenity into

21. See, e.g., *Moskal v. United States*, 498 U.S. 103, 108 (1990) (“[W]e have declined to deem a statute ‘ambiguous’ for purposes of lenity merely because it was possible to articulate a construction more narrow than that urged by the Government.”); *id.* at 119 (Scalia, J., dissenting) (criticizing the majority’s interpretation on grounds that it defies the text’s “ordinary meaning”).

22. See, e.g., *United States v. Kozminski*, 487 U.S. 931, 952 (1988) (citing the rule of lenity as one reason for interpreting “involuntary servitude” to include only physical, but not psychological, coercion).

operation, dictating a specific result (lenity). Unlike other rules, however, this rule's predicate is not a self-evident fact. The statute of frauds, a classic legal rule, requires only that the judge look to whether a writing exists; the rule that the President of the United States must be thirty-five²³ requires only an examination of birth date. The rule of lenity, by contrast, requires the judge to make a finding of ambiguity—and textual ambiguity is itself an interpretive, *legal* judgment. The judge must generate possible readings of the text before invoking lenity to choose the narrowest one.

The key question in applying lenity, therefore, is what rank the rule holds relative to other interpretive conventions. If multiple interpretive resources—say, plain text and legislative history—were given equal rank to each other and to lenity, then the rule of lenity would have significant implications. In that case, if the text supported a broad view and the legislative history a narrower one, lenity would compel adoption of the latter. On the other hand, if other conventions came before lenity, they would often resolve ambiguities before lenity took effect. As Dan Kahan explains:

The “meaning” of a statute is a function not just of the signification of words to English-speaking people generally but of the interpretive conventions shared by members of the legal culture in particular. Statutory language is “ambiguous” when these conventions conflict or point in different directions. Ambiguity is either avoided or resolved by giving certain of these conventions priority over others.²⁴

Consequently, “if lenity invariably comes in ‘last,’ it should essentially come in never.”²⁵ Competing views of the statute will disappear, reconciled by other conventions, before the rule even comes into operation.

Unfortunately, courts have rarely been explicit about lenity's place in the interpretive hierarchy. As Justice Scalia—himself a proponent of lenity, as we shall see—once complained while a judge on the D.C. Circuit, the rule often seems to provide “little more than atmospheric, since it leaves open the crucial question—almost invariably present—of how much ambiguousness constitutes an ambiguity.”²⁶ What is required to give the rule a definite function is some theory of ambiguity—of the sorts of interpretive conflicts that fall within lenity's ambit. Without such a theory, it is impossible to know what effect, if any, the rule will have in particular cases.

While lenity could be assigned many different functions in an interpretive theory, I want to highlight three possibilities, each of

23. U.S. Const. art. II, § 1, cl. 5.

24. Kahan, *supra* note 6, at 384-85 (citations omitted).

25. *Id.* at 386.

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

which has some grounding in the case law and could theoretically be applied in our criminal justice system.

The first possibility is a view that has recently gained favor in both state and federal courts. This approach ranks lenity dead last in the interpretive hierarchy. "The rule comes into operation at the end of the process of construing what [the legislature] has expressed,"²⁷ compelling the selection of one interpretation over another only if "seizing every thing from which aid can be derived" has failed to yield a single best reading.²⁸ On this view, judges are free to indulge a broad reading based on legislative history or policy even though the text could mean something narrower.²⁹ Or they may take a literal view of a statute's broad language, though common sense or legislative policy might suggest a narrow reading.³⁰ Lenity comes into play only in the unlikely event that other conventions yield an interpretive "tie."³¹

Recent decisions by the Supreme Court have endorsed this first approach to lenity. "[W]e have always," the Court said recently in *Moskal v. United States*, "reserved lenity for those situations in which a reasonable doubt persists about a statute's intended scope even after resort to 'the language and structure, legislative history, and motivating policies' of the statute."³² As we shall see in Part II, this statement is not accurate as a summary of the Court's historic practice. It does appear correct, however, with respect to the modern cases. Neither state nor federal courts today prefer narrow readings automatically; instead, they tend to interpret criminal laws much as they would civil statutes.³³ Accordingly, lenity tends to appear in opinions only as a supplemental rationale when narrow readings are chosen for other reasons, not as the exclusive or even dominant basis for a decision.

The second rendition of lenity is a theory that Justice Scalia has sketched in a series of dissents. On this view, lenity operates to cut off broad readings based on policy, legislative history, or other extra-textual sources whenever the text standing alone supports a narrower view. In other words, this theory ranks lenity second to the plain text

27. *Callanan v. United States*, 364 U.S. 587, 596 (1961).

28. *United States v. Bass*, 404 U.S. 336, 347 (1971) (internal quotations and brackets omitted) (quoting *United States v. Fisher*, 6 U.S. (2 Cranch) 358, 386 (1805)).

29. See, e.g., *Smith v. United States*, 508 U.S. 223, 229-37 (1993) (rejecting the suggestion that a sentencing enhancement for "use" of a firearm in a narcotics transaction referred only to "use as a weapon").

30. See, e.g., *Chapman v. United States*, 500 U.S. 453, 459-63 (1991) (interpreting the weight of a "mixture or substance" containing the drug LSD to include the weight of blotter paper on which the drug was placed).

31. *Kahan*, *supra* note 6, at 386.

32. *Moskal v. United States*, 498 U.S. 103, 108 (1990) (quoting *Bifulco v. United States*, 447 U.S. 381, 387 (1980)).

33. See *infra* notes 85-141 and accompanying text.

in the interpretive hierarchy: judges first identify the text's plain meaning, resolving any ambiguities without reference to lenity; next, they deploy lenity to resolve any ambiguity as between that reading and any broader view supported by non-textual interpretive theories. As Scalia puts it, "[i]f 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. . . [nor] give the words a meaning that even one unfamiliar with the term of art would not imagine."³⁴ When a statute refers, for example, to the "use" of a firearm in a narcotics transaction, the court must follow the commonsense meaning of the statutory phrase (use as a weapon), even if Congress's apparent policy ("drugs and guns are a dangerous combination"³⁵) could support an interpretation encompassing less obvious meanings (e.g., use as consideration for drugs).³⁶ Likewise, when a statute refers to "falsely made" titles, it must cover only forgeries, even if Congress's purpose ("attack[ing] a category of fraud"³⁷) could justify interpreting it to reach titles based on false information as well.³⁸ In each case, it is the plain text that controls; lenity blocks broader readings.

Scalia's rendition of lenity is peculiar in that it summons lenity's symmetric doctrine (always favor the narrower reading) in support of an asymmetric preference for text-oriented interpretations (first look to the text, then apply lenity to preclude other readings). It is clear that Scalia's main commitment is to textualism rather than lenity. When the text indicates broad liability, he has joined the majority in spurning lenity.³⁹ Moreover, in academic writing he has labeled strict construction a "canard" and quipped, "I should think that the effort, with respect to any statute, should be neither liberally to expand nor strictly to constrict its meaning, but rather to get the meaning precisely right."⁴⁰ One might therefore conclude that Scalia's appeals to lenity are merely rhetorical: Like the *Moskal* majority, he cites lenity when it favors his side; otherwise, he ignores it.

Scalia's lenity dissents, however, hint at a more fundamental connection with textualism: His claim is not simply that lenity is one

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

35. *Smith v. United States*, 508 U.S. 223, 240 (1993).

36. *See id.* at 242-43 (Scalia, J., dissenting).

37. *Moskal*, 498 U.S. at 111.

38. *Id.* at 119-20 (Scalia, J., dissenting).

39. *See, e.g., Deal v. United States*, 508 U.S. 129, 131 (1993) (majority opinion by Scalia, J.) (rejecting appeals to the rule of lenity and holding that the statutory phrase "second or subsequent conviction" applies when the two convictions are simultaneous); *Chapman v. United States*, 500 U.S. 453, 455 (1991) (Rehnquist, C.J., joined by White, Blackmun, O'Connor, Scalia, Kennedy, & Souter, JJ.) (interpreting sentencing provision to count blotter paper as a "mixture" containing the drug LSD).

40. Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 Case W. Res. L. Rev. 581, 582 (1989) (emphasis omitted).

argument in his favor, but rather that “if the rule of lenity means anything,” it means that legislative history and policy should not cloud the plain text.⁴¹ The answer to this puzzle may be that Scalia’s textual methodology itself entails a bias toward narrow readings—with the consequence that lenity often supports the same result as his brand of textualism.⁴² As is evident from his dissent in *Smith v. United States* (the guns for drugs case), textualism for Scalia means something different from the dictionary-oriented literalism often practiced by his colleagues. Scalia does not simply focus on the literal definition of terms in the statute; rather, he seeks to identify the text’s “plain meaning”—the commonsense interpretation that would spring first to an ordinary reader’s mind.⁴³ Whether or not this search for commonsense meaning is a coherent project (some scholars have questioned it⁴⁴), it is clear that accepting a “plain” reading will ordinarily mean rejecting the more attenuated implications of a text. Insofar as those implications broaden the text’s meaning, rejecting them is tantamount to following lenity’s command to select the narrower reading among the alternatives. Hence, the effects of lenity and textualism may be the same: Both compel the rejection of broad readings that might otherwise be viable. Scalia’s approach to lenity appears to identify the rule with these consequences of focusing on the plain text.

Of course, the rule of lenity might also mean confining the reach of criminal statutes even in cases where textualism would support a broader view. A third rendition of lenity would achieve that result.

41. *Moskal*, 498 U.S. at 132 (Scalia, J., dissenting) (emphasis added).

42. One commentator has canvassed Scalia’s statutory decisions, both criminal and civil, and concluded that the dominant characteristic of his interpretive jurisprudence is a preference for narrow readings over broad ones. Karkkainen, *supra* note 1, at 404.

43. This difference in approach is evident time and again in the Court’s statutory cases. Whereas his colleagues often defend broad readings by citing the dictionary definitions of the statute’s terms, Scalia typically identifies the meaning of a statutory phrase by comparing it to everyday expressions using similar terms. *Compare* *Smith v. United States*, 508 U.S. 223, 228-29 (1993) (citing the dictionary definition of “use”), *with id.* at 242-43 (Scalia, J., dissenting) (deducing the meaning of “use” from examples of common usage and criticizing the majority for failing “to grasp the distinction between how a word *can be* used and how it *ordinarily is* used”) (emphasis in original), *and Moskal*, 498 U.S. at 108-09 (concluding the phrase “falsely made” is “broad enough” to encompass forged instruments), *with id.* at 119-20 (Scalia, J., dissenting) (again offering sample everyday phrases as evidence of the term’s ordinary meaning and accusing the majority of endorsing an “extra-ordinary” interpretation) (emphasis in original); *see also* *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 406 (1999) (unanimous opinion by Scalia, J.) (rejecting a “linguistically possible” interpretation because it was not the “more natural meaning” as evidenced by comparison to sample phrases from everyday speech).

44. *See, e.g.*, Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 Harv. L. Rev. 405, 416-17 (1989) (“The central problem [with textualism] is that the meaning of words . . . depends on both *culture* and *context*. Statutory terms are not self-defining, and words have no meaning before or without interpretation.”).

Under this theory—which has not been clearly articulated in judicial opinions, but which seems most faithful to lenity’s command to pick the narrowest possible view—the judge’s first step in interpreting a criminal statute would be to identify all the plausible readings of the statute, employing all accepted interpretive techniques. Lenity would then compel the judge to select the narrowest interpretation within that set of plausible options. The effect would be to create a one-way ratchet in the defendant’s favor. Arguments about policy and legislative history—the full panoply of interpretive techniques—could narrow the statute’s coverage, but never broaden it. If the plain text were expansive but the legislative history suggested a narrower meaning, the judge would favor the latter view. By contrast, if the text were tightly drawn but construed broadly in committee reports, the textual reading would prevail. While judges might manipulate the threshold judgment of plausibility to exclude disfavored interpretations, it would generally be more difficult for them to reject narrow readings than under the first or second theories of lenity, because doing so would require them to deem the interpretation *implausible*, rather than simply wrong or unpersuasive.

Though explicit authority for this third approach to lenity is scant in the case law, some support may be drawn from Justice Holmes’s classic opinion in *McBoyle v. United States*.⁴⁵ *McBoyle* presented the question whether a defendant who had transported a stolen airplane could be convicted under a statute regulating theft of “motor vehicles.”⁴⁶ The statute defined “motor vehicle” as “an automobile, automobile truck, automobile wagon, motor cycle, or any other self-propelled vehicle not designed for running on rails.”⁴⁷ Though he admitted that “etymologically” the definition could encompass “a conveyance working on land, water, or air,” Holmes ruled for the Court that the statute could not support a conviction for transporting a stolen aircraft.⁴⁸

Holmes’s rationale appears to be a version of the second, textualist approach to lenity. Much as Scalia focuses on the “plain meaning” of statutes, Holmes asked what the statute would mean to the “common mind” and concluded the words would evoke “only the picture of vehicles moving on land.”⁴⁹ He then cut off broader interpretations that looked beyond the text, noting, “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.”⁵⁰

45. 283 U.S. 25 (1931).

46. *Id.* at 25-26.

47. *Id.* at 26 (quoting Act of Oct. 29, 1919, ch. 89, 41 Stat. 324).

48. *Id.* at 26.

49. *Id.* at 27.

50. *Id.*

Despite the parallels to Scalia's technique, however, it is the third view of lenity that makes Holmes's result the most convincing. As it stands, Justice Holmes's assertions about the plain meaning of the language are a judicial fiat—a contestable assertion by one reader about what other readers would conclude. Without a built-in bias for the narrower reading, one might just as easily conclude that the phrase "any self-propelled vehicle" includes airplanes and boats (otherwise, why not say, "any self-propelled landcraft"?).⁵¹ Similarly, the first view of lenity would permit consideration of Congress's policy purposes, which again could support a broad reading: Airplanes, like automobiles, may be readily moved over state lines, so federal criminal penalties seem equally appropriate.⁵² Only the third view makes Holmes's holding unavoidable: It is at least plausible that the statute covers only land vehicles; lenity may therefore block all broader readings—even if they, too, are plausible.

A recent New Hampshire case, *State v. Richard*,⁵³ further illustrates the differences between the three varieties of lenity. The defendant in *Richard* was accused of repeated sexual assault of two young boys.⁵⁴ Rather than charge him on the basis of discrete offenses or a single pattern of misconduct with respect to each boy, the state constructed an indictment that included ten pattern counts, one for each "discrete type of sexual assault" that the defendant committed more than once on each boy.⁵⁵ The statute defined a "pattern" as "committing more than one act under [the sexual assault provisions] upon the same victim over a period of 2 months or more and within a period of 5 years."⁵⁶ The defendant argued this language was meant only "to proscribe as a single pattern crime any and all variants of sexual assault . . . committed against a single victim during a common time

51. As was noted earlier, Scalia's tendency to select narrow interpretations suggests that his interpretive approach in fact includes such a bias for narrow readings. See *supra* notes 41-44 and accompanying text. The bias, however, is not explicit. See Karkkainen, *supra* note 1, at 404 (noting that Scalia's ostensible aim is "plain meaning" interpretation though the practical thrust of his opinions may be to advance strict construction). My point is that when the focus is on the text—even if it is the "plain meaning" of the text—the way will remain open for judges to conclude that the statute's meaning is somewhat broader than the narrowest defensible interpretation of its terms. Again, Scalia's willingness to accept broad liability rules in cases where the textual argument favors the broader view appears to confirm this implication of his textualist methodology. See *supra* note 39 and accompanying text.

52. See Kahan, *supra* note 6, at 401 (stating the "purpose of the Act was to reinforce state theft statutes, which were (and remain) difficult to enforce against crimes that span multiple jurisdictions").

53. 786 A.2d 876 (N.H. 2001).

54. *Id.* at 878.

55. *Id.* Thus, for instance, two pattern counts related to his performance of fellatio on them, two more to their fellatio on him, and yet a third for acts of mutual fellatio. See *id.*

56. N.H. Rev. Stat. Ann. § 632-A:1 (Supp. 2000), quoted in *Richard*, 786 A.2d at 879.

frame, regardless of the number or nature of the underlying acts.”⁵⁷ Dividing a single sequence of sexual crimes into multiple pattern counts, he claimed, would subject him to “multiple punishments for the same offense” in violation of the Double Jeopardy Clause.⁵⁸

Even more than in *McBoyle*, it seems that only something like the third version of lenity could assure victory to the defendant in *Richard*. The court in fact applied the first approach. Though it mentioned lenity, it gave it no force, deeming the statute unambiguous based on considerations of policy.⁵⁹ The defendant’s reading, it explained, could lead to the “absurd” result that only a single pattern conviction would be possible “when a victim is unable to recall discrete assaults due, in part, to their frequency, while defendants whose victims have discrete recall would remain accountable for multiple convictions under the single-act sexual assault provisions.”⁶⁰ Textualism, the second method, might favor the defendant instead, but its implications are debatable. One might argue, as the defendant did, that it is most natural to read “pattern” to refer to the entire pattern and “committing more than one act” to mean committing all the acts,⁶¹ yet it also seems possible to read the plain language—“committing more than one act”—to define any distinct subset of sexual wrongs occurring over a two month period as a “pattern.” Again, only the third view clearly favors the defendant’s position. Even if it has negative policy implications or is not the most intuitive, the defendant’s reading is at least plausible. The third view of lenity would therefore compel the court to adopt it, leaving it to the legislature to correct any “absurdities” that result.

It may not be surprising that the court chose to throw the book at a defendant accused of crimes as appalling as those alleged in *Richard*. I will return later in the paper to the reasons why lenity may be appropriate even with respect to such heinous crimes.⁶² In the meantime, the next part shows that *Richard*’s lax view of lenity is in fact the dominant approach not only in cases of serious crime, but also in nearly every prosecution in the United States.

II. EVOLUTION OF THE RULE

A. *Early Origins*

Historically, courts in England and the United States applied a strong version of strict construction—something rather like the second theory outlined in Part I, or perhaps even the third. The rule’s precise

57. *Richard*, 786 A.2d at 879.

58. *Id.* at 878.

59. *Id.* at 879.

60. *Id.*

61. *Id.*

62. See *infra* notes 352-56 and accompanying text.

textual methodology was never clearly articulated, however, so later courts have been free to demote lenity without squarely contradicting the controlling precedents.

The rule of lenity has its oldest origins in the efforts of common law courts in the seventeenth and eighteenth centuries to limit the brutality of English criminal law.⁶³ At the time, death was the usual penalty for all felonies, but liberal application of “benefit of clergy” (which notionally exempted clergymen from death, but in practice applied more widely) enabled courts to reduce the sentences of many defendants.⁶⁴ When Parliament passed statutes to limit benefit of clergy, courts responded with strict construction: They required abrogation in the most specific possible terms. Thus, as Blackstone recounts, courts barred application of a horse theft statute to the theft of a single horse and read a statute covering theft of “sheep, or other cattle” to apply only to sheep.⁶⁵ Though Parliament responded each time with more specific statutes,⁶⁶ strict construction at least provided dispensation to the defendants in the original suits.

The rule of lenity later entered American jurisprudence, at least on the federal level, as part of Chief Justice Marshall’s campaign to rationalize statutory construction and “reinforce an image of the federal judiciary as a nonpartisan discoverer of the law.”⁶⁷ Marshall’s project was to craft a disciplined methodology of interpretation based on the conventions of the common law.⁶⁸ The rule of lenity made its entry in *United States v. Wiltberger*,⁶⁹ a case interpreting Congress’s very first criminal statute, the Crimes Act of 1790.

The defendant in *Wiltberger* had committed manslaughter on a river in China.⁷⁰ Though the statute in question applied only to manslaughter “on the high seas,” it defined other crimes to apply more broadly. Murder, piracy, and mutiny, for instance, were banned “upon the high seas, or in any river, haven, basin or bay, out of the jurisdiction of any particular state.”⁷¹ The government pointed to these broader provisions as a basis for applying the statute to manslaughter on rivers as well as seas.⁷² Marshall agreed that the “differences with respect to place” made little sense.⁷³ “We can

63. See Livingston Hall, *Strict or Liberal Construction of Penal Statutes*, 48 Harv. L. Rev. 748, 748-51 (1935).

64. *Id.* at 749.

65. 1 William Blackstone, *Commentaries* *88 (emphasis omitted).

66. *Id.*

67. John Choon Yoo, Note, *Marshall’s Plan: The Early Supreme Court and Statutory Interpretation*, 101 Yale L.J. 1607, 1627 (1992).

68. *Id.*

69. 18 U.S. (5 Wheat.) 76 (1820).

70. *Id.* at 76.

71. *Id.* at 78 n.(a) (quoting The Act of April 30, 1790 § 8).

72. *Id.* at 77-85.

73. *Id.* at 105.

conceive no reason," he wrote, "why other crimes, which are not comprehended in this act, should not be punished."⁷⁴ Nevertheless, he declined to accept the government's reading. "The rule that penal laws are to be construed strictly," he noted, "is perhaps not much less old than construction itself."⁷⁵ Absent clear congressional direction, "this Court cannot enlarge the statute."⁷⁶

After *Wiltberger*, strict construction was widely accepted in state and federal courts in the United States.⁷⁷ Almost every jurisdiction in the United States applies some version of lenity today, at least in principle.⁷⁸ Nevertheless, confusion has persisted since *Wiltberger* about the precise function of the rule of lenity. Marshall's opinion deployed lenity to back up an interpretation reached on textual grounds: He referred to the literal meaning of "high seas," much as Justice Holmes invoked the statute's sense in the "common mind" 100 years later in *McBoyle*. Consequently, his opinion, like Holmes's in *McBoyle*, left some doubt as to whether textualism or narrow construction was the primary value; while lenity evidently placed a thumb on the scale, it was unclear, as Justice Scalia later put it, "how much the thumb weighs."⁷⁹

Considering that *Wiltberger* came only eight years after the landmark decision in *United States v. Hudson & Goodwin* abrogating common law crimes in the federal system,⁸⁰ it is tempting to conclude that *Wiltberger* had more to do with attention to statutes and congressional supremacy than with strict construction for its own sake.⁸¹ *United States v. Kelly*,⁸² a decision six years later, appears to confirm that suspicion. It asserted the Supreme Court's power to give meaning to undefined statutory terms—even to the extent of selecting a definition other than the narrowest option.⁸³ Had *Wiltberger* and other early opinions been more emphatic about the imperative of selecting a narrow reading, even when the text permits other possibilities, it might have been more difficult for lenity's function to erode. As it happened, in the years since *McBoyle* courts have

74. *Id.*

75. *Id.* at 95.

76. *Id.* at 105.

77. See Hall, *supra* note 63, at 751-52.

78. See *infra* notes 109-41 and accompanying text.

79. Scalia, *supra* note 40, at 582.

80. 11 U.S. (7 Cranch) 32, 34 (1812).

81. See Yoo, *supra* note 67, at 1625. Marshall in fact refers to legislative supremacy as one of the reasons to apply strict construction. *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820). As will be discussed below, that principle has come to be one of the conventional justifications for the doctrine. See *infra* notes 156-60 and accompanying text.

82. 24 U.S. (11 Wheat.) 417 (1826).

83. See *id.*

increasingly emphasized the definitional powers established by *Kelly* rather than the requirements of lenity outlined in *Wiltberger*.⁸⁴

B. *Modern Federal Practice*

The rule of lenity today has very little practical effect in decisions interpreting criminal statutes in either state or federal courts. The quotation given above from *Moskal* sums up the current view in federal courts: “[W]e have always,” Justice Thurgood Marshall wrote for the Court, “reserved lenity for those situations in which a reasonable doubt persists about a statute’s intended scope even *after* resort to ‘the language and structure, legislative history, and motivating policies’ of the statute.”⁸⁵ It seems doubtful Chief Justice John Marshall would have accepted this view of lenity’s place. Considering that he himself admitted it was “extremely improbable” that Congress intended the interpretation he chose in *Wiltberger*,⁸⁶ it is impossible to conclude that Marshall would have ruled as he did had he considered the statute’s legislative history and “motivating policies” before lenity.⁸⁷ At a minimum, he seems to have followed something more like the second, text-oriented view of lenity. Nevertheless, at least as early as Justice Frankfurter’s 1961 opinion in *Callanan v. United States*,⁸⁸ the Supreme Court has taken to denigrating lenity’s importance.⁸⁹ Since the rule of lenity by itself is not sufficient to produce affirmative readings of the text, it is inevitable that it must come after *some* other interpretive techniques. Nowadays it comes after all of them.

Moskal’s cramped view of lenity has resulted in a series of decisions construing federal criminal statutes broadly despite narrower alternatives. In *Moskal* itself, the Court extended a statute prohibiting “falsely made” securities to cover automobile titles prepared on the basis of falsified odometer readings, even though the state officials who prepared them were oblivious to the fraud.⁹⁰ As Justice Scalia noted in dissent, “the adverb preceding the word ‘made’ naturally refers to the manner of making, rather than to the nature of the product made. An inexpensively made painting is not the same as an inexpensive painting.”⁹¹ The majority, however, allowed a

84. See Kahan, *supra* note 6, at 372-73.

85. *Moskal v. United States*, 498 U.S. 103, 108 (1990) (quoting *Bifulco v. United States*, 447 U.S. 381, 387 (1980)).

86. *Wiltberger*, 18 U.S. at 105.

87. *Moskal*, 498 U.S. at 108 (quoting *Bifulco*, 447 U.S. at 387).

88. 364 U.S. 587 (1961).

89. See *id.* at 596 (“[The rule of lenity] only serves as an aid for resolving an ambiguity; it is not to be used to beget one. . . . The rule comes into operation at the end of the process of construing what Congress has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers.”).

90. *Moskal*, 498 U.S. at 105-06.

91. *Id.* at 119.

combination of textual analysis and “legislative purpose” to block that narrow view, leaving no conflict for the rule of lenity to resolve.⁹² Similarly, in *Smith v. United States*,⁹³ the Court rejected the narrow, intuitive interpretation of a ban on “use” of a firearm “during and in relation to . . . [a] drug trafficking crime”⁹⁴ as a ban on using the firearm “as a weapon.”⁹⁵ It held instead that the statute could cover the use of a gun as consideration in a narcotics transaction.⁹⁶ As a third example, in *Lewis v. United States*,⁹⁷ the Court held that a constitutionally invalid conviction could serve as the predicate for a ban on possession of firearms by convicted felons.⁹⁸ The dissenters observed that a plausible narrower reading would have limited the statute to valid prior convictions.⁹⁹

As if to underscore the Court’s departure from a real commitment to lenity, Justice Scalia has dissented repeatedly from decisions endorsing the *Moskal* formulation of the rule.¹⁰⁰ As was noted above, Scalia’s personal confidence in strict construction is open to question, since he himself has endorsed broad readings in several debatable cases.¹⁰¹ At the least, however, Scalia’s opinions highlight the Court’s willingness to reject plausible narrow readings of statutes based on considerations other than lenity. Though the Court continues to refer to lenity as one justification among others when it endorses a narrow reading,¹⁰² most of the Justices appear unwilling to rely on the rule in cases where they favor a broad interpretation.

The effect of the new approach to lenity has been even more dramatic in lower federal courts than in the Supreme Court. Expansive interpretations have given several key statutes striking breadth. The mail fraud statute, for example, may now permit prosecutions based on little more than a breach of fiduciary duty.¹⁰³ This theory has resulted from a literalist approach to the statute’s broad language, which bans all “schemes to defraud of money,

92. *Id.* at 114.

93. 508 U.S. 223 (1993).

94. 18 U.S.C. § 924(c)(1)(A) (2000).

95. *See Smith*, 508 U.S. at 242-43 (Scalia, J., dissenting).

96. *Id.* at 237.

97. 445 U.S. 55 (1980).

98. *Id.* at 67.

99. *Id.* at 69.

100. *See Smith*, 508 U.S. at 241 (Scalia, J., dissenting, joined by Stevens & Souter, JJ.); *United States v. R.L.C.*, 503 U.S. 291, 307 (1992) (Scalia, J., concurring, joined by Kennedy & Thomas, JJ.); *Moskal v. United States*, 498 U.S. 103, 119 (1990) (Scalia, J., dissenting, joined by O’Connor & Kennedy, JJ.).

101. *See supra* note 39.

102. *See, e.g.*, *United States v. Kozminski*, 487 U.S. 931, 952 (1988); *Bifulco v. United States*, 447 U.S. 381, 387 (1980); *United States v. Bass*, 404 U.S. 336, 347 (1971).

103. *See supra* note 17.

property, or the intangible right to honest services.”¹⁰⁴ Similarly, in interpreting the Hobbs Act’s ban on the “obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right,”¹⁰⁵ courts have suggested that threatened breach of contract could induce a criminally proscribed variety of “fear.”¹⁰⁶ While it might be argued that such theories follow unambiguously from the statutes’ texts, these interpretations hardly implement an intuitive understanding of “fraud” and “extortion.” It seems unlikely that courts would have extended these statutes to such minor malfeasances had they maintained a strong commitment to lenity.

In short, the rule of lenity today appears to be not so much a “rule” as an argument of convenience in federal courts. The rule is used to buttress results obtained on other grounds, not to compel decisions on the merits.¹⁰⁷ The dominant approach to interpretation of criminal statutes is instead a variety of hyper-literalism: “use” means whatever the dictionary says it means; “conviction” means any conviction, however doubtful; and “fear” means almost any form of commercial anxiety. A minority, led by Justice Scalia, has decried the methodology of such broad readings as dangerous and unprincipled, but their campaign has had little impact so far on the trend of the decisions.¹⁰⁸

C. Modern State Practice

The state cases display more or less the same pattern as their federal counterparts: The rule of lenity is frequently cited, but rarely taken seriously. Though nearly every state in the Union has endorsed the rule of lenity in some form, rigorous applications of lenity are extremely rare, and even those rare instances do not appear to reflect a serious commitment to the rule.¹⁰⁹

104. 18 U.S.C. §§ 1341, 1346 (2000).

105. *Id.* § 1951(b)(2).

106. *See, e.g.*, *United States v. Kattar*, 840 F.2d 118, 124 (1st Cir. 1988) (interpreting the Hobbs Act to cover extortion of benefits by placing a victim in fear of economic loss); *see also* *United States v. Covino*, 837 F.2d 65, 68 (2d Cir. 1988); *see generally* *Coffee*, *supra* note 17, at 208-10.

107. *See* Jeffries, *supra* note 1, at 198-99 (“Today, strict construction survives more as a makeweight for results that seem right on other grounds than as a consistent policy of statutory interpretation.”).

108. *See, e.g.*, *Smith v. United States*, 508 U.S. 223, 225 (1993); *Moskal v. United States*, 498 U.S. 103, 105-06 (1990); *Lewis v. United States*, 445 U.S. 55, 67 (1980).

109. The conclusions presented in this section result from a survey of decisions referring to the “rule of lenity” or “strict construction” in state courts of last resort between 1997 and 2002, expanded to include decisions outside that period when no decisions including those terms were found. For a sampling of representative decisions in the fifty states plus the District of Columbia, *see: Ex parte Washington*, 818 So. 2d 424 (Ala. 2001); *George v. State*, 988 P.2d 1116 (Alaska Ct. App. 1999); *Reinesto v. Superior Court*, 894 P.2d 733 (Ariz. Ct. App. 1995); *Manning v. State*, 956

In many states, statutory construction is regulated not only by common law principles, but also by statute. Though Florida and Ohio have codified the rule of lenity,¹¹⁰ most states with code provisions on statutory construction have instead attempted to abolish strict construction. Twelve have done so explicitly, using formulations such as, “[t]he general rule that a penal statute is to be strictly construed does not apply to this title, but the provisions herein must be construed according to the fair meaning of their terms to promote

S.W.2d 184 (Ark. 1997); *People v. Avery*, 38 P.3d 1 (Cal. 2002); *Fields v. Suthers*, 984 P.2d 1167 (Colo. 1999); *People v. District Court, Second Judicial District*, 713 P.2d 918 (Colo. 1986); *State v. Sostre*, 802 A.2d 754 (Conn. 2002); *State v. Jason B.*, 729 A.2d 760 (Conn. 1999); *Dixon v. State*, 673 A.2d 1220 (Del. 1996); *In re C.L.D., Jr.*, 739 A.2d 353 (D.C. 1999); *State v. Huggins*, 802 So. 2d 276 (Fla. 2001); *McClellan v. State*, 561 S.E.2d 82 (Ga. 2002); *State v. Shimabukuro*, 60 P.3d 274 (Haw. 2002); *State v. Barnes*, 859 P.2d 1387 (Idaho 1993); *People v. Davis*, 766 N.E.2d 641 (Ill. 2002); *Healthscript, Inc. v. State*, 770 N.E.2d 810 (Ind. 2002); *State v. Boleyn*, 547 N.W.2d 202 (Iowa 1996); *State v. Kleyvas*, 40 P.3d 139 (Kan. 2001); *Commonwealth v. White*, 3 S.W.3d 353 (Ky. 1999); *State v. Everett*, 816 So. 2d 1272 (La. 2002); *State v. Carr*, 761 So. 2d 1271 (La. 2000); *State v. Weeks*, 761 A.2d 44 (Me. 2000); *Webster v. State*, 754 A.2d 1004 (Md. 2000); *Harris v. State*, 728 A.2d 180 (Md. 1999); *Perry v. Commonwealth*, 780 N.E.2d 53 (Mass. 2002); *Commonwealth v. Carrion*, 725 N.E.2d 196 (Mass. 2000); *People v. Denio*, 564 N.W.2d 13 (Mich. 1997); *State v. Loge*, 608 N.W.2d 152 (Minn. 2000); *Edwards v. State*, 800 So. 2d 454 (Miss. 2001); *State v. Rowe*, 63 S.W.3d 647 (Mo. 2002); *J.S. v. Beard*, 28 S.W.3d 875 (Mo. 2000); *State v. Leifert*, 43 P.3d 329 (Mont. 2002); *State v. Turner*, 864 P.2d 235 (Mont. 1993); *State v. White*, 577 N.W.2d 741 (Neb. 1998); *Villanueva v. State*, 27 P.3d 443 (Nev. 2001); *State v. Richard*, 786 A.2d 876 (N.H. 2001); *State v. Cobb*, 732 A.2d 425 (N.H. 1999); *State v. Livingston*, 797 A.2d 153 (N.J. 2002); *State v. Valentin*, 519 A.2d 322 (N.J. 1987); *State v. McClendon*, 28 P.3d 1092 (N.M. 2001); *State v. Begay*, 17 P.3d 434 (N.M. 2001); *State v. Cleve*, 980 P.2d 23 (N.M. 1999); *People v. Green*, 497 N.E.2d 665 (N.Y. 1986); *People v. Brown*, 702 N.Y.S.2d 739 (App. Div. 2000); *State v. Hearst*, 567 S.E.2d 124 (N.C. 2002); *State v. Green*, 502 S.E.2d 819 (N.C. 1998); *State v. Laib*, 644 N.W.2d 878 (N.D. 2002); *State v. Rue*, 626 N.W.2d 681 (N.D. 2001); *State v. Hurd*, 734 N.E.2d 365 (Ohio 2000); *State v. Jordan*, 733 N.E.2d 601 (Ohio 2000); *State v. Snowden*, 720 N.E.2d 909 (Ohio 1999); *Roberts v. Okla. Dep't of Corr.*, 54 P.3d 106 (Okla. 2002); *Quinn v. City of Tulsa*, 777 P.2d 1331 (Okla. 1989); *State v. Isom*, 837 P.2d 491 (Or. 1992); *Commonwealth v. Collins*, 764 A.2d 1056 (Pa. 2001); *Commonwealth v. Lassiter*, 722 A.2d 657 (Pa. 1998); *State v. DeMagistris*, 714 A.2d 567 (R.I. 1998); *Whitner v. State*, 492 S.E.2d 777 (S.C. 1997); *State v. Dillon*, 632 N.W.2d 37 (S.D. 2001); *State v. Legg*, 9 S.W.3d 111 (Tenn. 1999); *State v. Alford*, 970 S.W.2d 944 (Tenn. 1998); *Vineyard v. State*, 958 S.W.2d 834 (Tex. Crim. App. 1998); *State v. Archuletta*, 526 P.2d 911 (Utah 1974); *State v. Fuller*, 721 A.2d 475 (Vt. 1998); *Lovisi v. Commonwealth*, 188 S.E.2d 206 (Va. 1972); *Richardson v. Commonwealth*, 489 S.E.2d 697 (Va. Ct. App. 1997); *State v. Coria*, 48 P.3d 980 (Wash. 2002); *State v. Green*, 534 S.E.2d 395 (W. Va. 2000); *State v. Zain*, 528 S.E.2d 748 (W. Va. 1999); *State v. Floyd*, 606 N.W.2d 155 (Wis. 2000); *State v. Kittilstad*, 603 N.W.2d 732 (Wis. 1999); *State v. Nelson*, 49 P.3d 185 (Wyo. 2002).

110. Fla. Stat. Ann. § 775.021 (West 2000) (“The provisions of this code and offenses defined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused.”); Ohio Rev. Code Ann. § 2901.04(a) (Anderson 2002) (“[S]ections of the Revised Code defining offenses or penalties shall be strictly construed against the state, and liberally construed in favor of the accused.”).

justice and effect the objects of the law,"¹¹¹ or directing that provisions are to be "liberally construed."¹¹² One more, New York, explicitly approves "departure from literal construction" when necessary to "sustain the legislative intention,"¹¹³ and permits reference to "extrinsic matters throwing light on the legislative intent" when "there is doubt as to the meaning of the language of the statute."¹¹⁴ Sixteen states indicate that statutory provisions are to be interpreted according to their "common," "ordinary," or "popular" meaning,¹¹⁵ which could imply that narrowing constructions are not to be favored.¹¹⁶ Five direct that statutes are to be construed in light of specified "general purposes" of the criminal code, which do not include strict construction,¹¹⁷ though in three states "fair warning" is listed as an objective.¹¹⁸ The codes of the remaining fifteen jurisdictions, including the District of Columbia, include no rule of construction relevant to lenity.¹¹⁹

Curiously, the liberal construction statutes do not appear to have been a significant motivation for lenity's deterioration in state court practice. While a few state courts of last resort have accepted the legislative abrogation of lenity,¹²⁰ most have ignored the statutory

111. Ariz. Rev. Stat. Ann. § 13-104 (West 2001); Del. Code Ann. tit. 11, § 203 (2001); Idaho Code § 73-102(1) (Michie 1999); Mich. Comp. Laws § 750.2 (2001); Mont. Code Ann. § 45-1-102(2) (2001); N.H. Rev. Stat. Ann. § 625:3 (1996); N.D. Cent. Code § 1-02-01 (1987); Or. Rev. Stat. § 161.025(2) (2001); S.D. Codified Laws § 22-1-1 (Michie 1998); Tex. Penal Code Ann. § 1.05 (Vernon 2003); Utah Code Ann. § 76-1-106 (1999).

112. Ky. Rev. Stat. Ann. § 500.030 (Michie 1999); *see also* Idaho Code § 73-102(1); N.D. Cent. Code § 1-02-01.

113. N.Y. Stat. Law § 111 (McKinney 1971).

114. *Id.* § 120.

115. Ala. Code § 13A-1-6 (1975); Alaska Stat. § 01.10.040(a) (Michie 1999); Cal. Penal Code § 7(16) (West 1999); Conn. Gen. Stat. tit. 1, § 1-1(a) (2000); Ga. Code Ann. § 1-3-1(b) (2000); Haw. Rev. Stat. § 1-14 (1993); La. Rev. Stat. Ann. § 1:3 (West 1997); Me. Rev. Stat. Ann. tit. 1, § 72(3) (West 1989); Mass. Gen. Laws Ann. ch. 4, § 6 (West 1998); Minn. Stat. § 645.08(1) (2000); Miss. Code Ann. § 1-3-65 (1999); Neb. Rev. Stat. § 28-102 (1995); Okl. Stat. Ann. tit. 25, § 1 (West 1987); Tenn. Code Ann. § 39-11-104 (1997); Wis. Stat. Ann. § 990.01(1) (West 1998); Wyo. Stat. Ann. § 8-1-103(a)(i) (Michie 2001).

116. *See* Ala. Code § 13A-1-6 commentary (noting the "original draft expressly abolished the common law rule that penal laws are to be strictly construed," but the drafters concluded "an explicit repeal of the rule was unnecessary" because "the old rule of strict construction is practically meaningless as it is seldom cited and then only to support a conclusion already reached by reference to the fair meaning of the words and phrases used in a statute and a consideration of the legislature's intent").

117. Colo. Rev. Stat. § 18-1-102 (2002); 720 Ill. Comp. Stat. Ann. 5/1-2 (West 2002); N.J. Stat. Ann. § 2C:1-2(a) (West 1995); 18 Pa. Cons. Stat. Ann. § 105 (West 1998); Wash. Rev. Code Ann. § 9A.04.020(2) (West 2000).

118. N.J. Stat. Ann. § 2C:1-2(a)(4); 18 Pa. Cons. Stat. Ann. § 104(4); Wash. Rev. Code Ann. § 9A.04.020(1)(c).

119. The federal code also includes no provision directing strict or liberal construction, though Congress has considered adding such a provision several times. *See generally* Kahan, *supra* note 6, at 382-83.

120. *See, e.g.,* Dixon v. State, 673 A.2d 1220, 1225 (Del. 1996); Commonwealth v.

directives or at least limited their impact.¹²¹ Courts in several states—Arizona, Idaho, New Hampshire, North Dakota, South Dakota, and Texas—continue to employ the rule of lenity despite statutes directing them not to.¹²² The California Supreme Court has noted that the rule of lenity has “constitutional underpinnings” and therefore declined to treat that state’s statutory abrogation as conclusive.¹²³ The court occasionally cites the rule as one basis for its decisions,¹²⁴ although its usual approach is to apply lenity “only if the court can do no more than guess what the legislative body intended; there must be an egregious ambiguity and uncertainty to justify invoking the rule.”¹²⁵ Montana’s courts have vacillated, applying the rule despite statutory abrogation in *State v. Goodwin*,¹²⁶ but then rejecting it in *State v. Turner*,¹²⁷ a case which the dissent feared sounded “the death knell of the rule of lenity in Montana.”¹²⁸

Whatever the impact of statutory guidelines, a flexible version of lenity is the dominant approach in nearly every state. Several state high courts have expressly adopted the *Moskal* formulation of the rule.¹²⁹ Many others appear to follow it in practice, explicitly ranking lenity after legislative history, policy, and other considerations.¹³⁰

White, 3 S.W.3d 353, 354-55 (Ky. 1999); *People v. Denio*, 564 N.W.2d 13, 17 (Mich. 1997); *State v. Isom*, 837 P.2d 491, 495 n.6 (Or. 1992); *State v. Archuletta*, 526 P.2d 911, 912 (Utah 1974). Tennessee appears to fall in this camp as well, though its cases have vacillated. In *State v. Legg*, 9 S.W.3d 111 (Tenn. 1999), the state’s high court cited the statute requiring interpretation “according to the fair import of [the statute’s] terms,” Tenn. Code Ann. § 39-11-104 (1997), and dismissed strict construction as an archaic feature of the common law. *Legg*, 9 S.W.3d at 116. Just a year before, however, in an opinion by one of the justices who joined the *Legg* decision, the court noted, “we must include in our analysis the rule of statutory construction which requires that criminal statutes be strictly construed in favor of the defendant.” *State v. Alford*, 970 S.W.2d 944, 947 (Tenn. 1998) (Birch, J.).

121. Courts in many states evidently resolved from very early on to ignore the statutory guidelines. Livingston Hall reported in 1935: “[L]egislative attempts to abrogate or modify the old rule [of strict construction] have met with surprisingly little favor with text writers and courts.” Hall, *supra* note 63, at 754.

122. See, e.g., *Reinesto v. Superior Court*, 894 P.2d 733, 735 (Ariz. Ct. App. 1995); *State v. Barnes*, 859 P.2d 1387, 1388 (Idaho 1993); *State v. Richard*, 786 A.2d 876, 879 (N.H. 2001); *State v. Laib*, 644 N.W.2d 878, 883 (N.D. 2002); *Vineyard v. State*, 958 S.W.2d 834, 838 (Tex. Crim. App. 1998).

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

124. See, e.g., *Harroff v. County of Kings*, 25 P.3d 649, 659 (Cal. 2001).

125. *Avery*, 38 P.3d at 6 (citation omitted).

126. 813 P.2d 953, 967 (Mont. 1991).

127. 864 P.2d 235, 241 (Mont. 1993).

128. *Id.* at 249 (Gray, J., dissenting).

129. See, e.g., *State v. King*, 735 A.2d 267, 294 n.47 (Conn. 1999); *State v. Ogden*, 880 P.2d 845, 853 (N.M. 1994).

130. See, e.g., *People v. District Court, Second Judicial District*, 713 P.2d 918, 922 (Colo. 1986); *People v. Green*, 497 N.E.2d 665, 666 (N.Y. 1986); *State v. Floyd*, 606 N.W.2d 155, 158 (Wis. 2000); cf. *Richmond v. City of Corinth*, 816 So. 2d 373, 375 (Miss. 2002) (noting “[s]trict construction means reasonable construction” (quoting *Reining v. State*, 606 So. 2d 1098, 1103 (Miss. 1992))).

While a few states have hinted at a tougher approach, occasionally citing lenity as a major basis for their decisions,¹³¹ lenity does not appear to impose significant discipline even in these jurisdictions. In Florida, for example, where the legislature has codified the rule of lenity, the state supreme court has resolved at least one case on the basis of lenity in recent years,¹³² but it has also indicated that “legislative intent is the polestar that guides’ the Court’s inquiry,”¹³³ and it rejected a colorable argument for lenity in at least one recent case.¹³⁴ Illinois, Idaho, and Hawaii have also shown some support for the rule,¹³⁵ and courts in Maryland, Louisiana, and Indiana have occasionally constricted the literal meaning of statutes in reliance on lenity.¹³⁶ Some of these same courts, however, have rejected respectable lenity arguments in other cases,¹³⁷ and none has clearly indicated that lenity ranks higher than other interpretive resources such as legislative history and policy. As with the federal cases, it is hard to avoid the suspicion that lenity is an argument of convenience, a tool to reach for when the equities favor a narrow reading. Overall, it is not a consistent source of discipline.

131. See, e.g., *State v. Huggins*, 802 So. 2d 276, 279 (Fla. 2001); *State v. Shimabukuro*, 60 P.3d 274, 277 (Haw. 2002); *State v. Barnes*, 859 P.2d 1387, 1388 (Idaho 1993); *People v. Davis*, 766 N.E.2d 641, 644 (Ill. 2002); *Healthscript, Inc. v. State*, 770 N.E.2d 810, 816 (Ind. 2002); *State v. Carr*, 761 So. 2d 1271, 1274 (La. 2000); *Webster v. State*, 754 A.2d 1004, 1016 (Md. 2000).

132. See *Huggins*, 802 So. 2d at 279.

133. *State v. Rife*, 789 So. 2d 288, 292 (Fla. 2001) (quoting *McLaughlin v. State*, 721 So. 2d 1170, 1172 (Fla. 1998)).

134. See *Seagrave v. State*, 802 So. 2d 281, 286 (Fla. 2001) (rejecting the lower court’s interpretation and holding that the statutory term “sexual contact” includes any “physical touching of a person’s sexual body parts” as opposed to “crimes of sexual battery that require the union of the sexual organ of one person with the oral, anal, or vaginal opening of another”). Recent cases from Ohio, the only other state to have codified the rule of lenity, see *supra* note 110, show a similar pattern. In *State v. Hurd*, 734 N.E.2d 365 (Ohio 2000), the Ohio Supreme Court followed the rule of lenity and exonerated the defendant, despite describing the lack of an applicable offense for his false representations in a securities registration as “Kafkaesque.” *Id.* at 367. On the other hand, the court has said that “[t]he canon in favor of strict construction of criminal statutes is not an obstinate rule which overrides common sense and evident statutory purpose,” *State v. Sway*, 472 N.E.2d 1065, 1068 (Ohio 1984), and it by no means accepts every plausible argument for lenity. See, e.g., *State v. Snowden*, 720 N.W.2d 909, 910-11 (Ohio 1999) (rejecting defendant’s argument that residence in a “community-based correctional facility” did not constitute “detention” within the meaning of a criminal escape statute).

135. See *Shimabukuro*, 60 P.3d at 277; *Barnes*, 859 P.2d at 1388; *Davis*, 766 N.E.2d at 644.

136. See *Healthscript*, 770 N.E.2d at 816; *Carr*, 761 So. 2d at 1274; *Webster*, 754 A.2d at 1016.

137. See, e.g., *State v. Downey*, 770 N.E.2d 794 (Ind. 2002) (declining to extend a line of cases holding that the more lenient of possible sentences between a general habitual offender statute and a specific provision should apply based on the rule of lenity); *State v. Everett*, 816 So. 2d 1272 (La. 2002) (rejecting lenity argument accepted by a concurring opinion); *Harris v. State*, 728 A.2d 180 (Md. 1999) (rejecting lenity argument accepted by a dissenting opinion).

Also as on the federal level, some judges on state courts of last resort have protested against the modern trend, arguing for stiffer applications of lenity.¹³⁸ Justice Sanders of Washington's Supreme Court has been particularly vociferous, citing lenity in four dissents between 2000 and 2002.¹³⁹ Yet even Sanders has indicated that lenity comes after legislative history,¹⁴⁰ and other dissents, like the majorities, appear to grab for lenity as a matter of ad hoc justification, rather than real commitment to principle.¹⁴¹ Thus, in state courts there does not even appear to be as consistent a campaign in favor of lenity as the one Justice Scalia has mounted in the federal system.

III. THE CLASSICAL RATIONALES AND THEIR FLAWS

Given the impressive early authorities supporting it, the weakness of the rule of lenity requires some explanation. Ambiguities in precedents such as *Wiltberger* and *McBoyle* may be part of the reason, yet Holmes's and Marshall's ambivalence about the rule at best explains why the rule of lenity *could* be disregarded, not why it was. The same may be said of the rule's methodological intricacies. Lenity's notion of textual ambiguity is perplexing. As Justice Scalia has complained, it is odd to suggest that some reading other than the best one on the merits should prevail.¹⁴² Perhaps it should not be surprising that courts have been reluctant to cut short the interpretive inquiry and rest on a judgment of uncertainty to be resolved by lenity. Again, however, this difficulty at best establishes the preconditions, not the reasons, for the rule's collapse. Had courts believed in strict construction, they could have developed methods to implement it. To understand why they did not, we need to examine the rule's normative underpinnings.

The more complete explanation for courts' disregard for lenity may be that the doctrine's conventional justifications are deficient. Since at least *Wiltberger* and *McBoyle*, the precedents have uniformly

138. See, e.g., *State v. Boleyn*, 547 N.W.2d 202, 206 (Iowa 1996) (Snell, J., dissenting); *Harris v. State*, 728 A.2d 180, 195 (Md. 1999) (Bell, C.J., dissenting); *People v. Mitchell*, 575 N.W.2d 283, 287 (Mich. 1998) (Kelly, J., dissenting).

139. See *State v. Coria*, 48 P.3d 980, 990-91 (Wash. 2002) (Sanders, J., dissenting); *State v. Elledge*, 26 P.3d 271, 286 (Wash. 2001) (Sanders, J., dissenting); *State v. Ahluwalia*, 22 P.3d 1254, 1263-64 n.3 (Wash. 2001) (Chambers, J., dissenting, joined by Alexander & Sanders, JJ.); *State v. Berry*, 5 P.3d 658, 667 (Wash. 2000) (Sanders, J., dissenting).

140. See *Berry*, 5 P.3d at 667 (Sanders, J., dissenting) (“[W]hen the plain language of a penal statute does not direct a result one way or the other, *and we are unable to adduce legislative history to the contrary*, the rule of lenity requires we construe the act in [the defendant's] favor.” (emphasis added)).

141. See, e.g., *Harris*, 728 A.2d at 191 (Bell, C.J., dissenting) (noting the provision at issue is “at best ambiguous”); *Mitchell*, 575 N.W.2d at 287 (Kelly, J., dissenting) (noting “[a]ny lingering uncertainty or ambiguity should be resolved in favor of lenity”).

142. Scalia, *supra* note 40, at 582.

associated lenity with two bedrock principles of criminal law, notice and legislative supremacy. Neither rationale stands up to critical examination.

Consider notice first. The theory here is that narrow construction protects citizens from being caught off guard by broader prohibitions than they could anticipate. Justice Holmes articulated this concern in *McBoyle*:

Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible, the line should be clear.¹⁴³

More recently, Justice Scalia offered a similar justification for excluding references to legislative history on grounds of lenity:

It may well be true that in most cases the proposition that the words of the United States Code or the Statutes at Large give adequate notice to the citizen is something of a fiction, albeit one required in any system of law; but necessary fiction descends to needless farce when the public is charged even with knowledge of Committee Reports.¹⁴⁴

As both Scalia and Holmes admit, one flaw of the notice theory is that it relies on a fiction: Criminals do not read statutes. Yet the problems run deeper. First, it is not quite right to say that defendants such as those in *Wiltberger* and *McBoyle* lacked notice of their crimes; both could anticipate that manslaughter and airplane theft would carry penalties. Consequently, ambiguities in the statute do not raise doubts about the moral probity of punishing them.¹⁴⁵ Furthermore, even if criminals did read statutes, their studiousness would not “establish[] the kind of reliance interest that society would be obliged to respect.”¹⁴⁶ To the contrary, their study of the laws might make them more culpable if their aim was to skirt the borders of criminal liability while engaging in conduct they knew society would condemn.¹⁴⁷

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

144. *United States v. R.L.C.*, 503 U.S. 291, 309 (1992) (Scalia, J., concurring).

145. See Kahan, *supra* note 6, at 401-02 (noting that often offenders are “surprised” by punishment—but not “unfairly”).

146. Jeffries, *supra* note 1, at 231.

147. See Kahan, *supra* note 6, at 401 (noting that, at least with respect to “interior” offenses, i.e., those that are self-evidently criminal, “a person who consciously seeks to come up to the statutory ‘line’ without crossing it is not attempting to conform her behavior to the law, but rather to evade punishment for admittedly wrongful or illegal acts”). For a good illustration of this problem, see *State v. Hurd*, 734 N.E.2d 365 (Ohio 2000). Though the defendant evidently submitted deliberate false statements in a securities registration, the *Hurd* court concluded he could not be convicted of any statutory violation consistently with the rule of lenity. *Id.* at 367. Had the defendant

Some scholars have suggested that notice concerns may be more compelling with regard to technical, “regulatory” crimes.¹⁴⁸ These crimes fall outside the ordinary moral compass, so it seems there may be greater risk of catching individuals off guard.¹⁴⁹ Livingston Hall urged in 1935 that state courts should generally apply a rule of “liberal” construction, but should construe statutes narrowly when, among other things, the law relates to the “regulation of business practices for the social welfare” and “an honest effort is commonly made by those to whom the law applies to ascertain the precise limits of the legal sanction imposed.”¹⁵⁰ More recently, Dan Kahan has suggested that notice concerns should apply when conduct “sits on the boundary line between socially desirable and undesirable conduct,” but not when crimes fall deep within the “interior” of societal prohibitions.¹⁵¹

The problem with Hall’s and Kahan’s view is that notice might, if anything, cut the other way with respect to regulatory crimes. Though it may be true that technical regulatory statutes are less intuitive than core offenses, they are also one type of criminal law that defendants may actually read.¹⁵² Certainly participants in regulated industries have only themselves to blame if they fail to seek counsel’s advice about the potential breadth of regulations.¹⁵³ Perhaps for that reason, Einer Elhauge has concluded that courts have in fact adopted the reverse approach from Hall and Kahan: If anything, they appear less likely to apply lenity in the regulatory context.¹⁵⁴ In any event, courts applying lenity have never drawn categorical distinctions of the sort Hall and Kahan urge: The differences Elhauge identifies are a matter

anticipated that result and sought to benefit from the gaps in the law while causing real social harm, that fact might only strengthen the moral case for criminal punishment. Lenity’s compulsion of a contrary result therefore requires a justification other than notice.

148. See, e.g., Kahan, *supra* note 6, at 400.

149. See *id.* (describing the prohibitions on such crimes as tax evasion, securities fraud, and antitrust violations as laws that “are understood to invite individuals to come right up to the line between what is a crime and what is not”).

150. See Hall, *supra* note 63, at 764-65.

151. Kahan, *supra* note 6, at 400.

152. Hall, *supra* note 63, at 764-65; Kahan, *supra* note 6, at 400.

153. See Stuart P. Green, *Why It’s a Crime to Tear the Tag off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses*, 46 Emory L.J. 1533, 1586 (1997) (arguing that regulatory crimes are morally acceptable because “participants in a regulated industry . . . frequently agree [either implicitly or explicitly] to be bound by the statutes and regulations applicable to that industry”).

154. Elhauge, *supra* note 8, at 2201 (“Regulatory crimes like antitrust and securities violations are often defined with enormous ambiguity, yet the rule of lenity is rarely applied to them.”). Elhauge’s claim may be overstated, given that courts rarely apply lenity at all. His explanation for the pattern he claims to identify is that regulatory offenses are more likely to reflect a genuine political compromise, considering that regulatory offenses target respectable constituencies whereas the targets of ordinary criminal laws are likely to be politically underrepresented. *Id.* at 2202 n.126.

of practice, not doctrine.¹⁵⁵ If the notice theory is insufficient to justify the application of lenity across the gamut of crimes, there appears to be little authority to support selective application of the rule to some crimes but not others.

As for legislative supremacy, it unfortunately fares no better than notice. This result should not be surprising: Upon reflection, it is rather strange to associate legislative supremacy with a doctrine that originated in deliberate obstruction of Parliament's will. Courts, however, have made this association at least since *Wiltberger*. In *United States v. Hudson & Goodwin*,¹⁵⁶ decided eight years before *Wiltberger*, the Marshall Court had declared that there could be no federal common law of crimes; "[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 offense."¹⁵⁷ Chief Justice Marshall evidently saw lenity as a means of reinforcing that result. The doctrine of strict construction, he wrote in *Wiltberger*, "is founded . . . on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment."¹⁵⁸ Hence, just as courts could not create common law crimes by analogizing to other offenses, so could they not expand legislative provisions "so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of a kindred character, with those which are enumerated."¹⁵⁹ The Court continues to apply this logic today. "[B]ecause of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community," the majority explained in *United States v. Bass*, "legislatures and not courts should define criminal activity. . . . Thus, where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant."¹⁶⁰

The trouble with this theory is that lenity goes further than would be necessary to limit courts to legislatures' prescriptions. Lenity is in effect a non-delegation doctrine: It prevents legislatures from passing off the details of criminal lawmaking to courts.¹⁶¹ There is no reason to suppose legislatures would not sometimes prefer to make such delegations. Indeed, given the popularity of anti-crime measures,¹⁶²

155. Elhauge himself admits that "the actual doctrine does not draw this distinction [between *malum in se* and *mala prohibita* cases]." *Id.* at 2201.

156. 11 U.S. (7 Cranch) 32 (1812).

157. *Id.* at 34.

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

159. *Id.* at 96.

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

161. See Kahan, *supra* note 6, at 350.

162. See Sara Sun Beale, *What's Law Got To Do with It? The Political, Social, Psychological and Other Non-Legal Factors Influencing the Development of (Federal)*

one might guess “that in ambiguous cases the legislature would likely prefer a ‘rule of severity’—the greater punishment for the criminal defendant.”¹⁶³ The “liberal construction” statutes in many states certainly suggest that is the case. Perhaps, as Einer Elhauge has suggested, lenity should be understood as “eliciting” legislative preferences rather than effectuating them; the rule may compel legislatures “to define just how anti-criminal they wish to be, and how far to go with the interest in punishing crime when it runs up against other societal interests.”¹⁶⁴ Yet even if that view is right,¹⁶⁵ some explanation is required as to why details are required in the criminal code, though not with respect to civil laws.¹⁶⁶ A theory of legislative supremacy alone is not enough.

Given the defects of the notice and legislative supremacy rationales, it is perhaps not surprising that courts show little commitment to lenity. A remaining puzzle is why they continue to cite the rule despite its lack of practical effect. The cynical answer might be that the rule has survived because it affords a convenient rationale in the rare cases where courts favor a narrow construction for other reasons. The more likely explanation, however, is that lenity remains in play because the flexibility of the *Moskal* formulation has given courts little reason to overrule it. Litigants cite lenity because of its venerated status in the precedents and because courts occasionally accept it as one factor justifying an interpretive result. Theoretical doubts have simply prevented rigorous and consistent application of the rule.

IV. TOWARDS A BETTER THEORY OF LENITY

The abandonment of the rule of lenity is a mistake. Though the notice theory is flawed and legislative supremacy inadequate, a more robust theory of the political processes of criminal law—of the structural relationships between the governmental branches and the

Criminal Law, 1 Buff. Crim. L. Rev. 23, 28-29 (1997) (giving examples such as the three strikes laws).

163. Elhauge, *supra* note 8, at 2193.

164. *Id.* at 2194.

165. For doubts about Elhauge’s view, see William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 Mich. L. Rev. 505, 564 n.227 (2001).

166. While some influential judges have urged techniques of narrow construction in both contexts, see Frank H. Easterbrook, *Statute’s Domains*, 50 U. Chi. L. Rev. 533, 548 (1983) (criticizing “judicial interpolation of legislative gaps”); Karkkainen, *supra* note 1, at 404 (identifying a general preference for narrow construction in Justice Scalia’s jurisprudence), the rule of lenity is a doctrine specific to criminal statutes. Moreover, although the textualism of Scalia and Easterbrook has gained ground in the judiciary as a whole, see Fallon et al., *supra* note 2, at 708, the rule of lenity’s method of resolving conflicts automatically in favor of the narrower view has no analogue in the interpretation of civil statutes, where “no interpretive games end in a tie.” Kahan, *supra* note 6, at 386.

role of statutory construction in regulating them—may provide ample justification for the rule.

Notwithstanding the universal recognition, enshrined in the dogma of legislative supremacy, that the moral will of the community should reign supreme in criminal law, the reality is that legislative enactments in the criminal field often fail to capture majoritarian sentiments. Legislators face intense pressure to expand the reach of criminal law. Not only do criminal statutes score political points with a “tough on crime” electorate;¹⁶⁷ they also help avert the political risk that serious misconduct will go unpunished because prosecutors lack the tools to attack it.¹⁶⁸ At the same time, there is little incentive for legislators to limit criminal prohibitions according to community expectations; they may rely instead on prosecutors to exercise discretion and let minor offenders off the hook. The result is a sort of hydraulic pressure pushing criminal legislation towards unreasonable extremes. In the absence of any political force to check the incentives to criminalize,¹⁶⁹ legislatures have steadily expanded the domain of liability, sweeping ever broader ranges of unremarkable conduct within criminal law’s bounds.¹⁷⁰

In this context, the rule of lenity strengthens the guarantee that criminal legislation and law enforcement will reflect majoritarian preferences. With respect to legislatures, the value of the rule is to counteract the tendency to broaden liability. Whereas the interaction of political incentives with enforcement discretion biases the lawmaking process in favor of expansive criminal prohibitions, the rule of lenity biases the interpretive process in favor of the accused. The effect is to require legislatures to define crimes in specific rather than general terms. That requirement not only makes the process of building legislative coalitions more involved, perhaps stimulating greater deliberation, but also maximizes whatever incentive legislators have to avoid embarrassingly overbroad prohibitions. A legislature that wishes to criminalize drunken bicycling must call it that; politicians who want minor fiduciary breaches to trigger jail time must do more than tout a new statute on “fraud.” In short, politicians must lay bare the full extent of the conduct they intend to criminalize, exposing themselves to whatever resistance or ridicule their choices entail; they cannot use vague or general language to obscure the law’s reach.

With respect to law enforcement, the effect of the rule of lenity is

167. See Beale, *supra* note 162, at 29.

168. See Stuntz, *supra* note 165, at 531.

169. Needless to say, criminals are not well represented in the political process. See Beale, *supra* note 162, at 23-27.

170. As will be evident from the ensuing discussion, this account of the American criminal justice system and the political incentives it generates draws heavily from Stuntz, *supra* note 165.

again to enhance transparency and accountability. When statutes employ broad language, the charges pressed by prosecutors may not accurately reflect the seriousness of the underlying conduct. Prosecutors may brand drunken bicycling as “driving while intoxicated” and fiduciary peccadilloes as “fraud.” To the extent prosecutors (who are typically elected officials) wish to be seen as attacking major crimes rather than minor ones,¹⁷¹ this situation is appealing. The rule of lenity, however, may prevent it. When criminal statutes are detailed and specific, the public need do no more than consult the charges to know what conduct has been penalized. The political incentives for prosecutors may then reverse: To win the public’s support, they must charge crimes that actually are serious, rather than offenses that merely sound so. In turn, charging more serious offenses may foster a more accurate assessment of defendants’ culpability; when cases go to trial, prosecutors would need to prove a genuine offense, rather than an overbroad proxy.

In sum, my claim is that the rule of lenity enhances the transparency and accountability of criminal justice in both its lawmaking and law enforcement aspects. In the following discussion, I will first expound this claim in more detail, and then show that a strong version of the rule is necessary to achieve its beneficial potential.

A. *Reasons for Lenity*

The first step in making the argument for lenity is to establish the operational features of our criminal justice system. Both the classical rationales, notice and legislative supremacy, presume that statutes define the conduct that legislatures and enforcers intend to punish: Criminals are to be given notice of what conduct is banned, and the moral source of the ban is to be the legislature. Yet criminal codes in fact sweep more broadly than society’s real prohibitions.¹⁷² As William Stuntz has shown, proxy crimes—offenses that are not blameworthy in themselves, but that stand in for more culpable activities—are rife in both state and federal laws.¹⁷³ “Possession of burglars’ tools,” for example, “which may mean no more than possession of a screwdriver, is routinely criminalized, as is possession of various sorts of ‘drug paraphernalia’ (e.g., bowls and spoons) other

171. Though it is doubtless founded on the erroneous perception that criminals who plead guilty receive inadequate sentences, the widespread unpopularity of plea bargaining, as evidenced by California’s 1982 referendum purporting to abolish it, Cal. Penal Code § 1192.7 (West 2000), probably indicates that the voting public is hostile to the practice of charging defendants with offenses other than the “real crime.”

172. See Stuntz, *supra* note 165, at 507; Erik Luna, *Principled Enforcement of Penal Codes*, 4 Buff. Crim. L. Rev. 515, 522-23 (2000).

173. See Stuntz, *supra* note 165, at 515-19 (citing examples).

than the banned drugs themselves.”¹⁷⁴ Meanwhile, truly serious offenses—rape, murder, theft, and so forth—are criminalized many times over in provisions that define subtle variations on conduct already subject to severe penalties.¹⁷⁵

The impetus for these peculiar patterns appears to be prosecutorial discretion. Because prosecutors have broad, largely unreviewable control over enforcement policies,¹⁷⁶ legislatures may pass expansive criminal statutes with impunity, confident that prosecutors will spare them the embarrassment of unwarranted enforcement actions.¹⁷⁷ Indeed, insofar as legislators trust prosecutors to avoid inappropriate charges, the political imperative to boost law enforcement and appear “tough on crime” gives legislators strong incentives to provide tools to obtain easier convictions.¹⁷⁸ Proxy offenses serve that interest—possession of a screwdriver is easier to prove than burglary. So does the repeat criminalization of core offenses: Stacking additional charges in each indictment enhances prosecutors’ leverage to extract guilty pleas.¹⁷⁹

The danger in this system is that blameless defendants may be punished because law enforcers incorrectly identify them as criminal suspects. Defendants charged with proxy crimes may have no way to exonerate themselves—they are guilty of the alleged conduct, just as almost everyone is. Defendants charged with core crimes may also have little incentive to make the government prove its case; if their gamble fails, they may face penalties much more severe than those offered in a plea bargain.¹⁸⁰ The effect is to shift the burden of determining who goes to prison off the formal trial process and onto informal, discretionary adjudications of guilt and innocence by prosecutors.¹⁸¹ The trial process, of course, provides a backstop to

174. *Id.* at 516 (citing examples).

175. *Id.* at 518; Luna, *supra* note 172, at 522-23.

176. *See* Wayte v. United States, 470 U.S. 598, 607 (1985) (stating that the decision whether to prosecute a statutorily defined offense is in the prosecutor’s hands); United States v. Batchelder, 442 U.S. 114 (1979) (referring to the prosecutor’s power to select the penalty-imposing statute).

177. *See* Stuntz, *supra* note 165, at 529-33 (discussing symbolic legislative action).

178. *See id.*

179. *See id.* at 519-20.

180. For example, holding aside reputational costs and other reasons to resist criminal charges, a defendant should be indifferent between a 25% chance of conviction at trial and a plea agreement offering one quarter the penalty. The sentencing disparity between a plea offer and penalties at trial may in fact be much greater than a 4:1 ratio in many cases. *See* Bordenkircher v. Hayes, 434 U.S. 357 (1978) (affirming prosecutor’s discretion to seek indictment and conviction under a recidivism statute carrying a life sentence after the defendant refused to plead guilty to an offense carrying a maximum sentence of five years imprisonment).

181. *See* Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 Fordham L. Rev. 2117, 2120 (1998) (noting that “[p]lea bargaining and prosecutorial discretion may control the fates of most defendants”).

prosecutors' decisions; it permits a sort of judicial review.¹⁸² Yet that review cannot afford a strong guarantee of accuracy when charging proxy offenses or stacking crimes may increase the likelihood of government victory at trial.¹⁸³

If defendants have little reason to go to trial and trial itself does little to establish genuine culpability, the only deterrent to practices that risk penalizing ordinary citizens is electoral accountability.¹⁸⁴ That constraint is especially vital with respect to statutes that proscribe conduct that would not ordinarily or intuitively be considered criminal. The democratic legitimacy of prosecutions based on such offenses cannot be taken for granted; it is critical to ensure that the public had maximum opportunity to influence both the enactment of the prohibition and the selection of the charge.

Some scholars have gone beyond the argument for democratic control and proposed that substantive constitutional limits be imposed on the definition of crimes.¹⁸⁵ Henry Hart, for example, once questioned whether it makes sense "to insist upon procedural safeguards in criminal prosecutions if anything whatever can be made a crime in the first place."¹⁸⁶ Worried that expansive prohibitions might render proof a formality and gut the Constitution's procedural guarantees, Hart argued that the Constitution "means something definite and something serious when it speaks of 'crime.'"¹⁸⁷ While criminals' relative lack of political influence could justify such countermajoritarian judicial action in terms of a political process theory of constitutional law, Hart's proposal, like other substantive constitutional theories, has at least two significant drawbacks. First, it

182. See *id.* at 2145-46.

183. Cf. Henry M. Hart, *The Aims of the Criminal Law*, 23 *Law & Contemp. Probs.* 401, 431 (1958) (questioning what "sense" it makes "to insist upon procedural safeguards in criminal prosecutions if anything whatever can be made a crime in the first place"). By contrast, Lynch suggests that "appreciation of the true role of the jury trial in our system" as a backstop to informal adjudications by prosecutors "might make us a little more cautious about efforts to streamline courtroom procedure in the interest of more efficient law enforcement." Lynch, *supra* note 181, at 2145. While Lynch is right that streamlined procedures that impair the accuracy of jury trial could lead to greater errors in plea bargaining, he does not mention that overbroad substantive laws, like weak procedural guarantees, may also undermine jury trial's "appellate" function in our criminal justice system.

184. Cf. Luna, *supra* note 172, at 523-24 (advocating efforts to stimulate more principled exercise of enforcement discretion by "allow[ing] community members to observe and scrutinize the policy choices of law enforcement, as well as their underlying justifications, and to have a direct say in the formation and reformulation of these decisions").

185. See, e.g., Stuntz, *supra* note 165, at 587-96 (urging limited constitutionalization of substantive criminal law as a means of imposing stronger judicial review on prosecutorial decision making); Hart, *supra* note 183, at 431.

186. Hart, *supra* note 183, at 431; see also Herbert L. Packer, *The Aims of the Criminal Law Revisited: A Plea for a New Look at "Substantive Due Process"*, 44 *S. Cal. L. Rev.* 490 (1971).

187. Hart, *supra* note 183, at 431.

is almost certainly unrealistic. Though courts have imputed mens rea terms¹⁸⁸ and invalidated vague laws¹⁸⁹ on the basis of due process, they have never imposed absolute barriers on the designation of crimes.¹⁹⁰ Second, even if the theory were viable, applying it would require a disturbingly anti-democratic political theory. Though it is always something of a fiction to suppose legislative enactments reflect the majority's will, as opposed to interest group tradeoffs, that fiction is the source of all our laws' claims to legitimacy. It is especially vital to criminal law, which derives its moral force from the community's collective standards of unacceptable behavior.¹⁹¹ To question legislatures' capacity to make criminal law might raise doubts about their capacity to make valid laws at all.¹⁹²

Whatever the merits of substantive due process review, the rule of lenity permits a gentler judicial response to the defects of the criminal lawmaking process—one that seeks to enhance popular control of criminal justice, rather than remove it. The rule accomplishes that purpose through a range of effects on both the legislative and executive branches. On the most basic level, the rule serves to counteract legislatures' tendency to generate expansive criminal codes. A requirement of specificity compels legislators to agree on legislative details; they may not delegate the fine-tuning to the executive or judiciary.¹⁹³ To the extent more detailed legislation requires greater political time and energy, detracting from other priorities,¹⁹⁴ the rule of lenity may therefore make it more difficult to impose broad liability rules.¹⁹⁵ It may also have a cautionary effect, stimulating more thought and deliberation as legislators set about building majorities for explicit prohibitions.¹⁹⁶

This generic braking effect, without more, might not be enough to

188. See, e.g., *Liparota v. United States*, 471 U.S. 419 (1985).

189. See, e.g., *Chicago v. Morales*, 527 U.S. 41 (1999).

190. See *Patterson v. New York*, 432 U.S. 197, 205-11 (1977); cf. Louis D. Bilonis, *Process, the Constitution, and Substantive Criminal Law*, 96 Mich. L. Rev. 1269, 1320-23 (1998) (offering a "process-oriented" account of decisions such as *Lambert* that are conventionally understood to reflect the possibility of substantive review of crimes).

191. See *United States v. Bass*, 404 U.S. 336, 348 (1971) (noting that "criminal punishment usually represents the moral condemnation of the community").

192. This objection is less powerful with respect to the more limited forms of constitutional review, such as doctrines of desuetude and a powerful requirement of notice, that Stuntz proposes as a solution to the deficiencies of the political process in criminal lawmaking. See Stuntz, *supra* note 165, at 587-96. Such doctrines do not impair the power of political majorities to implement criminal policies so much as impose burdens on the lawmaking process, much as the rule of lenity does.

193. See Kahan, *supra* note 6, at 351-52.

194. See Easterbrook, *supra* note 166, at 548.

195. Kahan, *supra* note 6, at 351.

196. Cf. William N. Eskridge, *Public Values in Statutory Interpretation*, 137 U. Pa. L. Rev. 1007, 1084 (1989) (advocating express consideration of "public values" such as the rule of lenity in statutory interpretation as a means of "ventilat[ing] policy issues in an open intellectual forum").

justify strict construction. Imposing costs on crime-definition as a general matter is a crude way to raise the quality of criminal laws. In the long run, legislatures are likely to deem the same conduct criminal,¹⁹⁷ while in the short run the rule's main effect may be to benefit undeserving defendants such as the airplane thief in *McBoyle* or the manslaughterer in *Wiltberger*. Moreover, anxiety about unworthy defendants going free—or fury over exonerations—might stimulate legislators to pursue criminal lawmaking with greater zeal. Legislatures have often reacted to adverse rulings with extraordinary swiftness;¹⁹⁸ the breadth and depth of criminal codes certainly suggests they have little trouble passing criminal statutes. Thus, even if the end product of a tussle between legislature and judiciary is, as Einer Elhauge has suggested, a more nuanced statute,¹⁹⁹ in most cases the nuance will run entirely in the direction of broadened criminal liability.²⁰⁰ The ultimate effect of a strong rule of lenity might then be to worsen the problems of overbroad criminalization and excessive enforcement discretion.

A further effect of lenity on legislatures, however, provides a better justification of the rule. With respect to legislatures, lenity is a disclosure requirement. It compels them to own up to the precise nature of the conduct they plan to criminalize. Such disclosure maximizes the chance that laws will encounter political resistance. Although the electorate has obviously tolerated such broad laws as the capacious definitions of burglars' tools and drug paraphernalia, there does seem to be a limit to its good graces. The regulatory offense of tearing off mattress tags²⁰¹ has been widely derided—even

197. William Eskridge's seminal study found that Congress was much more likely to overrule decisions construing criminal statutes than other types of Supreme Court decisions. See William N. Eskridge, *Overriding Supreme Court Statutory Interpretation Decisions*, 101 Yale L.J. 331, 344 tbl.4 (1991). Two high-profile recent examples are Congress's decision to overrule the Supreme Court's decisions in *McNally v. United States*, 483 U.S. 350 (1987), which rejected the "intangible rights" theory of mail fraud, and *Ratzlaf v. United States*, 510 U.S. 135, 137 (1994), which construed an anti-structuring provision of a bank regulation to require knowledge of the structuring requirement. Both overrides came within a year of the decisions. See Stuntz, *supra* note 165, at 563. On the state level, a salient example is *Keeler v. Superior Court*, 470 P.2d 617 (Cal. 1970), which held that the intentional killing of a viable fetus without the mother's consent was not the killing of a human being under the state's murder statute. That case was overruled by the state legislature in a matter of months. See Elhauge, *supra* note 8, at 2194-95.

198. See *supra* note 197.

199. Elhauge, *supra* note 8, at 2195-96.

200. Elhauge's example, *Keeler*, may be anomalous in that it involves a subject-matter, abortion, where there is particularly likely to be mainstream political pressure on both sides to generate a nuanced statute. The repeal of *McNally*, which simply reversed the Court's holding without adding any nuance, may be more typical.

201. Regulations prohibit removal of the tags by anyone other than the "ultimate consumer," 16 C.F.R. § 1632.31(b)(5) (2002), while the federal code prohibits willful violations of the regulations. 15 U.S.C. §§ 1192, 1196 (2002).

though “there appear to be no tagless mattress cases in which federal criminal sanctions have actually been pursued” and the offense does not even apply to consumers directly (despite popular misconceptions to the contrary).²⁰² The ban on unauthorized use of the “Woodsy Owl” image has received similar scorn.²⁰³ While public pressure has not been strong enough to provoke repeal of these laws, the response indicates there may be political costs to criminalizing trivial conduct, at least when the regulation’s connection to public welfare is less than obvious. Those costs, however, would be mitigated if legislatures could obscure the extent of criminal prohibitions through use of broad language. Easy as it may be at present, it would likely be much easier to criminalize possession of screwdrivers if legislators could do so by passing a broadly-worded statute, one that failed to enumerate the prohibited items specifically. The rule of lenity ensures that legislators must take the more exacting path, rather than the easier one.

The same may be said of open-ended criminal statutes, such as the federal fraud and extortion laws. As was noted above, the broad language of these statutes has fostered expansive interpretations. “Fraud” may now include fiduciary breaches that would not even give rise to civil liability, and some cases suggest that efficient contract breaches could count as a form of extortion.²⁰⁴ There has not been any significant political movement for legislative repeal of these broad readings; to the contrary, the Supreme Court’s one attempt at restraint was met with swift reversal.²⁰⁵ Nevertheless, the judiciary’s unwillingness to apply lenity has probably reduced the political costs of expanding federal commercial crimes. Indeed, while decriminalizing dubious conduct after a federal court has labeled it “fraud” is likely to be politically damaging, affirmatively criminalizing accepted business practices may be quite another matter. The recent fuss over Sarbanes-Oxley²⁰⁶ shows that white-collar criminal regulations may encounter resistance even at times of great public scandal.²⁰⁷ Despite mounting public outrage, congressional leaders

202. Green, *supra* note 153, at 1540 & n.7.

203. See Stuntz, *supra* note 165, at 517.

204. See *supra* notes 103-06 and accompanying text.

205. The Court’s holding in *McNally v. United States*, 483 U.S. 350 (1987), was overruled within months. See *supra* note 197.

206. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 11, 15, 18, 28, and 29 U.S.C.). In addition to various accounting and securities law reforms, the statute included several important criminal provisions, such as enhanced mail and wire fraud penalties and a new conspiracy statute. For a summary, see Jennifer S. Recine, Note, *Examination of the White Collar Crime Penalty Enhancements in the Sarbanes-Oxley Act*, 39 Am. Crim. L. Rev. 1535, 1549-58 (2002).

207. See Recine, *supra* note 206, at 1545-49, for an account of the legislative history of Sarbanes-Oxley’s criminal provisions. See also Brian Kim, *Recent Developments—The Sarbanes-Oxley Act*, 40 Harv. J. on Legis. 235, 238-41 (2003) (describing

added tough criminal provisions to the bill only when they began to fear repercussions in the mid-term elections,²⁰⁸ initial reform proposals had been limited to civil measures and as late as one month before the bill passed influential Members of Congress doubted that any serious law, let alone tough criminal measures, would go through.²⁰⁹ Even *McNally*'s repeal is somewhat ambivalent. Though Congress speedily reinstated the "honest services" theory of mail fraud, it declined to go further than courts had gone before. Whereas the Justice Department sought a broader prohibition on "public corruption,"²¹⁰ Congress merely added the "intangible right to honest services" to the list of items that could be defrauded²¹¹ and indicated strongly in the legislative history that the aim of the reform was to "reinstate all the pre-*McNally* case law."²¹² This political story strongly suggests that it is easier for Congress to approbate prior judicial action than to craft entirely new crimes.

Apart from its significance for legislatures, the rule of lenity's effect on prosecutors affords another justification for the doctrine. Though it is more conventional to see the moral dimension of criminal law as a justification for legislative supremacy, electoral constraints on executive officials may be just as important when it comes to aligning criminal justice with majoritarian preferences.²¹³ In a system that affords such broad discretion as ours, prosecutors' sense of responsibility to the public affords a vital guarantee that serious offenses will be pursued, protestations of innocence will be investigated, and cases will be selected on the basis of public weal rather than personal or professional interest.²¹⁴ At present, however, direct political checks on prosecutors are weak at best.²¹⁵ An elected

opposition to Sarbanes-Oxley as a whole). *But cf.* Note, *Recent Legislation—Corporate Law—Congress Passes Corporate and Accounting Fraud Legislation—Sarbanes-Oxley Act of 2002*, 116 Harv. L. Rev. 728, 728-34 (2002) (surveying criminal provisions of Sarbanes-Oxley and concluding they mainly add penalties to conduct that is already criminal rather than broadening substantive liability).

208. Recine, *supra* note 206, at 1548 n.116.

209. *Id.* at 1545, 1547-48.

210. Craig M. Bradley, *Mail Fraud After McNally and Carpenter: The Essence of Fraud*, 79 J. Crim. L. & Criminology 573, 619 (1988).

211. Alex Hortis, Note, *Valuing Honest Services: The Common Law Evolution of Section 1346*, 74 N.Y.U. L. Rev. 1099, 1110 (1999) (quoting 18 U.S.C. § 1346 (1994)).

212. *Id.* (quoting 34 Cong. Rec. H11, 251 (daily ed. Oct. 21, 1988) (statement by Rep. John Conyers (D-Mich.)) (describing the bill as "restor[ing] the mail fraud provision to where [it] was before the *McNally* decision"); see also Bradley, *supra* note 210, at 619; Geraldine Szott Moohr, *Mail Fraud and the Intangible Rights Doctrine: Someone to Watch Over Us*, 31 Harv. J. on Legis. 153, 169-70 (1994).

213. See Luna, *supra* note 172, at 523-24.

214. Stuntz has expressed concern that the selection of cases on the basis of interest or difficulty may be a special risk in the federal system, where prosecutors are only indirectly accountable to the public and may cherry-pick cases from their local counterparts. See Stuntz, *supra* note 165, at 542-43.

215. Cf. Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and*

District Attorney cannot neglect heinous crimes or high-profile cases, and exposés of wrongful punishment may cause political damage. Still, the public's main interest is probably in overall rates of conviction, and the details of most convictions are buried in opaque plea agreements.²¹⁶

The rule of lenity is important in this context for three reasons. First, the rule may give prosecutors an incentive to charge the “real” crimes rather than proxies. As popular hostility to plea bargaining shows, the public is uncomfortable with the notion that criminals may be punished for something other than the crime they actually committed.²¹⁷ Yet when legislatures are free to lump minor and major crimes together under a single broad heading—fiduciary breaches as a form of “fraud” and screwdrivers as a type of “burglars’ tools,” for example—the political incentive for prosecutors to establish major violations is relatively weak. Why prove a real scam when a conviction or plea based on fiduciary breach will receive the same label of fraud? On the other hand, if the rule of lenity compelled legislatures to define crimes explicitly, political concerns might push prosecutors toward charging more culpable conduct, lest they be derided for ignoring real crimes (burglary) while pursuing proxies (possession of screwdrivers). The effect of *charging* more serious misconduct would be to require the government to *prove* it in any cases that went to trial. Prosecutors’ selection of targets might then be subject to greater public scrutiny. At any rate, voters would be on notice whenever prosecutors chose to penalize minor misconduct or a proxy offense in place of a major crime.

The second effect of a strong rule of lenity on prosecutors would be to impose a brake on their power to pursue novel theories without a democratic mandate. The risk of governmental overreaching is one of the classic reasons for the ban on judicial crime creation.²¹⁸ Without advance delineation of crimes, law enforcers have incentives to “vindicate their own notions of appropriate social control by criminal arrest and prosecution.”²¹⁹ Yet broadly defined crimes in effect vest prosecutors with that same discretion.²²⁰ As the Supreme Court

Enforcement Discretion, 46 UCLA L. Rev. 757, 759-60 (1999) (characterizing Congress’s design of the federal law enforcement bureaucracy as an effort aimed less at maintaining direct oversight, and more at limiting “presidential power” by dispersing prosecutorial authority in local U.S. Attorney’s Offices).

216. Cf. Lynch, *supra* note 181, at 2138 (noting the public may want a system that leaves enforcers discretion to select defendants from within “broadly defined zones of anti-social conduct”).

217. See *supra* note 171.

218. See Jeffries, *supra* note 1, at 226.

219. *Id.*

220. See Luna, *supra* note 172, at 522-23; cf. Williams v. United States, 458 U.S. 279, 286 (1982) (rejecting the government’s view that a bad check could constitute a “false statement” under a criminal banking regulation because that interpretation “would make a surprisingly broad range of unremarkable conduct a violation of

recognized in *United States v. Kozminski*,²²¹ broad interpretations may “delegate to prosecutors and juries the inherently legislative task of determining what type of coercive activities are so morally reprehensible that they should be punished as crimes,” thus “subject[ing] individuals to the risk of arbitrary or discriminatory prosecution and conviction.”²²² The history of fraud and extortion prosecutions appears to vindicate these concerns: We may never know if the criminalization of fiduciary breaches or efficient breaches has democratic legitimacy because prosecutors were able to obtain these results without going to the legislature.

Though most interpretive claims are less egregious than the federal fraud cases, the sheer frequency with which disputes arise suggests that the problem may be endemic. One might think that the breadth of criminal codes would permit prosecutors to slot all blameworthy crimes within an established statutory category, but in fact invocations of the rule of lenity are rife in the reported cases from state courts of last resort.²²³ If prosecutors stuck to the interior confines of criminal statutes, there would seem to be no reason why high courts would face so many interpretive questions in criminal cases. It may be that the problem is not so much the broad reading of statutes, but rather confusion about interpretive method in general; disputes could arise at the border of “narrow” readings just as easily as at the text’s outer edge.²²⁴ Yet it seems plausible that the viability of broad readings stimulates prosecutors to advance textually questionable charges.²²⁵ A number of the reported cases from recent years appear to bear out this concern. Prosecutors in Louisiana sought conviction for a third offense of driving while intoxicated—with stiffened penalties—based on a drunken bicycle ride.²²⁶ Police in D.C. charged a young man with “assault” of a police officer after he uttered profanities and walked away from a cop.²²⁷ Prosecutors would have less incentive to bring such suits if expansive interpretations were clearly off the table.

Finally, there is some potential that a stiffer rule of lenity would permit juries to impose beneficial discipline on prosecutors. Though

federal law”).

221. 487 U.S. 931 (1988) (interpreting a criminal ban on “involuntary servitude” to apply only to forced labor based on physical, as opposed to psychological, coercion).

222. *Id.* at 949.

223. My research has uncovered over 100 cases from the past five years. See *supra* note 109 for an account of my methodology.

224. Cf. Jeffries, *supra* note 1, at 221-22 (arguing that the interpretation of criminal statutes should aim to foster rule-like resolution of disputes, “discouraging fact-specific innovation,” rather than advancing strict construction).

225. Cf. Stuntz, *supra* note 165, at 543 (noting that federal prosecutors regularly pursue challenging white-collar cases, as opposed to ordinary street crimes, but attributing the pattern to the unique incentives created by federal prosecutors’ discretionary jurisdiction).

226. *State v. Carr*, 761 So. 2d 1271 (La. 2000).

227. *In re C.L.D., Jr.*, 739 A.2d 353 (D.C. 1999).

commentators debate both the existence and the desirability of the phenomenon, in principle juries have the power to nullify crimes and set defendants free despite nominal guilt under the statute.²²⁸ It is not clear how narrow crime definitions would play into jury decision-making. There is some chance that they would make nullification less likely: Juries might accept their duty to convict when the letter of the law is met, but revolt when the facts of the case fail to satisfy their intuitive notion of some broad, vague notion such as “fraud.” On the other hand, it is also possible that narrow prohibitions could lead juries to revolt at the suggestion that conduct defined by a narrow statute is criminal. Juries might then impose discipline on prosecutors who pursue seemingly trivial behavior.²²⁹ At the least, the risk of such a response might give prosecutors reason to fear such discipline, and thus reason to charge truly culpable offenses rather than proxies.²³⁰

In sum, the best justification for the rule of lenity may be its service to governmental transparency and accountability. The rule guarantees explicit notification of the meaning of criminal legislation, and it makes prosecutors’ charging policies more transparent to voters and juries. Given that criminal law otherwise tends to surpass popular expectations about what conduct is seriously wrongful, these disclosure effects are vital to the moral and political legitimacy of criminal law. At the least, the rule assures voters the maximum opportunity to restrain criminal laws and enforcement policies. Even if they fail to seize that opportunity, providing them with it deepens their responsibility for the policies of their government—and deepening popular responsibility strengthens criminal justice’s claim of reflecting the moral will of the community.

228. See Andrew D. Leipold, *Rethinking Jury Nullification*, 82 Va. L. Rev. 253, 253-57 (1996) (describing the debate on jury nullification and noting that it generally proceeds on the assumption that “nothing can be done to prevent a jury from nullifying”). Trial judges also have the power to nullify verdicts despite nominal guilt. See *Fong Foo v. United States*, 369 U.S. 141 (1962).

229. As Leipold recounts, the jury results in two of the most celebrated cases of purported nullification—the trials of Dr. Jack Kevorkian and Oliver North—are explicable only on the theory that the jury concluded the conduct charged was not criminal. See Leipold, *supra* note 228, at 254 nn.3-4.

230. Considering that juries’ lack technical legal understanding, it is probably more likely that juries nullify based on a sense that the conduct alleged should not be criminal, rather than a sense that the crimes charged are not crimes, in which case narrow crime definition might not make nullification any more likely than at present. Still, to the extent narrow crime definitions would limit the government’s ability to establish the relevance of evidence showing the defendant’s culpability, see Fed. R. Evid. 403 (barring admission of evidence that is substantially more prejudicial than probative), narrow crime definitions might stimulate the government to charge more serious offenses in conjunction with narrow proxy crimes, if not to the exclusion of them.

B. *The Need for a Strong Rule*

For lenity to serve its purpose of enhancing criminal law's democratic responsiveness, the rule must be given more teeth than the *Moskal* formulation. As I noted earlier, the *Moskal* formula strips the rule of lenity of independent significance, leaving judges free to select any reading they prefer on the merits based on "the language and structure, legislative history, and motivating policies" of the statute.²³¹ While this regime is ostensibly neutral, permitting both defense and prosecution to present the full range of interpretive arguments, in practice it probably favors the government. As Dan Kahan has observed, prosecutors enjoy a "power of initiative" that permits them to select factually favorable cases for the presentation of hard questions to appellate courts.²³² Furthermore, the open season on interpretive techniques—text, legislative history, policy, and so forth—is likely to help the government more than the defense. Courts have occasionally adopted narrow readings on the basis of policy or history;²³³ to the extent courts are immune from anxieties about appearing tough on crime, they may be more inclined than legislatures to do just that.²³⁴ Nevertheless, given legislatures' evident preference for severity rather than lenity, serious consideration of legislative history and policy is likely to push courts toward broader interpretations. The apparent tendency of courts applying *Moskal* to construe statutes against defendants may confirm this intuition.²³⁵

What is needed, therefore, is not an equal opportunity for defense and prosecution to appeal to legislative policy, but rather a generic judicial policy of favoring defendants' views—a "tenderness of the law for the rights of individuals," as Chief Justice Marshall put it.²³⁶ A strong rule of lenity could supply that bias. Indeed, the original form of the rule—the version applied in English common law courts—could have quite dramatic effects on criminal justice. William Stuntz has argued that the only effective way to curb the expansion of criminal law and narrow prosecutorial discretion would be to impose constitutional limits on crime definition through the Due Process

231. *Moskal v. United States*, 498 U.S. 103, 108 (1990) (quoting *Bifulco v. United States*, 447 U.S. 381, 387 (1980)).

232. Dan M. Kahan, *Is Chevron Relevant to Federal Criminal Law?*, 110 Harv. L. Rev. 469, 479-80 (1996).

233. See, e.g., *United States v. R.L.C.*, 503 U.S. 291, 298-305 (1992) (plurality opinion by Souter, J.) (concluding that the plain text is ambiguous and adopting a narrow reading on the basis of legislative history).

234. As Stuntz observes, "even elected judges are much less politically accountable than legislators or elected prosecutors." Stuntz, *supra* note 165, at 540.

235. See, e.g., *Smith v. United States*, 508 U.S. 223, 239-40 (1993); *State v. King*, 735 A.2d 267, 294 n.47 (Conn. 1999); *State v. Ogden*, 880 P.2d 845, 853 (N.M. 1994). *But see R.L.C.*, 503 U.S. at 305-06 (plurality opinion) (applying *Moskal* but construing the statute in the defendant's favor).

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

Clause.²³⁷ Stuntz sees lenity as unpromising because legislatures may evade its strictures by passing a multiplicity of specific statutes.²³⁸ In the old English courts, however, lenity functioned in effect as a form of judicial review of criminal statutes. Decisions limiting a horse theft statute to the theft of multiple horses or the theft of “sheep, or other cattle” only to sheep can be understood only as deliberate efforts to preempt unfair statutes.²³⁹ Though in each case Parliament overturned the result, these cases show that judicial willingness to depart from the text in crafting narrow rules could create major problems for governments seeking to impose harsh penalties for minor offenses. Insofar as proxy offenses and charge stacking have that effect today (though obviously not to the same extent as capital offenses did in Blackstone’s day), erecting similar obstacles to prosecution might be warranted.

Such stiff use of lenity to limit the reach of criminal law may not be entirely implausible in modern American courts. Both federal and state courts already cite lenity as a basis for imputing mens rea terms to ostensibly strict liability offenses.²⁴⁰ Courts might extend that practice by imputing a toughened notice requirement, holding, for instance, that the only fair reading of certain statutes is to ban conduct that the defendant could have known was illegal or at least immoral.²⁴¹ Indeed, the Supreme Court flirted with this approach in *Lambert v. California*,²⁴² a decision that barred the government from prosecuting a former convict on the basis of a registration requirement that the convict had no means of anticipating.²⁴³ Though the Court has not followed through on *Lambert’s* implications,²⁴⁴ the rule of lenity might permit it to do so in a manner respectful of legislative supremacy. Like canons of constitutional avoidance, lenity would permit courts to scold legislators for proscribing unobjectionable conduct while preserving their power to maintain such policies if they wished to reinstate them.

Still, the use of lenity to support departures from the text is

237. Stuntz, *supra* note 165, at 588.

238. *Id.* at 562-63.

239. 1 William Blackstone, Commentaries *88.

240. See, e.g., *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 437 (1978); *United States v. Nofziger*, 878 F.2d 442, 452 (D.C. Cir. 1989); *State v. Sidway*, 431 A.2d 1237, 1239 (Vt. 1981); *In re C.R.M.*, 611 N.W.2d 802, 803 (Minn. 2000); see generally *infra* notes 342-51 and accompanying text.

241. Stuntz advocates this approach, noting that “[a] necessary condition of any free society is the ability to avoid going to prison; one has that ability only if one can know what behavior will lead to prosecution and punishment.” Stuntz, *supra* note 165, at 588.

242. 355 U.S. 225 (1957).

243. *Id.* at 226-30.

244. See Stuntz, *supra* note 165, at 589 (noting “*Lambert’s* notice principle has never taken off”); Bilonis, *supra* note 190, at 1270 (describing the “received wisdom” that *Lambert* has not been seriously followed).

probably not a realistic possibility, given the disregard of legislative preferences that it would entail.²⁴⁵ As I noted above in commenting on substantive due process review of crimes, the substitution of judicial norms for legislative preferences, always dubious in a democratic polity, is especially problematic in the area of criminal law, where the opprobrium of the community affords the moral justification for punishment. Implementing due process review through reversible interpretive holdings based on lenity might make the practice more palatable, yet the acceptability of the rule of lenity would likely suffer if it were unmoored from principles of interpretation and set adrift on the doubtful waters of substantive due process.

A more realistic option is the third variety of lenity that I outlined in Part I: After establishing a set of plausible readings based on accepted interpretive techniques, courts could deploy lenity to select the narrowest one. The effect of this approach would be to replace the government's advantages under *Moskal* with a bias in the defendant's favor. The defense could argue, for example, that the legislature's purpose was narrower than the text implies, but the government could not extend the text on that basis. Accordingly, legislators could not expect conduct to be criminalized unless it were defined in crystal-clear terms; prosecutors could then bring charges only on the basis of narrowly drawn prohibitions. The benefits of legislative and executive accountability that I identified above might then be realized.

The second variety of lenity—the text-oriented approach—could also bring significant benefits, as a number of Scalia's dissents may show.²⁴⁶ Had the *Smith* court, for instance, limited the ban on “use” of a firearm in connection with a drug trafficking crime to use of the gun as a weapon, we might have learned from Congress whether in its view “drugs and guns are a dangerous combination” in all contexts, as the majority claimed,²⁴⁷ or a special problem when guns are used with violence in mind. Because the Court ruled against the defendant, Congress obtained the former result without ever making an affirmative case to voters. Prosecutors may now tout convictions and guilty pleas for gun “use”—and assign the stigma of that crime to particular defendants—though the conduct involved may be rather

245. See Bilionis, *supra* note 190, at 1271 (identifying failure to account for the “countermajoritarian difficulties attending judicial review under the capacious concept of due process” as a principle defect of proposals for substantive limits on criminal law).

246. See, e.g., *Smith v. United States*, 508 U.S. 223, 240-47 (1993) (Scalia, J., dissenting).

247. *Id.* at 240.

more innocuous than that term conveys.²⁴⁸ The same pattern is evident in *Lewis*, where the Court, in effect, permitted Congress to criminalize gun possession by individuals with constitutionally invalid felony convictions without its members ever having to defend or even acknowledge that rather unpalatable choice in open debate.²⁴⁹ Henceforth, prosecutors may point to successes in keeping guns out of the hands of criminals, though the convictions of some of those criminals may be more doubtful than voters would likely assume. For the defendant himself, *Lewis* offered the unfairness of compounded injuries from a constitutional violation: He is subject to status-based crimes based on a status that was not assigned to him legitimately.²⁵⁰

No version of the rule of lenity will be a panacea for the ills of the criminal justice system. Powerful structural forces drive our system towards overbroad criminalization.²⁵¹ The rule of lenity alone will not bring criminal statutes in line with democratic preferences, nor will it necessarily bring public attention to dubious prosecutions. Nevertheless, the rule of lenity is important because it at least facilitates democratic accountability in circumstances where political constraints would otherwise be weak. The current vogue for literal reading of broad statutory language permits legislators to cloud the full extent of criminal prohibitions. It also permits prosecutors to obscure their enforcement patterns by slotting wide ranges of conduct, with varying degrees of culpability, under uniform criminal labels. To the extent we care about maximizing the democratic accountability of our criminal justice system, we should be worried by these results of the abandonment of strict construction. Courts may have thought that relaxing the rule of lenity would liberate democratic lawmaking.²⁵² The real effect is probably the opposite.

V. LENITY'S IMPLICATIONS FOR RECURRENT TEXTUAL PROBLEMS

To make my argument more concrete, I want now to demonstrate the effects the rule of lenity might have in a variety of common interpretive disputes. The typology that follows is not meant to be exhaustive. It provides a sampling of the types of textual problems that have led courts to consider the rule of lenity in recent years. In

248. *Smith* itself involved rather peculiar facts—the delivery of a gun as consideration for drugs—that may not be repeated often. The Court's expansive definition of the term "use," however, could sweep other peculiar scenarios within the statute.

249. See *Lewis v. United States*, 445 U.S. 55, 59-65 (1980)

250. See *id.* at 69-70 (Brennan, J., dissenting) (citing the rule of lenity and refusing to accept a construction of the statute that "reflects such an indifference to the petitioner's plight and such a derogation of the [right to counsel]").

251. See, e.g., Stuntz, *supra* note 165, at 528-29; Richman, *supra* note 215, at 765-66.

252. See Kahan, *supra* note 6, at 370 (arguing that the rule of lenity conflicts with the delegated lawmaking that permits Congress to maximize its policymaking authority).

each case, I hope to show two things: First, that courts have not applied the rule with any consistency; and second, that more regular application of the rule could bring substantial benefits, for the reasons I discussed in Part IV. This survey should also help convince skeptical readers that reinvigoration of the rule of lenity is a realistic prospect. Courts already discuss lenity in these cases; all they must do now is apply it.

A. *Open-Ended Statutes*

As has already been discussed in the context of federal fraud statutes,²⁵³ some of the strongest cases for lenity involve statutes that appear deliberately broad and open-ended. The federal fraud and extortion statutes are prime examples: Their vague references to schemes to defraud²⁵⁴ and receipt of property by “force, violence, or fear”²⁵⁵ have opened the door to criminal convictions based on fiduciary breaches and contract violations that in all likelihood would not give rise to civil liability.²⁵⁶ *United States v. Kozminski*²⁵⁷ is another example. That case involved two statutes²⁵⁸ that referenced the Thirteenth Amendment’s ban on “involuntary servitude,” apparently in an effort “to incorporate by reference a large body of potentially evolving federal law.”²⁵⁹ Though such statutes may be particularly common on the federal level,²⁶⁰ state and local regulations may also employ broad, undefined terms. *In re C.L.D., Jr.*,²⁶¹ for example, involved a statute aimed at any individual who “assaults, resists, opposes, impedes, intimidates, or interferes with any officer or member of any police force operating in the District of Columbia while engaged in or on account of the performance of his or her official duties.”²⁶² The case raised the issue whether a profane tirade and an effort to walk away from a police officer could count as an “assault.”²⁶³

Dan Kahan has argued that broad statutes like these amount to an implicit delegation of lawmaking power to the judicial branch.²⁶⁴

253. See *supra* notes 103-06 and accompanying text.

254. 18 U.S.C. § 1346 (2000).

255. *Id.* § 1951(b)(2).

256. See *supra* notes 103-06 and accompanying text.

257. 487 U.S. 931 (1988).

258. 18 U.S.C. §§ 241, 1584.

259. *Kozminski*, 487 U.S. at 941.

260. See Kahan, *supra* note 232, at 472 (describing federal criminal law as “a system of delegated common law-making”); Coffee, *supra* note 17, at 198 (noting that “the federal law of ‘white collar’ crime now seems to be judge-made to an unprecedented degree, with courts deciding on a case-by-case, retrospective basis whether conduct falls within often vaguely defined legislative prohibitions”).

261. 739 A.2d 353 (D.C. 1999).

262. *Id.* (quoting D.C. Code § 22-505(a) (1990) amended by § 22-405 (2001)).

263. *Id.* at 354.

264. See Kahan, *supra* note 6, at 367-70; Kahan, *supra* note 232, at 471-79.

Courts have the power to define statutory terms;²⁶⁵ these statutes invite them to do so.²⁶⁶ To his mind, the mistake courts have made is not to abandon lenity, but rather to take broad language literally, failing to recognize it as an opportunity for careful policy making.²⁶⁷

Given legislatures' tendency to reverse limiting judicial constructions, Kahan's notion that open-ended statutes were intended to delegate law-making power to courts seems at least questionable. A more likely explanation is that these statutes are designed to give prosecutors maximum leeway in deciding whom to charge.²⁶⁸ At any rate, as Kahan himself admits, the effect of broad statutory language is to grant such discretion to executive officials.²⁶⁹ Prosecutors ultimately decide what theories of the statute to push before courts, and their "power of initiative" permits them to present courts with the most compelling cases to support their views.²⁷⁰ Even if defendants prevail in the courts, prosecutors may subject them to prolonged prosecutions based on theories ultimately deemed illegal.

A strong rule of narrow construction is desirable in this context because it could limit prosecutors' discretion, spare defendants experimental prosecutions, and maximize the voting public's appreciation of criminal charges, for all the reasons discussed in Part IV. Indeed, what is needed is the strongest of the three versions of lenity I described in Part I. Whereas orientation toward the literal language of the text might support broad constructions, the third version of lenity could permit courts to whittle prohibitions back to a narrower, more reasonable meaning.

Courts, however, have not applied strict construction with any consistency. The Supreme Court endorsed a narrow reading in *Kozminski*, and in *McNally* it reined in one of the most radical theories of mail fraud, but in general it has tolerated broad interpretations of white collar crimes, refusing to limit "fraud" to its common law meaning,²⁷¹ and permitting theories based on intangible property to prevail.²⁷² Federal courts of appeals have been equally

265. See *United States v. Kelly*, 24 U.S. (11 Wheat.) 418 (1826).

266. See Kahan, *supra* note 6, at 369.

267. *Id.* at 373-75.

268. See Richman, *supra* note 215, at 765 (noting that the "breadth of federal criminal legislation" combined with the "relatively small size of the federal enforcement apparatus" makes for an appearance of "virtually unfettered executive discretion").

269. Kahan writes that the effect of delegation to courts is to give prosecutors "de facto criminal law-making power," but he attributes the effect to prosecutors' power of initiative and to courts' attachment to "principal-agent" theories of interpretation, not to a deliberate delegation of lawmaking authority from Congress to the Executive. See Kahan, *supra* note 232, at 479-80.

270. *Id.*

271. *Durland v. United States*, 161 U.S. 306 (1896).

272. *Carpenter v. United States*, 484 U.S. 19, 27-28 (1987).

flexible.²⁷³ While the D.C. Court of Appeals ruled for the defense in *C.L.D.*, it seemed at least as concerned about avoiding First Amendment difficulties and effectuating the “commonly-understood meaning of the statutory terms” as about lenity.²⁷⁴ In all these cases, more regular application of strict construction would help guarantee legislative accountability and deter prosecutorial abuse.

B. *Unanticipated Factual Variations*

Perhaps the most interesting lenity cases have arisen in cases involving unusual facts that raise questions the legislature likely failed to anticipate. Such disputes are probably inevitable; given the limitations of language, criminal codes may never be perfectly comprehensive. The question raised by the rule of lenity is whether courts should work to fill in the gaps. In all but a few cases, I will argue, they should not.

It may be helpful to divide this type of dispute into three categories. The first, which affords the strongest case for lenity, comprises cases where the alleged conduct falls within the text’s literal language but pushes beyond its most intuitive meaning. *Smith* is a good example: Furnishing a gun as consideration is certainly a “use,” but it is not the use that most readily comes to mind.²⁷⁵ *United States v. Albertini*²⁷⁶ is another illustration: In that case, the recipient of a “bar letter” banning entry onto a particular military base was prosecuted when he entered during a public open house.²⁷⁷ The Supreme Court noted that “Congress in 1909 [when it passed the statute] very likely gave little thought to open houses on military bases.”²⁷⁸ Nevertheless, as in *Smith*, it held that the statutory language clearly encompassed the defendant’s conduct, even if that application was not its most obvious meaning.²⁷⁹

The rule of lenity is important in cases like *Smith* and *Albertini* because such prosecutions carry a serious risk of prosecutorial overreaching. In *Albertini*, there was reason to believe the prosecution was vindictive—the defendant had staged a brief anti-war protest before being asked to leave.²⁸⁰ In *Smith*, the government

273. See, e.g., *United States v. Margiotta*, 688 F.2d 108 (2d Cir. 1982) (interpreting the mail fraud statute to cover political patronage kickbacks to a party officer who held no public office); see generally Jeffries, *supra* note 1, at 234-42 (describing *Margiotta* as an illustration of the “dangers of reverting to the common-law methodology of fact-specific innovation in the penal law”). *Id.* at 234.

274. *In re C.L.D., Jr.*, 739 A.2d 353, 356-57 (1999).

275. See *Smith v. United States*, 508 U.S. 223, 242-43 (1993).

276. 472 U.S. 675 (1985).

277. *Id.* at 678-79.

278. *Id.* at 682.

279. *Id.* at 680 (“Unless the statutory language is to be emptied of its ordinary meaning, respondent violated [its] terms.”).

280. *Id.* at 678.

sought to enhance the punishment for conduct (the drug transaction) that already carried stiff penalties.²⁸¹ In both cases, the government appeared to be pushing beyond the penal scheme contemplated by the legislature,²⁸² yet rather than confine the statutes to the narrowest meaning Congress likely intended, the Court relied on speculations about the policy Congress was trying to achieve.²⁸³ It thus missed the opportunity both to elicit clearer policy statements from Congress²⁸⁴ and to check two questionable exercises of prosecutorial discretion.²⁸⁵

The second class of cases comprises disputes where the legislature seems to have neglected the fact pattern at issue through mere thoughtlessness or inattention. These cases arise with disturbing regularity. *Lewis v. United States*²⁸⁶ involved a statute that was ambiguous as to whether the predicate felony conviction needed to be constitutionally valid; the Court held it did not. Over twenty years later, a Hawaii case presented the very same issue, but reached the opposite result.²⁸⁷ Despite their recent popularity, many “three strikes” laws have left courts with inadequate guidance as to what counts as a strike. Just two years ago, New Jersey’s Supreme Court had to decide whether a reference to “crimes committed on separate occasions” required prior convictions in separate proceedings or only for separate crimes (it held the former),²⁸⁸ and in 2000 Maryland’s Court of Appeals faced the question whether to base the applicability of a sentencing enhancement on crime definitions in effect at the time of initial sentencing or the time of a subsequent sentencing modification (it said the latter).²⁸⁹ Also in 2000, the Washington Supreme Court considered whether a stayed conviction from another state could count as a strike under the statute (it held it could, over a strong dissent).²⁹⁰ A slew of other statutes fail inexplicably to account for people moving between jurisdictions. The West Virginia Supreme Court of Appeals had to refer to legislative history and policy—and disregard the rule of lenity²⁹¹—to determine that a sentencing

281. The *Smith* defendant was also charged with several drug trafficking crimes, but the weapons offense carried a potential sentence of 30 years based on the fact that the gun had been outfitted with a silencer. *Smith*, 508 U.S. at 226-27.

282. Indeed, the Court acknowledged as much in *Albertini* by raising doubts about Congress’s intentions. See *supra* note 278 and accompanying text.

283. *Albertini*, 472 U.S. at 682; *Smith*, 508 U.S. at 240.

284. See Elhauge, *supra* note 8, at 2194-96.

285. See Eskridge, *supra* note 196, at 1078 (noting the military commander’s charging decision in *Albertini* seemed “extreme”).

286. 445 U.S. 55 (1980).

287. *State v. Shimabukuro*, 60 P.3d 274 (Haw. 2002).

288. *State v. Livingston*, 797 A.2d 153, 155 (N.J. 2002).

289. *Webster v. State*, 754 A.2d 1004, 1016 (Md. 2000). The aggressive application of lenity in *Webster* and *Livingston* may reflect judicial discomfort with draconian three strikes laws.

290. *State v. Berry*, 5 P.3d 658 (Wash. 2000).

291. *State v. Hulbert*, 544 S.E.2d 919, 922-23 n.6 (W. Va. 2001).

enhancement for a third domestic violence offense encompassed prior convictions in other states.²⁹² The Missouri Supreme Court recently faced the opposite dilemma: That state's version of "Megan's Law" required convicted sex offenders to register with law enforcement officials "within ten days of coming into any county."²⁹³ The defendant argued he was exempt because he had always lived in the county.²⁹⁴ The court agreed, citing lenity as one of its reasons.²⁹⁵

The case for lenity is somewhat weaker regarding this second set of cases as compared to the first. To the extent judicial elaboration of crimes is ever appropriate, these cases might seem to be the prime candidates. In some disputes—the West Virginia case, for example—the statutory policy seems obvious, with the conflict arising only due to poor draftsmanship.²⁹⁶ Yet the fact that its policy is obvious should not necessarily excuse the legislature from expressing it. Exposing legislators to the political costs of poor drafting might promote better habits in the future—habits that give voters and enforcers better notice of criminal definitions. Moreover, in some cases, textual oversights may raise important policy questions that merit legislative attention. The scope of "three strikes" laws, for instance, is a major question of penal policy, one with grave implications for individual defendants—not to mention state prison budgets. If courts adopt expansive interpretations, legislators are unlikely to scale them back.²⁹⁷ Narrow readings therefore seem better designed to ensure public choice on key matters of penal policy.

The third and final set of disputes comprises cases where social circumstances have moved beyond the terms of the statute. In this

292. *Id.* at 923-24; *see also* *People v. Avery*, 38 P.3d 1 (Cal. 2002) (interpreting a prior theft conviction under a foreign state's law to count as a "serious felony" for purposes of recidivism-based sentencing in California despite differences between the two states' law of theft). For a somewhat contrary decision, *see State v. Rowe*, 63 S.W.3d 647, 650 (Mo. 2002), in which the Missouri Supreme Court concluded—expressly denying it was applying lenity—that driving after the revocation of the defendant's Iowa driver's license could not count as a violation of a Missouri statute prohibiting driving after cancellation of driving privileges "under the laws of this state."

293. *J.S. v. Beaird*, 28 S.W.3d 875, 876 (Mo. 2000).

294. *Id.* at 875.

295. *Id.* at 877. The court acknowledged, however, that the rule of lenity was technically inapplicable because the statute at issue was civil rather than criminal. *Id.*

296. In *Hulbert*, the statute included an express statement of the legislature's objectives, and as the court observed, "nothing in the objectives... evinces a legislative concern to limit the scope of this state's policy against domestic violence to those offenses that occur in this state." 544 S.E.2d at 923. Accordingly, the court interpreted the statute to apply to prior out-of-state offenses, despite the statute's explicit reference to the West Virginia code's definitions of predicate domestic violence crimes. *Id.* at 924; *see also State v. Zain*, 528 S.E.2d 748, 754-55 (W. Va. 1999) (holding that a theft statute applying to the taking of property under false pretenses from "another person" must apply to theft of government property because it would be "absurd" not to include the government as a potential victim).

297. *See Elhauge, supra* note 8, at 2194.

category, there may be instances where lenity should not bar expansion of the statutes. Some crimes may lie deep in the interior of social prohibitions but fall outside the statute's text only because it is outdated. For example, in *Perry v. Commonwealth*,²⁹⁸ a recent Massachusetts case, the Supreme Judicial Court interpreted a statute banning dissemination of "visual material" involving child nudity or child sexual conduct to include computer images even though the statutory definition of "visual material" at the time of the prosecution applied only to "any motion picture film, picture, photograph, videotape, any book, magazine, or pamphlet that contains pictures, photographs or similar visual representations or reproductions," or "[u]ndeveloped photographs, pictures, motion picture films, videotapes and similar visual representations or reproductions."²⁹⁹ The defendant cited lenity and argued that his participation in a pedophile website was not illegal under the statute because the language failed to account for the Internet.³⁰⁰ The court disagreed, holding that "the Legislature's obvious intent [was] to include any visual image created by use of a camera or similar device, regardless of how or where the image is stored."³⁰¹

Ruling the other way in a case like *Perry* might have served to discipline legislators for failure to anticipate new criminal developments. It is indeed remarkable that Massachusetts did not specifically criminalize computerized child pornography as late as 1998. Its main effect, however, would have been to set an assuredly culpable defendant free without stimulating any change in the statute, which had already been updated by the time the case reached the Supreme Judicial Court.³⁰² Thus, there may have been little reason to apply strict construction.

Still, *Perry* may be an unusual case. It involved an exceptionally culpable defendant and a statutory concept ("visual material") that could fit the new phenomenon (computer images) with exceptional ease. In general, appeals to changed societal conditions should be carefully scrutinized so as to maintain strong pressures on legislatures to keep criminal codes abreast of new developments. Chief Justice Burger once described the mail fraud statute as a "stopgap device to deal on a temporary basis with the new phenomenon, until particularized legislation can be developed and passed to deal directly with the evil."³⁰³ That may be true in some cases, but in many others the notion of a changed society may be a cover for an effort to extend

298. 780 N.E.2d 53 (Mass. 2002).

299. *See id.* at 54-55 (quoting Mass. Gen. Laws ch. 272, § 31 (1992)).

300. *Id.* at 56-57, 58.

301. *Id.* at 55; *see also* State v. Weeks, 761 A.2d 44 (Me. 2000) (likewise applying the term "visual material" in a child pornography statute to apply to computer files).

302. *See Perry*, 780 N.E.2d at 57.

303. United States v. Maze, 414 U.S. 395, 405-06 (1974) (Burger, C.J., dissenting).

the statute's reach to new forms of conduct. In the latter variety of cases, if not the former, lenity should apply.

C. *Ambiguous Use of Modifiers*

Interpretive questions may also stem from grammatical ambiguities. A particularly common problem is the unclear use of a word or phrase to modify a series of terms. For example, in *United States v. Bass*,³⁰⁴ the statute at issue applied to any convicted felon "who receives, possesses, or transports in commerce or affecting commerce . . . any firearm."³⁰⁵ The issue was whether the "in commerce" phrase applied to the crime of possession; the Court held it did.³⁰⁶ Similarly, in *State v. Huggins*,³⁰⁷ the statute applied stiffened sentences to recently released prisoners who committed burglary of an "occupied structure or dwelling."³⁰⁸ The defendant argued his sentence could not be enhanced for burglarizing an unoccupied dwelling, and the court agreed.³⁰⁹ In *State v. Kleypas*,³¹⁰ Kansas's death penalty statute applied to premeditated killings occurring during or after "rape, . . . criminal sodomy, . . . or any attempt thereof," leaving it grammatically uncertain whether attempted rape would qualify or only attempted sodomy.³¹¹ The court held it applied to both.³¹²

What is needed in these cases is not so much a rule of lenity as some clear interpretive canon to guide legislatures in drafting statutes. In the absence of such a canon, however, the rule of lenity is appropriate, as the *Bass* and *Huggins* courts recognized. Serious questions of criminal policy may turn on the applicability or inapplicability of modifiers: *Bass* added an element to the government's case in all felon-in-possession prosecutions, while *Huggins* spared the defendant a substantial sentencing enhancement. Such questions should be left to express statutory determination. *Kleypas*, by contrast, may be a case where the defendant's reading of the statute was simply too absurd to countenance: It is hard to imagine why a legislature would punish attempted sodomy more severely than attempted rape. The rule of lenity, however, need not prevent that result. *Kleypas* could be a case where the defendant's argument would fail even a threshold examination of plausibility.³¹³

304. 404 U.S. 336 (1971).

305. *Id.* at 337 (quoting 18 U.S.C. § 1202(a) (1968)).

306. *Id.* at 350-51.

307. 802 So. 2d 276 (Fla. 2001).

308. *Id.* at 277 (quoting Fla. Stat. Ann. § 775.082(9)(a)(1)(q) (West 2000)).

309. *Id.* at 279.

310. 40 P.3d 139 (Kan. 2001).

311. *See id.* at 193 (quoting Kan. Stat. Ann. § 21-3439(a)(4) (1995)).

312. *Id.*

313. In terms of the third version of lenity that I outlined in Part I, the argument would be that the defendant's reading does not enter the set of plausible interpretations on which the rule of lenity operates. The court's actual reasoning was

D. Definitions by List

Another set of difficult interpretive cases arises from the use of lists of examples to define key terms or provisions. Again, this problem may be inevitable: No definitional list can be perfectly comprehensive. The question is whether courts should require express enumeration of each item, giving but limited scope to phrases such as “and other similar items,” or whether they should permit arguments by analogy. Though legislatures must be permitted to define concepts with examples without enumerating every possible item, courts must be careful to maintain the integrity of the defined concept and avoid expanding it by analogy.

State v. Carr,³¹⁴ the case of the drunken bicyclist, is a useful illustration.³¹⁵ The government argued the defendant’s conduct qualified as “driving while intoxicated” (DWI), an offense that the statute defined as the operation, while under the influence, “of any motor vehicle, aircraft, watercraft, vessel, or other means of conveyance.”³¹⁶ The defendant had two prior DWI convictions (presumably for driving automobiles), so a conviction would have carried enhanced penalties.³¹⁷ Though the intermediate appellate court had held that a bicycle was plainly a “means of conveyance,” Louisiana’s Supreme Court compared the statute to a related provision referring to the operation of “the motor vehicle . . . or other means of motorized conveyance” and concluded that the statute at issue was ambiguous as to whether the “means of conveyance” must be motorized.³¹⁸ It then cited the rule of lenity as one of its reasons for adopting the narrower view.³¹⁹

Carr is an exemplary application of lenity. The prosecution appears questionable, particularly considering the stiffened penalties for a third offense. Moreover, the crime charged, “driving while intoxicated,” would not call to mind a drunk person on a bicycle for the average voter reviewing the government’s policies—nor, for that matter, for the average employer considering the defendant’s criminal record. Whether to impose comparable penalties for riding bicycles drunk (which primarily endangers the rider) as for driving under the influence (which endangers others) is a significant policy choice for which the legislature should be responsible. Even without the parallel provision referring to motorized conveyances, a stiff version of lenity—something like the third approach I described in Part I, if not

that the defendant’s view defied legislative intent because the legislature could not have intended the reading he proposed. *Id.* at 193-94.

314. 761 So. 2d 1271 (La. 2000).

315. *Id.* at 1272-73.

316. *Id.* at 1273 (quoting La. Rev. Stat. Ann. § 14:98A(1)(West 2003)).

317. *Id.* at 1273 n.2.

318. *Id.* at 1275.

319. *Id.* at 1276.

the second—would have justified adopting the intuitive meaning of the provision over the government’s broad interpretation. The phrase “other means of conveyance” is certainly no less ambiguous than “any other self-propelled vehicle not designed for running on rails” was in *McBoyle*.³²⁰

*People v. Davis*³²¹ is another exemplary case. The defendant in *Davis* had fired a “pellet/BB gun” at two individuals, causing one of them to lose an eye.³²² Though he was obviously guilty of battery and aggravated battery, the government also charged him with “armed violence,” that is, the commission of “any felony defined by Illinois law” while “armed with a dangerous weapon.”³²³ The applicable provision defined “dangerous weapon” to include “a pistol, revolver, rifle, shotgun, spring gun, or any other firearm, sawed-off shotgun, a stun gun or taser,” as well as various knives and bludgeons.³²⁴ Referring to other provisions that described pellet guns as an “implement that is not a firearm,”³²⁵ the court cited the rule of lenity and excluded BBs from the statutory category of dangerous weapons.³²⁶ It thus averted a reading that might have permitted stiffened penalties and the sinister label of “armed violence” to be attached to crimes that the average voter might not associate with that term.

There may be other cases where lenity is less appropriate. For instance, in the *Perry* case discussed above, an interpretation defining on-line images as “visual material” does not seem to carry the same risk of fostering misleading prosecutions and imposing a questionable policy choice. What *Carr* and *Davis* demonstrate is that courts should not take phrases such as “other means of conveyance” or “other firearm” too literally. When courts stray beyond the list’s core concept, they unmoor criminal law from majoritarian prohibitions, opening the door to criminalization by analogy, the danger that Chief Justice Marshall counseled against in *Wiltberger*.³²⁷

E. Units of Prosecution in Double Jeopardy Disputes

Another circumstance where lenity concerns regularly arise is in disputes over whether counts in a conviction should merge for double

320. See *supra* notes 45-47 and accompanying text.

321. 766 N.E.2d 641 (Ill. 2002).

322. *Id.* at 642.

323. *Id.* at 642-43 (quoting 720 Ill. Comp. Stat. Ann. 5/33A-2 (West 1992)).

324. *Id.* at 643 (quoting 720 Ill. Comp. Stat. Ann. 5/33A-1(b)(West 1992)).

325. *Id.* at 645 (quoting 720 Ill. Comp. Stat. Ann. 535/1 (West 2000)).

326. *Id.* at 647.

327. *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 96 (1820) (“It would be dangerous, indeed, to carry the principle, that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated.”).

jeopardy purposes. According to the Supreme Court, this issue turns on whether the statute defines conduct as a single “unit of prosecution” or as multiple offenses.³²⁸ The rule of lenity militates in favor of finding a single offense.³²⁹

This problem has arisen several times in drug cases where the defendant held multiple “stash” of a controlled substance. The government’s argument in these cases is that each stash is analytically distinct, such that it may support a separate charge and thus a compounded penalty.³³⁰ The problem also occurs in cases where a status offense, such as possession of a firearm, could apply separately to each count in a conviction or only once to the overall incident.³³¹ Courts have vacillated on these questions, drawing fine distinctions between cases. The Washington Supreme Court held in 1998 that trace quantities of marijuana found in the defendant’s car and in his convenience store were a single unit of prosecution,³³² but the following year it reversed course, holding that simultaneous marijuana “grow operations” at two separate homes were distinct offenses.³³³ The District of Columbia Court of Appeals held one year that a drive-by shooting involving assaults on four separate individuals gave rise to only a single weapons offense,³³⁴ but the next year it held that possession of a firearm during distinct burglaries could support multiple convictions.³³⁵ Other cases have involved more unique fact-patterns. In *State v. Cobb*,³³⁶ the New Hampshire Supreme Court allowed separate child pornography charges for each of the 53 photographs found in the defendant’s possession.³³⁷ In *State v. Dillon*,³³⁸ South Dakota’s high court merged first-degree rape of a minor and criminal pedophilia charges because of lenity concerns.³³⁹

Perhaps because these disputes typically arise in appeals following a conviction, courts often treat them as straightforward questions of

328. See *Ball v. United States*, 470 U.S. 856, 865 (1985).

329. See *Ladner v. United States*, 358 U.S. 169 (1958) (citing the rule of lenity and holding that a shotgun blast that injured two officers while transporting the defendant, a prisoner in their custody, constituted a single assault under the statute); *Bell v. United States*, 349 U.S. 81 (1955) (citing the rule of lenity and holding that the transport of two women over state lines at once constituted a single Mann Act violation).

330. See, e.g., *Commonwealth v. Rabb*, 725 N.E.2d 1036, 1040 (Mass. 2000); *In re Davis*, 12 P.3d 603, 607 (Wash. 2000); *State v. Adel*, 965 P.2d 1072, 1075 (Wash. 1998).

331. See, e.g., *Stevenson v. United States*, 760 A.2d 1034 (D.C. 2000); *Nixon v. United States*, 730 A.2d 145 (D.C. 1999).

332. *Adel*, 965 P.2d at 1075-76.

333. *Davis*, 12 P.3d at 604-05.

334. *Nixon*, 730 A.2d at 153.

335. *Stevenson*, 760 A.2d at 1036.

336. 732 A.2d 425 (N.H. 1999).

337. *Id.* at 433.

338. 632 N.W.2d 37 (S.D. 2001).

339. *Id.* at 46.

statutory construction and fair punishment.³⁴⁰ As some courts have acknowledged, however, the real importance of these decisions, and the best reason for applying lenity, lies in their effect on prosecutors' power to stack charges and obtain leverage in plea negotiations.³⁴¹ Possessing fifty-three pornographic photographs of children is not necessarily more offensive than possessing a single snapshot, and it certainly is not fifty-three times as heinous. Nor is holding drugs in multiple stashes necessarily worse, though it might merit additional punishment because of the detection difficulties it creates. Given the immense increase in power that prosecutors may obtain by parsing crimes into separate charges, considerations of lenity favor requiring explicit definition of multiple crimes before allowing multiple charges to result from conduct that could plausibly be understood as a single offense.

F. *Unspecified Mens Rea*

Like the double jeopardy cases, this category of interpretive disputes arises because of background constitutional and common law principles. According to the Supreme Court, "the existence of a mens rea is the rule of, rather than the exception to," common law offenses,³⁴² although Congress may create strict-liability "regulatory" crimes where the conduct is such "that a reasonable person should know [it] is subject to stringent public regulation and may seriously threaten the community's health or safety."³⁴³ State courts have often followed the same analysis, occasionally invoking strict construction to support the inference of a mens rea term. For instance, the Vermont Supreme Court imputed a knowledge requirement into the state's hit-and-run statute because of lenity concerns, among other reasons.³⁴⁴ Minnesota's high court held that the government must prove the defendant had knowledge to convict for illegal possession of a knife on school grounds.³⁴⁵ John Coffee, however, has observed a growth in the number of strict-liability "regulatory" crimes carrying stiff criminal penalties,³⁴⁶ and state courts have proved willing to forego

340. See Nancy J. King, *Portioning Punishment: Constitutional Limits on Successive and Excessive Penalties*, 144 U. Pa. L. Rev. 101, 126-27 (1995) (describing the dominant approach to the Double Jeopardy Clause as one of "legislative deference" that leaves it to the legislature to determine defendants' exposure to "successive punishments or prosecutions" based on the same conduct). King supports this view of double jeopardy but argues that the Eighth Amendment requirement of "proportional" punishment should limit the total penalty that may be imposed on any particular defendant based on any particular course of conduct. *Id.* at 105, 149-50.

341. See, e.g., *State v. Adel*, 965 P.2d 1072, 1075 (Wash. 1998).

342. *Staples v. United States*, 511 U.S. 600, 605 (1994).

343. *Liparota v. United States*, 471 U.S. 419, 433 (1985).

344. *State v. Sidway*, 431 A.2d 1237, 1239 (Vt. 1981).

345. *In re C.R.M.*, 611 N.W.2d 802, 810 (Minn. 2000).

346. Coffee, *supra* note 17, at 216.

mens rea even on key elements of relatively serious crimes, such as the age element in Rhode Island's crime of first-degree child molestation.³⁴⁷

While the inference of mens rea is not a straightforward application of strict construction, it involves an analogous "clear statement" rule: Courts presume mens rea unless the legislature specifies otherwise.³⁴⁸ As with the rule of lenity, however, courts have not applied this canon of construction with much rigor; they often accept mere omission of mens rea as proof of the legislature's intention, turning to history and policy to support their result.³⁴⁹ Though the requirement of mens rea stems from due process concerns that go beyond the scope of lenity,³⁵⁰ the rationales for strict construction generally support inferring mens rea terms absent clear instruction not to. In many crimes, particularly proxy offenses such as the possession of burglars' tools or drug paraphernalia, the presence of some nefarious intention is the only thing to distinguish criminals from ordinary citizens.³⁵¹ Requiring proof of bad intent thus helps ensure that those convicted of crimes engaged in conduct that the electorate conventionally understands as wrongful.

G. Heinous Crimes

The ultimate test, perhaps, of the rule of lenity's value is its application in cases where technical parsing of the statute may exonerate unarguably reprehensible conduct. These cases pose the deepest challenge for lenity, because there appears to be no reason to give such defendants the benefit of the legislature's drafting errors. Defendants cannot plausibly claim that they lack notice of the criminality of rape, murder, or similar offenses, and courts have little reason to presume legislatures would not desire punishment.

Nevertheless, strict construction should apply to core crimes no less than minor offences. Given that core crimes are generally criminalized many times over in criminal codes,³⁵² the interpretive issues in a case of serious crime will generally relate to the grading of

347. *State v. Yanez*, 716 A.2d 759, 760 (R.I. 1998).

348. *See United States v. U.S. Gypsum Co.*, 438 U.S. 422, 437 (1978).

349. *See, e.g., Yanez*, 716 A.2d at 768-70; *State v. Loge*, 608 N.W.2d 152 (Minn. 2000); *cf. Ex parte Washington*, 818 So. 2d 424, 426 (Ala. 2001) (interpreting the phrase "is knowingly in actual or constructive possession of 28 grams or more of cocaine" to require knowledge only of possession, not of the specific quantity possessed).

350. *See Liparota v. United States*, 471 U.S. 419, 423-28 (1985).

351. According to Stuntz, "burglars' tools statutes seem in practice to boil down to bans on possessing screwdrivers, perhaps with an implicit additional term requiring that the possession seem suspicious." Stuntz, *supra* note 165, at 516 n.50 (citing *Commonwealth v. Calderon*, 681 N.E.2d 1246 (Mass. App. Ct. 1997); *Dotson v. State*, 260 So. 2d 839 (Miss. 1972); *People v. Diaz*, 244 N.E.2d 878 (N.Y. 1969)).

352. *See Stuntz, supra* note 165, at 518-19.

the defendant's offense, rather than the question of his ultimate guilt or innocence. Indeed, when a defendant's conduct is obviously reprehensible, it is hard to imagine why the government would press a debatable interpretive claim—one potentially subject to lenity—if not to push the statutory scheme toward stiffer penalties than it apparently authorizes. For example, in *Richard*, the pedophilia case discussed in Part I,³⁵³ there was no question that the alleged conduct—repeated sexual assaults of young boys—was criminal. Nor was there any doubt that the multiplicity of the defendant's crimes subjected him to a sentencing enhancement under the code's "pattern" provision.³⁵⁴ The government presented a strained reading of the statute—arguing that the specific types of sexual conduct involved in the crime formed multiple patterns, rather than a single pattern based on the totality of the assaults—only because it hoped to enhance the defendant's sentence beyond what a more natural interpretation of the statute would support.³⁵⁵

Lenity is appropriate in such cases because it sustains legislative accountability for the grading of offenses. It might seem that legislatures would naturally prefer the stiffest possible punishment for crimes as heinous as those alleged in *Richard*. Yet by that logic every heinous crime would merit the maximum penalty—and not every heinous crime can be the *most* heinous. In fact, whether crimes of the sort alleged in *Richard* are more or less reprehensible than other conceivable forms of pedophilia, or indeed other disgusting crimes, is a question with no obvious answer. It is therefore a question that our conventional theory of legislative supremacy in criminal law should assign to the legislature. When courts resolve the question in favor of severity, they usurp that legislative function: The one-way nature of criminal politics will likely make it impossible for the legislature to correct the result—even if it conflicts with the legislature's original intention.³⁵⁶ What is worse, courts that accept strained readings in cases like *Richard* absolve the legislature of responsibility for failing to authorize the punishment voters might have wanted. To sustain accountability and stimulate thoughtful attention to the grading of offenses, courts should apply lenity and hold the legislature to the punishment it has most clearly authorized, even in cases of heinous crime.

H. Summary

Interpretive questions arise in a wide variety of contexts. As I noted at the outset, my selections here are meant only to illustrate a

353. *State v. Richard*, 786 A.2d 876 (N.H. 2001).

354. *Id.* at 879.

355. *Id.*

356. *See Elhauge, supra* note 8, at 2194.

few of those contexts and highlight the arguments they may foster. The strength of my theory that lenity enhances democratic accountability varies across the categories. The best cases for my view are the open-ended statutes discussed in (A), the unforeseen violations in (B), the vague lists in (D), and the units of prosecution in (E). In many disputes over grammatical ambiguity, there may be no better justification for lenity than the need to impose discipline on the drafting process—and in many cases the concrete remedy of releasing a guilty defendant may seem mismatched with the abstract goal of improving the drafting quality of statutes in the long run. Likewise, in cases of double jeopardy or heinous wrongdoing, lenity may serve only to hold the legislature to the scheme of penalties it appeared to choose in advance. That concern relates importantly to the democratic legitimacy of criminal law, but the need for accountability may not be as imperative as when, say, proxy offenses or open-ended statutes threaten to permit unaccountable prosecutions of innocent defendants.

This variety in the arguments for lenity might suggest that the rule's strength should vary from one context to the next. Perhaps a weak rule should be imposed in interpreting core crimes; a strong rule when crimes are petty, or when statutes define crimes in open-ended terms.³⁵⁷ My preference, however, is for consistent application of a single standard. There is enough work to be done in terms of identifying the sorts of textual ambiguities that qualify for lenity; adding distinctions between crimes would only compound the confusion. Moreover, as many commentators have observed, statutory construction today is plagued by inconsistent standards and ad hoc resolutions.³⁵⁸ Imposing a uniform, clearly-articulated rule of lenity could go a long way towards regularizing statutory construction. That, after all, was Chief Justice Marshall's goal when he introduced the rule of lenity into American jurisprudence nearly 200 years ago.³⁵⁹

It also bears emphasis that, in many of the disputes discussed in this part, the only theory of lenity that would work serious changes in criminal justice is the third possibility that I outlined in Part I, that is, the theory that mandates selection of the narrowest plausible reading established by reference to a variety of interpretive techniques. An orientation toward the plain text—my second version of lenity—may be more disciplined than the current ad hoc approach, but it will not guarantee a narrow reading when statutes include broad language, as in the open-ended “common law” provisions in (A); when a literal reading of the text could support expansive liability, as in some cases in (B); or when a sweeping catchall phrase follows a definitional list,

357. See *supra* notes 148-54 and accompanying text.

358. See *supra* notes 1-3 and accompanying text.

359. See *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 96 (1820).

as in (D). In such disputes, a more aggressive preference for lenity must be deployed to cut off the expansive possibilities of the text.

As I noted earlier, there is some reason to believe that Justice Scalia's brand of textualism, if not textualism in general, carries such a preference.³⁶⁰ Scalia's focus on the text's "ordinary" meaning often precludes expansive literal readings like those adopted in *Moskal* and *Smith*.³⁶¹ In many cases, his approach may appear indistinguishable from lenity. Nevertheless, if the goal is to promote narrow construction, it may be better to deemphasize the text and bring lenity to the fore. The "ordinary meaning" of the text—Scalia's core concept—is often debatable, and there may be cases where the textual view is more expansive than certain plausible alternatives.³⁶² Making lenity a primary value in statutory construction would ensure that there is always a bias toward narrow readings, not just when the plain text supports them.

VI. CONCLUSION

The overbreadth of American criminal law is one of its most widely recognized problems. In this Article, I have tried to show that a toughened rule of lenity could be one of the problem's most congenial solutions. Whereas the substantive due process review of crimes, the favored approach of many commentators, would raise the specter of counter-majoritarian judicial activism, the rule of lenity could be understood as a device for strengthening criminal law's responsiveness to democratic preferences. To be sure, limiting constructions may thwart legislative preferences in particular cases in the short run. Yet correcting objectionable judicial rulings does not appear to involve much effort or distraction on the part of legislatures, and in the long run the elaboration of a more detailed criminal code could enhance the accountability of both legislators and prosecutors. Legislatures would need to disclose the precise nature of the conduct they intended to criminalize, and prosecutors' charging decisions could be reviewed more easily based on the specific crime definitions that lenity would stimulate.

Rules of construction are inevitably about more than the meaning of words in a text.³⁶³ They set the parameters of inter-branch relations, effectuating background expectations about governmental structure and determining how much power legislatures may delegate. By requiring specificity in criminal statutes, the rule of lenity enhances

360. See *supra* notes 41-44 and accompanying text.

361. *But see* *Chapman v. United States*, 500 U.S. 453, 461-62 (1991) (majority opinion joined by Scalia, J.) (rejecting suggestion that the term "mixture or substance" might exclude blotter paper on which the drug LSD was placed).

362. As was noted earlier, Scalia's own voting pattern on the Court appears to bear out this concern. See *supra* note 39 and accompanying text.

363. See *Eskridge*, *supra* note 196, at 1009.

the accountability of both lawmaking and enforcement in criminal law—an area where the value of majoritarian moral legitimacy is paramount. Courts should therefore embrace and strengthen the strict construction of criminal statutes.

Notes & Observations