RECONSTRUCTING THE RULE OF LENITY

David S. Romantz†

"If [lenity] is no longer the presupposition of our law, the Court should say so, and reduce the rule of lenity to an historical curiosity."

—*Holloway v. United States*, 526 U.S. 1, 21 (1999) (Scalia, J., dissenting)

TABLE OF CONTENTS

† Associate Professor of Law, University of Memphis, Cecil C. Humphreys School of Law. I am grateful to Matthew Lawless, Bridget Warner, Connor Dugosh, and Johnathan Burnley for their excellent research assistance, and to Professor Kevin H. Smith for commenting on an earlier draft of the Article. I am also grateful to the University of Memphis, Cecil C. Humphreys School of Law for providing financial support.

INTRODUCTION

The rule of lenity is easy to define but difficult to apply. Simply stated, it is a rule of statutory construction that requires a court to resolve statutory ambiguity in favor of a criminal defendant, or to strictly construe the statute against the state. Scores of courts and commentators have tried to make sense of the rule with little success. As a result, it is difficult, if not impossible, to predict when the rule should apply and—if it does apply—to predict the result of its application. A serious problem is the tension between lenity's two opposing functions. Lenity purports to support two important constitutional objectives. First, it serves to preserve the separation of governmental powers. As applied, lenity limits the scope of statutory language in penal statutes, because the legislature and not the courts ought to establish the contours of a crime and its punishment. Lenity then serves to protect the legislature's constitutional lawmaking prerogative and to limit the courts' encroachment on a legislative function. Second, lenity preserves the constitutional right of fair warning found in due process. The rule ensures that we do not have to guess as to the breadth and meaning of a penal statute, the application of which could seriously impact our life or liberty. Thus, lenity promotes fair notice and helps secure our right to (procedural) due process. But while the United States Supreme Court—the highest court in the land—purports to uphold both constitution-based rationales, it routinely favors one and ignores the other. Thus, judges and commentators have questioned its continued viability.

Beginning in the 1950s, the Court began tipping the lenity scale in favor of the separation of powers function over the fair warning function, thus limiting lenity's application and frustrating its foundation in due process. The modern application of the rule simply asks whether statutory ambiguity in a criminal statute can be resolved using traditional tools of statutory construction. This test sharply focuses on the separation of powers leg of the lenity ladder, since it asks whether Congress spoke to the issue; and if the Court can resolve the ambiguity—if the Court concludes that Congress has spoken to the issue—then the inquiry ends and Congress's discovered intent controls. Once ambiguity is resolved, the Court can avoid fair warning on the grounds that the statute is no longer in doubt, and so there is no longer a need for lenity. Since the 1950s, the Court typically reserves the

application of lenity to those few cases where it fails after effort to resolve statutory ambiguity. What remains in these cases is a statute that is ultimately ambiguous with lenity reduced to a mere tiebreaker.

The modern application of the rule as applied by the Supreme Court relegates lenity to an afterthought or curiosity. Faced with an obvious statutory ambiguity, the Court endeavors to solve the problem by applying any number of statutory construction canons. After Congress's intent is declared, the Court cites lenity and its goal of protecting the separation of powers—a makeweight. Further confusing the issue is the Court's reluctance to decide just when a criminal statute is ambiguous enough to trigger lenity. Even when the Court concludes—after applying the tools of construction—that a statutory term is ambiguous, the Court may still refuse to apply lenity unless the statutory language in question is ambiguous enough to warrant the rule. In some instances, the Court requires a grievously ambiguous statute. But other times, the Court requires only a sufficiently ambiguous term to trigger lenity; and still other times it requires reasonable doubt to trigger the rule. The result is a confusing, inconsistent, and frustrating jurisprudence that cries for clarity if lenity is to survive.

Lenity is an ancient doctrine that speaks to fair warning and fair play. It is afforded out of fairness to a criminal defendant when she faces the possibility of conviction and sentencing under a statute that is less than clear. Minimizing the due process function of lenity and failing to articulate just when lenity applies not only harms the Court's credibility, but does violence to our deeply-held notions of liberty and fair play.

This Article examines the Supreme Court's use and abuse of the rule of lenity. It argues that courts ought to weigh both the separation of powers objective and the fair warning objective that define lenity. It also argues that the Court must develop a credible test and a consistent application if it intends to preserve the venerable rule. First, the Article explains briefly the origins of the rule. Then, it describes the Supreme Court's evolving view of lenity and its function. Next, the Article examines the Court's modern view of the rule; a view that defers to Congress's law-making authority—a view that has little to do with leniency. Lastly, the Article argues that the rule of lenity ought to be reconstructed to recover and reclaim the important due process foundation that begat the rule.

I. A SHORT HISTORY OF LENITY

The rule of lenity has its roots in the proclivity of British kings to hang their subjects.[1] The rule was conceived by judges in an effort to mitigate the Crown's liberal and expansive use of the death penalty.[2] Sir William Blackstone in his *Commentaries on the Laws of England* noted that "[i]t is a melancholy truth, that among the variety of actions which men are daily liable to commit, no less than a hundred and sixty have been declared by act of parliament to be felonies . . . to be worthy of instant death."[3] The number of capital felonies swelled to approximately 200 by the end of the seventeenth century, and almost all of them made death the only possible penalty.[4]

Early on, English jurists sought creative ways to avoid capital punishment.[5] One such practice—the "benefit of the clergy" rule—is believed to be the spark for the modern rule of lenity.[6] In the thirteenth century, English common law courts developed the benefit of the clergy rule to remove members of the clergy from the reach of criminal laws by reassigning cases to the more benign ecclesiastical courts.[7] Since felonious crimes were numerous and punishable by death, the clergy certainly benefited from the court's generosity.[8] As Parliament and the king continued to proliferate capital felonies in the coming centuries, the courts responded by expanding the benefit of the clergy rule to include any citizen who could read.[9] The court's philanthropy saved countless lives as increasing numbers of defendants were shielded from the reach of the death penalty.[10] Keenly aware that the courts were frustrating its legislative prerogative to kill the nation's criminals,

---

1 John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 198 (1985).

2 *Id.*

3 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 18 (1769).

4 Jeffries, *supra* note 1, at 198 n.23.

5 Phillip M. Spector, *The Sentencing Rule of Lenity*, 33 U. TOL. L. REV. 511, 518–19 (2002).

6 *Id.* at 514.

7 *Id.* at 514–15. For example, members of the clergy would receive "a brief term of imprisonment in a monastery, and a forfeiture of goods but not of land." *Id.* at 516. The harshest sentence imposed was life imprisonment. *Id.* Those unable to invoke the "benefit of clergy" were sentenced to death. *Id.*

8 *Id.*

9 *Id.* at 515.

10 *Id.*

Parliament responded by enacting more and more capital felonies, while excluding increasing numbers of felonies from the benefit of the clergy.[11] The courts, in response, began strictly construing felonies that were excluded from the benefit of the clergy—thus creating a rule of lenity in the construction of criminal statutes.[12] Under the new rule, statutes that imposed the death penalty were construed narrowly to favor the defendant.

The courts in the United States inherited the rule of lenity from the English common law.[13] But instead of using the rule to thwart an over-zealous legislature, American jurists adopted the rule to help it advance important constitutional objectives that emerge when Congress enacts criminal statutes.[14] In 1817, in *United States v. Sheldon*, the Supreme Court first suggested that an ambiguity in a criminal statute ought to be strictly construed against the government.[15] In *Sheldon*, the Court considered whether the statutory term "transport" included driving oxen on foot into Canada.[16] Concluding that the term is limited to carrying or conveying articles, the *Sheldon* Court could find "no good reason for construing a penal law by equity, so as to extend it to cases not within the correct and ordinary meaning of the expressions of the

---

11 *Id.* at 515–16.

12 *Id.* at 518. For example, when Parliament excluded from the benefit of the clergy a statute for stealing "horses," the courts responded by narrowly construing the statute to require the theft of more than one horse; then, the courts excluded colts from the reach of the statute. *Id.*

The rule of lenity first developed in England with the decided goal of frustrating the intent of the legislature. English courts resolved to chart a more humane path despite the legislature's facility to enact capital crimes. Interestingly, courts in the United States use the rule to assuage a different sort of tension—to facilitate the intent of the legislature by refusing to broaden statutory language even when humanity and compassion would otherwise demand it. *See* discussion *infra* Sections II.A, II.B. Early English courts sought to protect citizens; modern American courts seek to protect the legislature.

13 Sarah Newland, Note, *The Mercy of Scalia: Statutory Construction and the Rule of Lenity*, 29 HARV. C.R.-C.L. L. REV. 197, 200 (1994).

14 *Id.* at 201.

15 United States v. Sheldon, 15 U.S. 119, 121–22 (1817). In *Sheldon*, the Supreme Court considered whether the defendant committed a crime when he drove oxen on foot into Canada. *Id.* at 120. The applicable statute made it a crime to "transport . . . in any wagon, cart, sleigh, boat, *or otherwise* . . . any articles of provision" of war into Canada. *Id.* (emphasis added). The government contended that the term "or otherwise" was not limited to the means of transport but included the article of transport—the oxen. The Court disagreed. *Id.* at 121. Conceding that Congress's goal would be met with either construction, the Court adopted the narrower view and concluded that "or otherwise" means the means of transport. *Id.* at 122.

16 *Id.* at 120.

law . . . ."[17] While the *Sheldon* Court did not explain why a penal statute ought to be narrowly construed, its construction of the term suggests that the Court was sensitive to the danger of judicially-created statutory breadth—an idea the Court would soon take up in earnest.[18]

In 1820, in *United States v. Wiltberger*, Chief Justice John Marshall first articulated the "well known rule that . . . a penal statute . . . is to be construed strictly."[19] The *Wiltberger* Court considered whether the phrase "high seas" in a manslaughter statute included a river in the interior of China.[20] Concluding that it did not, the Court announced a dual purpose of lenity that departed from its British roots but survives in form, if not in substance, to this day.[21] The Court explained that the rule of lenity "is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not the judicial department."[22] Thus, the *Wiltberger* Court decreed that lenity both protects our individual right to fair warning and guards against judicial encroachment of Congress's rulemaking authority.[23]

---

17 *Id.* at 121.

18 *See id.* at 120–21 (construing the statute's language narrowly to include only vehicles similar to those enumerated in the statute).

19 United States v. Wiltberger, 18 U.S. 76, 94 (1820).

20 *Id.* at 94. In *Wiltberger*, the defendant—an American—was charged with manslaughter on board a private American ship sailing on the Tigris river in the interior of China. *Id.* at 93–94, 105–06. China disclaimed jurisdiction over the defendant. The applicable statute only conferred jurisdiction on American courts if the crime was committed on the "high seas." *Id.* at 93–94; An Act for the Punishment of Certain Crimes Against the United States, ch. 9, § 12, 1 Stat. 112, 115 (1790). Thus, the Court was asked to determine whether the phrase "high seas" included an interior river in China. *Wiltberger*, 18 U.S. at 94.

21 *Wiltberger*, 18 U.S. at 104–05; *see also supra* text accompanying notes 5–14. The government argued that the Court should construe the phrase "high seas" found in section XII in relation to the whole statute. *Wiltberger*, 18 U.S. at 94. Section VIII of the statute criminalizes murder or any other felony committed on the "high seas, or in any river, haven, basin, or bay, out of the jurisdiction of any particular State." *Id.* at 98–99. The government asked the Court to incorporate the jurisdictional language of section VIII to section XII to conclude that crimes on the "high seas" could include crimes committed on rivers in foreign countries. *Id.* at 94–95. After an exhaustive review of the whole statute, the Court concluded that Congress intended each section of the statute to be read independently from the others. *Id.* at 104–05. The Court explained that "[t]his characteristic feature of the law . . . affords a powerful reason for restraining the Court from annexing to the description contained in one section, parts of the description contained in another." *Id.*

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

23 *See id.*

The *Wiltberger* Court seemed particularly wary of upsetting the careful distribution of powers articulated in the United States Constitution.[24] The Court cautioned against defeating "the obvious intention of the legislature" in its construction of an ambiguous penal statute.[25] The Court warned that "[i]t is the legislature, not the Court, which is to define a crime, and ordain its punishment."[26] The rule of lenity, then, serves in part to protect the legislature's exclusive law-making powers by discouraging courts from interpreting penal statutes broader than Congress intended. Since the rule of lenity is a narrowing canon—a rule of strict construction—it works to avoid judicial overreaching and to preserve the legislature's law-making authority.

Wiltberger also, but with less enthusiasm, addressed the other purpose of lenity—the law's "tenderness . . . for the rights of individuals."[27] The Court suggested that a crime committed on a river in the interior of a country could not be considered a crime on the high seas without upsetting settled linguistic expectations.[28] The Court had little reason to describe more fully this aspect of lenity, because it concluded that the phrase "high seas" was not ambiguous.[29] Thus, lenity did not apply. The Court did note, however, that statutory terms ought

---

24 *Id.* at 95–96; *see also infra* note 26.

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

26 *Id.* The Supreme Court was, of course, alluding to the vesting clauses in Articles I and III of the U.S. Constitution. Article I states, in relevant part, "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives." U.S. CONST. art. I, § 1. Article III states, in relevant part, "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1. Congress's law-making power is considered specific, exclusive, and separate; thus, the executive and the judicial branches are largely prohibited from enacting laws. *See* United States v. Lopez, 514 U.S. 549, 592 (1995) (discussing the framers' intent as it relates to the structure of the Constitution). The *Wiltberger* Court cautioned against an aggressive application of lenity that would operate to narrow the meaning of a penal statute beyond that which Congress intended. *Wiltberger*, 18 U.S. at 95. Doing so, the Court warned, would violate the Constitution. *See id.* at 96.

27 *Wiltberger*, 18 U.S. at 95. The Supreme Court had little reason to expand on the fair-notice purpose of lenity. Once the Court concluded that Congress had not intended each section of the statute to be read together, it simply concluded that the common understanding of the phrase "high seas" did not include the river at issue in the case. *Id.* at 104–06.

28 *Id.* at 94.

29 *Id.* at 105; *see also supra* note 27. The *Wiltberger* Court explained that "[w]here there is no room for ambiguity in the words, there is no room for construction." *Wiltberger*, 18 U.S. at 95–96.

to "be taken according to the common understanding of mankind . . . in their popular and received sense."[30]

A little over a century after *Wiltberger*, the Court more fully explained the second object of lenity: to protect a defendant's "common understanding" of statutory language. In *Connally v. General Construction Company*, the Supreme Court considered whether the language in a state wage and hour statute violated due process.[31] The Court concluded that the statutory language was impossibly vague and upheld an order from the district court enjoining the state of Oklahoma from enforcing the vague provisions.[32] The Court explained that:

> the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to what conduct on their part will render them liable to its penalties is a well-recognized requirement, consonant with ordinary notions of fair play and the settled rules of law; and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.[33]

The *Connally* Court recognized that it is sometimes difficult to pinpoint exactly when statutory language becomes so uncertain that it must fail.[34] But the Court proffered that statutory words or phrases

---

30 *Wiltberger*, 18 U.S. at 94.

31 Connally v. Gen. Constr. Co., 269 U.S. 385, 388–90 (1926). *Connally* did not apply lenity but instead considered whether the statutory language in question was unconstitutionally vague. *Id.* at 390. Despite this, *Connally* does shed light on the Court's concern for fair warning in criminal statutes (or civil statutes with criminal penalties), *id.* at 390–91, which clearly is a concept important to lenity. The Court, in fact, has been known to confuse the three theories that share the same concern for fair warning: lenity, due process, and the void for vagueness doctrine. While the three theories do overlap, an extended discussion is best left to a later paper.

32 *Id.* at 393–95. The Oklahoma law stated, in relevant part: "That not less than the current rate of per diem wages in the locality where the work is performed shall be paid to . . . persons so employed by or on behalf of the State . . . ." *Id.* at 388. The Commissioner of Labor cited General Construction Company for violating the statute. *Id.* at 389. The Commissioner determined that the current rate in the locality for construction workers was more than General Construction paid. *Id.* General Construction sued to enjoin the Commissioner from enforcing the statute, arguing the statutory terms "current rate" and "locality" are unconstitutionally vague. *Id.* at 388, 390, 393–94.

33 *Id.* at 391 (citing Int'l Harvester Co. of Am. v. Kentucky, 234 U.S. 216, 221 (1914)).

34 *Id.* at 394 (opining that some statutory language is too uncertain to resolve).

ought to be "well enough known to enable those within their reach to correctly apply them."[35] The Court warned that "[t]he dividing line between what is lawful and unlawful cannot be left to conjecture . . . . The crime . . . must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course it is lawful for him to pursue."[36]

While *Connally* concerned the degree to which statutory vagueness rises to a due process violation, Justice Oliver Wendell Holmes, in *McBoyle v. United States*, applied a *Connally*-like standard to a case with closer lenity bona fides.[37] The *McBoyle* Court decided whether an airplane is a vehicle under the National Motor Vehicle Theft Act.[38] The Court applied lenity—if not in name then in spirit—and narrowly construed the ambiguous statutory language to preclude a definition of "motor vehicle" that includes airplanes.[39] Writing for the Court, Justice Holmes concluded that the statutory ambiguity demanded a strict construction. He explained that "it is reasonable that a fair warning should be given to the world in language that the common world will understand."[40] "To make the warning fair," the Court continued, "so far as possible the line [in the statute] should be clear."[41]

---

35 *Id.* at 391. The Court compared a number of cases from the 1920s before it concluded that a statute must articulate a "standard of some sort" to pass muster. *See id.* at 391–92 (quoting United States v. L. Cohen Grocery Co., 255 U.S. 81, 92 (1921)).

36 *Id.* at 393. The Supreme Court cited *Connally* a few years later in *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939). In that case, the Court considered the constitutionality of a conviction under a New Jersey statute that purported to criminalize membership in a "gang." *Id.* at 452. The Court reversed the conviction, ruling that "[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids." *Id.* at 453. The Court found the lack of certainty in the statutory language to be repugnant to due process. *Id.* at 458.

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

38 *Id.* at 25. Under the National Motor Vehicle Theft Act, the phrase "motor vehicle" included, among other things, "any other self-propelled vehicle not designed for running on rails." *Id.* at 26. The defendant, William McBoyle, was convicted under the Act when he transported an airplane he knew to be stolen across state lines. *Id.* at 25. He argued that an airplane is not a motor vehicle under the statute. *Id.* at 27.

39 *Id.* The Supreme Court would not use the term "lenity" until 1955 when it decided *Bell v. United States*, 349 U.S. 81 (1955). *See infra* note 84 and accompanying text.

40 *McBoyle*, 283 U.S. at 27. It is worth noting that Justice Holmes recognized the fictional character of fair notice and admitted that "it is not likely that a criminal will carefully consider the text of the law before he murders or steals." *Id.* Despite this, Justice Holmes concluded that fair warning is required for the sake of justice and fairness. *Id.*

41 *Id.*

McBoyle's holding also promoted lenity's separation of powers function first articulated in *Wiltberger*.[42] Justice Holmes in *McBoyle* warned that statutory language should not be broadened "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."[43] Congress, Holmes cautioned, and not the courts ought to determine the breadth and reach of statutory language.

A few years later, in 1939, the United States Supreme Court reaffirmed the importance of fair warning and fair play in penal statutes.[44] In *Lanzetta v. New Jersey*, the Court considered whether

---

42 *Id.*; *see also* United States v. Wiltberger, 18 U.S. 76, 95 (1820).

43 *McBoyle*, 283 U.S. at 27 (citing United States v. Bhagat Singh Thind, 261 U.S. 204, 209 (1923)).

44 *See* Lanzetta v. New Jersey, 306 U.S. 451 (1939) (analyzing indefiniteness in a state penal statute). The Supreme Court considered fair warning in penal statutes in a series of cases decided in the 1910s. In 1914, the Court decided *International Harvester Co. of America v. Kentucky*, 234 U.S. 216 (1914). The case involved a combination of manufacturers—including International Harvester—that fixed the price of harvesters sold in Kentucky. *Id.* at 219. A series of Kentucky statutes—as well as its state constitution—prohibited companies from colluding to control prices. *Id.* at 220. But to protect tobacco farmers, the courts in Kentucky construed the various anti-trust provisions to apply only when an agreed-upon fixed-price exceeded the "real value" of the article. *Id.* at 221. Applying the law of the state, Kentucky courts convicted International Harvester of illegal price fixing. *Id.* at 219. On appeal to the Supreme Court, International Harvester argued that it was wrongfully convicted because it was impossible to know what conduct is prohibited under the state's statutory scheme. *Id.* at 221. The petitioner contended that it is "required to guess at its peril what its product would have sold for if the combination had not existed and nothing else violently affecting values had occurred." *Id.* at 222. Justice Holmes, writing for the Court, agreed. *Id.* at 222–23. Reversing the state court convictions, Justice Holmes noted that it is impossible to "say what would have been the price in an imaginary world." *Id.* at 222. He concluded that the Kentucky courts committed reversible error when they indicted, prosecuted, convicted, and fined the petitioner when it was impossible to determine what conduct—or price—would trigger criminal liability. *Id.* at 223–24.

Justice Holmes, in *International Harvester*, 234 U.S. at 223, cited an earlier case to support his fair warning decision: *Nash v. United States*, 229 U.S. 373 (1913). In *Nash*, Justice Holmes confirmed that a criminal statute must be sufficiently definite and certain to pass muster. *Id.* at 377 (quoting Tozer v. United States, 52 F. 917, 919 (C.C.E.D. Mo. 1892)). Holmes found support in *Tozer*, a federal circuit court case. George Tozer was an agent for the Missouri Pacific Railway Company. *Tozer*, 52 F. at 918. He was convicted for violating the Interstate Commerce Act for charging different rail rates to different customers for similar service. *Id.* The Act criminalized "unreasonable" rail rates. Tozer argued on appeal that he should not have been convicted because he had no way of knowing in advance what rate a jury would find unreasonable. *Id.* at 919–20. The *Tozer* court agreed. It explained that "no penal law can be

uncertainty in a New Jersey criminal statute violated a defendant's due process rights.[45] Reversing the defendant's conviction, the Court explained that "[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids."[46] The Court explained that the indefiniteness of the statutory terms "gang" and "gangster" raised serious doubt about the legislature's intent, and thus the terms were sufficiently ambiguous to warrant leniency.[47] Uncertainty in penal statutes, the Court confirmed, is repugnant to due process.[48]

---

sustained unless its mandates are so clearly expressed that any ordinary person can determine in advance what he may and what he may not do under it." *Id.* at 920. *International Harvester* and *Nash* confirm that the Supreme Court was keenly aware of the danger of uncertainty and indefiniteness in criminal statutes. To combat the danger, the Court developed the rule of lenity to ensure fair warning in penal statutes.

45 *Lanzetta*, 306 U.S. at 452. In *Lanzetta*, the Court considered whether an ill-conceived New Jersey penal statute was "repugnant to the due process clause." *Id.* The statute purported to criminalize "[a]ny person not engaged in any lawful occupation, known to be a member of any gang consisting of two or more persons" and who "has been convicted of any crime . . . ." *Id.* Such a person "is declared to be a gangster." *Id.* As such, an out-of-work defendant with a criminal record and bad reputation could be considered a "gangster" under the statute and imprisoned for up to twenty years. *Id.* The statute, however, imprecisely defined "gangster" and failed altogether to define "gang." *Id.* at 453–57. Like the Court in *Connally*, the *Lanzetta* Court did not directly apply a rule of strict construction likely because a stricter construction was not possible. Instead, the Court concluded that the statute wholly fails to punish any act or omission, explaining that "the terms [the statute] employs to indicate what it purports to denounce are so vague, indefinite and uncertain that is must be condemned as repugnant to the due process clause of the Fourteenth Amendment." *Id.* at 458. The case, however, clearly reflects the Court's concern for fair warning and definiteness in criminal statutes—both hallmarks of lenity.

46 *Id.* at 453.

47 *Id.* at 453–58. The Court looked at the plain meaning of the word "gang" and concluded that the term lacked a single or definite meaning. *Id.* at 454–55. The Court also determined that both common law and enacted law failed to resolve the uncertainty of the word. *Id.* Finally, the Court looked to a New Jersey appellate court case that purported to define the term "gang," but the case was decided after the defendants were convicted. *Id.* at 456. The Court stated that "[i]t would be hard to hold that, in advance of a judicial utterance upon the subject, [the defendants] were bound to understand the challenged provision according to the language later used by the court." *Id.* The Court was also troubled by other language in the statute, including the phrase "any person not engaged in any lawful occupation" and the phrase "known to be a member" of a gang. *Id.* at 458. The Court concluded that statutory language is "so vague, indefinite and uncertain that it must be condemned as repugnant to the due process clause of the Fourteenth Amendment." *Id.*

48 *Id.* at 458.

When the *Wiltberger* Court in 1820 approved of the rule of strict construction of penal statutes, the Court introduced the dual function of lenity: to safeguard the separation of governmental powers and to promote fair warning to secure due process under the law.[49] Both goals were co-equal, important, and saturated in constitutional significance. Under *Wiltberger* and its early progeny, once the Court determines that a term or phrase in a penal statute is ambiguous, the Constitution requires a strict construction of the offending language. Despite the significance of both goals, the Supreme Court began in the 1950s to favor one over the other, weakening the rule's function and heralding its decline.

II. THE MODERN APPROACH

A. Universal C.I.T. *and the Decline of Lenity*

The modern approach to lenity began in 1952, when the Supreme Court decided *United States v. Universal C.I.T. Credit Corp*.[50] The case required the Court to determine the unit of prosecution in the criminal provisions of the Fair Labor Standards Act.[51] The relevant criminal provisions of the Act related to wage, overtime, and record-keeping practices.[52] The government charged the defendant corporation with a total of thirty-two violations of the statute, counting a new violation for each week the defendant continued to violate the Act.[53] The district court dismissed most of the charges and consolidated the remaining charges in the indictment, concluding that Congress intended to punish an employer's illegal course of conduct and not punish each breach.[54]

Justice Felix Frankfurter, writing for the majority, admitted that the construction of the Act is "not easy of solution" and "cannot be

---

49 *See supra* text accompanying notes 19–27.

50 United States v. Universal C.I.T. Credit Corp., 344 U.S. 218 (1952).

51 *Id.* at 221.

52 *Id.* at 219.

53 *Id.* at 219–20. For example, the government charged the defendant with six counts when the defendant violated the minimum wage requirement for one employee for six weeks or one charge per week. *Id.*

54 *Id.* at 220–21.

answered merely by a literal reading of the penalizing sections."[55] A few paragraphs later, Justice Frankfurter noted that the Court ought to choose the less harsh alternative—lenity—when faced with a choice between two readings.[56] And, in fact, the Court did affirm the district court and did avoid the government's harsh reading of the statute.[57] The Court did apply lenity. But, Justice Frankfurter in his opinion opened a door that would allow later courts to defeat the due process protections at the core of the rule.[58]

Explaining how to resolve statutory ambiguity, Justice Frankfurter wrote that the Court "may utilize, in construing a statute not unambiguous, all the light relevantly shed upon the words and the clause and the statute that express the purpose of Congress."[59] For support of this notion, Justice Frankfurter reached back to Chief Justice John Marshall's opinion in *United States v. Fisher*.[60] In *Fisher*—a case that had nothing at all to do with lenity, fair warning, or due process—Justice Marshall considered whether parsing the title of a statute is fair game when construing language in the body of a statute.[61] Marshall wrote "[w]here the mind labours to discover the design of the legislature, it seizes every thing from which aid can be derived; and in

---

55 *Id.* at 221.

56 *Id.* at 221–22. Justice Frankfurter wrote:

> [W]hen a choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite. We should not derive criminal outlawry from some ambiguous implication.

Id.

57 *Id.* at 224. The Court concluded:

> [T]he history of this legislation and the inexplicitness of its language weigh against the government's construction of a statute that cannot be said to be decisively clear on its face one way or the other . . . . The district judge was therefore correct in rejecting the government's construction of the statute.

Id.

58 *See infra* Section II.B.

59 *Universal C.I.T.*, 344 U.S. at 221. Justice Frankfurter wrote that the Court can use any and all the tools of construction it wishes to resolve statutory ambiguity because the rules of statutory construction are not laws but simply hints or customs or nuggets of experience. *Id.* Because one particular tool of construction may "not solve the special difficulties in construing a particular statute" and because "every problem of statutory construction [is] unique," the Court is free to use them—or not—in any way it wishes. *Id.*

60 *Id.* (quoting United States v. Fisher, 6 U.S. 358, 386 (1805)).

61 *Fisher*, 6 U.S. at 386.

such case the title claims a degree of notice, and will have its due share of consideration."[62] Justice Marshall opined that the title of a statute—among other tools of construction—is fair game when a court is searching for meaning in an ambiguous statute.

Unfortunately, Justice Frankfurter, writing 147 years after *Fisher*, both misquoted Marshall's opinion and misconstrued his point. In *Universal C.I.T.*, Justice Frankfurter directs courts to use "all the light relevantly shed upon the words . . . that express the purpose of Congress."[63] Here, Frankfurter directs courts to use whatever tool is available to glean the intent of Congress to resolve statutory ambiguity to avoid applying lenity.[64] To support this idea, Justice Frankfurter quotes *Fisher* for the proposition that a court ought to "seize[] every thing from which aid can be derived" to resolve ambiguous statutory doubt.[65] *Fisher* offered broad guidance on resolving ambiguous statutory language; *Universal C.I.T.* tied that broad guidance to lenity.[66] Marshall's original language suggests only that the use of titles is helpful to a court trying to resolve statutory ambiguity;[67] it was not intended to

---

62 *Id.* The *Fisher* Court considered whether a bankruptcy statute gave the United States priority in a bankruptcy proceeding ahead of general creditors, and whether the statute applied to all debtors generally. *Id.* at 385, 395. In this case, the United States was the holder of a bill of exchange—akin to a promissory note—that the bankrupt's creditors sought to satisfy the bankrupt's debts. *Id.* at 385. The creditors argued that the title of the act did not include language applying its provisions to all debtors but only "receivers of public money" and urged the Court to construe the statute in line with its title. *Id.* at 385–86. Responding to this narrow argument, Justice Marshall concluded that when statutory language is ambiguous, the title of a statute deserves some weight. *Id.* at 386. The Court proceeded to give the title its share of consideration, but it also considered other tools of construction before concluding that the United States had priority and the act applied to all debtors generally. *See id.* at 387–95.

63 *Universal C.I.T.*, 344 U.S. at 221.

64 *Id.* The four preceding sentences in the opinion discuss the tools of statutory construction; and thus Frankfurter allows the reader to infer that the phrase "all the light relevantly shed upon the words" means all the tools of construction that help glean the intent of Congress. *Id.*; *see also supra* note 59.

65 *Universal C.I.T.*, 344 U.S. at 221 (quoting *Fisher*, 6 U.S. at 386).

66 *See Fisher*, 6 U.S. at 386 ("Where the intent is plain, nothing is left to construction. Where the mind labours to discover the design of the legislature, it seizes every thing from which aid can be derived; and in such case the title claims a degree of notice, and will have its due share of consideration."). *Cf. Universal C.I.T.*, 344 U.S. at 221–22.

67 *Fisher*, 6 U.S. at 386. Justice Marshall's opinion is clearly in response to an argument advanced by the creditors. *Id.* The creditors argued that because the title of the Act includes the phrase "receivers of public money," the United States' priority is limited to debtors who are revenue officers and other persons accountable for public money. *Id.* at 385. The Court

serve as a test to trigger lenity. Frankfurter now proposes that a court ought to "seize[] every thing from which aid can be derived" before declaring hazy statutory language ambiguous enough to warrant lenity.[68]

Lenity, however, serves two important goals: it preserves the separation of powers expressed in the structural components of the United States Constitution, and it safeguards notions of fair play and fair warning found in due process. When it first announced the rule of strict construction of penal statutes in *United States v. Wiltberger*, the Supreme Court considered both goals compelling and co-equal.[69] In 1952, *Universal C.I.T.* reaffirmed the rule and its dual goals, but Frankfurter helped turn lenity into judicial sport when he offered a test for ambiguity that begged its own question. Frankfurter asks courts to "seize[] every thing from which aid can be derived" when faced with ambiguous statutory language.[70] The "every thing" in the quote speaks to the canons of statutory construction, including legislative history.[71] After applying the canons of construction, however, a court will usually solve the ambiguity. When a court solves a statutory ambiguity, it determines which meaning Congress intended when it drafted the offending language. Justice Frankfurter's test in *Universal C.I.T.* is very good at preventing judicial usurping of legislative powers—and thus preserving the separation of powers—because its focus is on Congress's intent. A court resolves statutory ambiguity by applying canons of construction to glean the intent of Congress, allowing it to declare the language unambiguous. Once the language is clarified, it is no longer ambiguous. Without ambiguity, there is no lenity.[72] The fallacy of Frankfurter's test is that it purports to support leniency, but in fact it allows a court to avoid it.

---

conceded that titles are due some consideration, and while the title here did support the creditors' position, it did not reflect the intent of Congress. *Id.* at 386, 395.

68 *Universal C.I.T.*, 344 U.S. at 221–22.

69 *See* United States v. Wiltberger, 18 U.S. 76, 95–96 (describing the rule of strict construction).

70 *Universal C.I.T.*, 344 U.S. at 221.

71 *Id.* at 222 (analyzing the scheme of the Act, remedies found in related surrounding sections, and "the specific history of the legislative process that culminated in the Act . . . for giving it appropriate meaning").

72 *See Wiltberger*, 18 U.S. at 95–96 ("Where there is no ambiguity in the words, there is no room for construction.").

B. *The Rule of Lenity After* Universal C.I.T.

Universal C.I.T. begat a slow march that purged due process and fair warning from the lenity equation.[73] *Universal C.I.T.*'s recasting of lenity survived the Warren, Burger, and Rehnquist Courts and endures into the Roberts Court.[74] The once venerable doctrine is now no more than a tie-breaker at best; a throwaway doctrine at worst.[75] The United States Supreme Court may cite lenity—if at all—at the end of the analysis simply to rebut its application.[76] Lenity, it seems, has been relegated to the purgatory of dissenting opinions.[77]

Two years after its *Universal C.I.T.* opinion, the Supreme Court decided *United States v. Harriss*.[78] In *Harriss*, the Court considered whether parts of the Federal Regulation of Lobbying Act violated due process and its requirement of definiteness.[79] The Court applied a number of construction canons to conclude that Congress intended a narrow scope to the Act.[80] To its credit, the *Harriss* Court did write that "[t]he constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair

---

73 *See Universal C.I.T.*, 344 U.S. at 221–22 (permitting courts to use any and all canons of construction, effectively eliminating a defendant's right to fair warning); *supra* note 59.

74 *See infra* notes 80, 90–91 (Warren Court); *infra* notes 123, 133, 135 (Burger Court); *infra* notes 156, 163, 176–77 (Rehnquist Court); *infra* note 205 (Roberts Court).

75 *See infra* notes 76, 135, 163, 205.

76 *See* Lockhart v. United States, 136 S. Ct. 958, 968 (2016) ("We have used the lenity principle to resolve ambiguity in favor of the defendant only 'at the end of the process of construing what Congress has expressed' when the ordinary canons of statutory construction have revealed no satisfactory construction.") (citation omitted).

77 *See, e.g.*, Muscarello v. United States, 524 U.S. 125, 139 (1998) (Ginsburg, J., dissenting).

78 United States v. Harriss, 347 U.S. 612 (1954).

79 *Id.* at 617. Like *Connally*, the Court couched the issue in due process, deciding whether the statute was so vague and indefinite as to render it unconstitutional. *Id.*; *see also supra* note 31. The *Harriss* Court does not mention the rule of lenity by name, but its holding strictly construed the statute to favor the defendant. *See Harriss*, 347 U.S. at 623–24.

80 *Harriss*, 347 U.S. at 619–23. The *Harriss* Court considered the title of the statute, its language, and its legislative history. *Id.* at 620. The Court also applied the avoidance canon. *Id.* at 618. Under the avoidance canon, the Court should favor a construction of an ambiguous statute that renders it constitutional as opposed to a construction that renders a statute unconstitutional. *Id.*; *see also* Gomez v. United States, 490 U.S. 858, 864 (1989). The *Harriss* Court stated "if [a] general class of offenses can be made constitutionally definite by a reasonable construction of the statute, this Court is under a duty give the statute that construction." *Harriss*, 347 U.S. at 618.

notice that his contemplated conduct is forbidden by the statute."[81] The Court, however, then stated "[o]n the other hand . . . if this [statute] can be made definite by a reasonable construction of the statute, this Court is under a duty to give the statute that construction."[82] Like *Universal C.I.T.*, the *Harriss* Court appears to command courts to favor a test that preserves Congress's law-making authority over a defendant's right to a fair warning. And, like *Universal C.I.T.*, if a court resolves statutory ambiguity using the canons of construction, it has no need to consider the larger due process problem of indefiniteness.

A year after *Harriss*, the Court decided *Bell v. United States*.[83] *Bell* is noteworthy for two main reasons. First, it is the first instance where the Court uses the term "lenity."[84] Second, the case offers Justice Frankfurter an opportunity to chew on a true ambiguity—a statutory term that cannot be resolved using the canons of statutory construction.[85] In *Bell*, the Court was asked to determine the unit of prosecution in the Mann Act—a federal statute that prohibited the interstate transportation of women for "immoral purpose[s]"—when a defendant transported two women in the same car on the same trip across state lines.[86] Justice Frankfurter explained that "[w]hen Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity. . . . [I]f Congress does not fix the punishment for a federal offense clearly and without ambiguity," Frankfurter continues, "doubt will be resolved [in favor of the defendant], when we have no more to go on than the

81 *Harriss*, 347 U.S. at 617.

82 *Id.* at 618.

83 Bell v. United States, 349 U.S. 81 (1955).

84 *Id.* at 83. Prior to *Bell*, the Court referred to a rule of strict or narrow construction of penal statutes. *See, e.g.*, United States v. Wiltberger, 18 U.S. 76, 94 (1820).

85 *Bell*, 349 U.S. at 81–84. The *Bell* Court asked rhetorically whether Congress had spoken clearly in the statute and concluded that "it has not done so." *Id.* at 82–83. The Court admitted that "[i]t is not to be denied that argumentative skill, as was shown at the Bar, could persuasively and not unreasonably reach either of the conflicting constructions," but the Court was unable to determine whether Congress favored either construction. *Id.* at 83.

86 *Id.* at 82. The relevant part of the Mann Act states, "[w]hoever knowingly transports in interstate or foreign commerce . . . any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose" is guilty of violating the Act. *Id.* (alteration in original). The defendant argued that he should be convicted of one violation despite transporting two women on the same trip across state lines. *Id.* The district and appellate courts disagreed, concluding that the defendant had two unlawful purposes, one for each woman. *Id.*

present case furnishes."[87] Justice Frankfurter's nod to leniency is not due to "any sentimental consideration" or his disagreement with the Mann Act, but his frustration with Congress's failure to clarify its intent.[88] *Bell* confirms that when Congress declares its will, even when its will is declared by a court, there is no room left for due process and fair warning.

Justice Frankfurter invoked lenity a few years later in *United States v. Turley* to chastise Congress for its careless drafting of the National Motor Vehicle Theft Act.[89] Writing in dissent, Frankfurter disagreed with the Court's broadening of a statutory term using what he called "pedantically exacting" construction.[90] While Justice Frankfurter offers a small nod to lenity, his beef is with Congress.[91] A narrow construction

---

87 *Id.* at 83–84. Interestingly, the dissenting judges in *Bell* thought Congress was clear and thus made no mention of lenity. *Id.* at 84 (Minton, J., dissenting).

88 *Id.* at 83. Justice Frankfurter did attempt to glean the will of Congress when he looked to the terms in the Mann Act that define the crime and fix the punishment: the "statute in its entirety," and other "controlling gloss." *See id.* "Controlling gloss" in this context means an explanation, likely from a legislative committee report.

89 United States v. Turley, 352 U.S. 407, 417–18 (1957) (Frankfurter, J., dissenting).

90 *Id.* at 417–18. In *Turley*, the Court construed the term "stolen" in the National Motor Vehicle Theft Act. *Id.* at 408 (majority opinion). The government argued that the term should include all felonious takings of a motor vehicle; the defendant argued it should be construed narrowly to mean only a larceny of a motor vehicle as defined by common law. *Id.* 409–10. Siding with the government, the Court pointed to the common law, dictionaries, statutory context, legislative history, and statutory purpose to construe the term. *Id.* at 410–17. Lenity does not apply, the Court ruled, when a strict construction of a statutory term conflicts with Congress's purpose as deduced through the canons of construction. *Id.* at 413. Once again, the separation of powers arm of lenity trumped due process, fair warning, and fair play.

91 *Id.* at 417–18 (Frankfurter, J., dissenting). In arguably the most famous lenity case of the Warren Court, *Ladner v. United States*, 358 U.S. 169 (1958), the Court was left to resort to lenity only after declaring the offending language ambiguous. *See Ladner*, 358 U.S. at 173–78. In *Ladner*, the defendant was convicted of two separate offenses when he fired a single discharge from a shotgun that wounded two officers. *Id.* at 170–71. The defendant asserted that he committed only one assault because he fired his weapon only once; the district court and Fifth Circuit agreed with the government and held that the applicable federal statute criminalizes each separate assault on each of the two officers. *Id.* at 171. The Supreme Court said that it "cannot find clearly from the statute, even when read in the light of its legislative history, that the Congress intended" one construction over the other. *Id.* at 176–77. So, the Court applied lenity and chose the less harsh construction. *Id.* at 177–78. The Court explained, "lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation [is] . . . no more than a guess as to what Congress intended." *Id.* at 178. It bears repeating that a court is left with only a guess after it tries but fails to glean the intent of Congress. The *Ladner* Court expressed concern with

of a penal statute is preferred, Justice Frankfurter suggests, not to protect a defendant's right to fair notice, but to prevent a court from usurping legislative powers by giving a statute unintended breadth.[92]

If ambiguity is the touchstone of lenity but the Court refuses to find a statute ambiguous, then lenity is indeed relegated to nothing more than judicial sport. In *United States v. Shirey*, Justice Frankfurter admits that the language in a federal anti-corruption statute is *awkward* but clarifies that "[a]wkwardness is not ambiguity."[93] The dissent, however, is convinced that the statute is indeed "highly ambiguous" and ought to be strictly construed.[94] Justice Frankfurter insists that the statutory language, legislative history, and congressional purpose of the statute "coalesce" against the application of lenity.[95] Justice Frankfurter offers a test for ambiguity that continues to render lenity obsolete. "Statutes," he writes, "including penal enactments, are not inert exercises in literary composition. They are instruments of government, and in construing them 'the general purpose is a more important aid to the meaning than any rule which grammar or formal logic may lay

---

the due process implications of a poorly worded statute only after it failed to discover Congress's unexpressed will.

Two months later, the Court decided *Heflin v. United States*, 358 U.S. 415 (1959). The case required the Court to construe the Federal Bank Robbery Act. *Id.* at 416. The government charged the defendant with both illegally "taking" and illegally "receiving" the same property. *Id.* The defendant argued that both charges ought to merge into one crime. *Id.* at 416–17. Two years earlier, in *Prince v. United States*, 352 U.S. 322 (1957), the Court considered the same statute and whether entering a bank with the intent to commit robbery and robbery merge into one offense. The Court in *Prince* was unable to resolve the ambiguity using the statute's meager legislative history, and so it applied lenity. *Id.* at 329; *see also Heflin*, 358 U.S. at 419 (explaining that the *Prince* Court construed the Act narrowly because of lenity). The later *Heflin* Court, faced with the same meager legislative history of the Federal Bank Robbery Act, was able to use Congress's purpose to construe the Act narrowly and avoid lenity. *Id.* at 419–20. How the Court is able to rely on lenity in one instance and not the other is anyone's guess. In one case, the Court is unable to glean the intent of Congress; in the other it is, but just barely. In neither case, however, did the Court concern itself with defendants who were likely unable to give the statutory language the same scrutiny as the United States Supreme Court.

92 *Turley*, 352 U.S. at 418. A few decades later, Justice Scalia, like Justice Frankfurter, would use lenity as a stick to promote his textual view of statutory construction. *See* discussion *infra* Section II.E.

93 United States v. Shirey, 359 U.S. 255, 256–58 (1959). The relevant statute states, in pertinent part: "Whoever pays or offers or promises any money or thing of value, to any person, firm, or corporation in consideration of the use or promise to use any influence to procure any appointive office" violates the law. *Id.* at 255–56.

94 *Id.* at 269–70 (Harlan, J., dissenting).

95 *Id.* at 261 (majority opinion).

down.'"[96] Frankfurter offers that "[s]tatutory meaning . . . is more to be felt than demonstrated."[97]

In 1961, Justice Frankfurter continued his attack on lenity, writing for the majority in *Callanan v. United States*.[98] In *Callanan*, the petitioner argued that a part of the Hobbs Act—an anti-racketeering statute—was ambiguous and invoked the rule of lenity.[99] He was convicted and sentenced for two violations under the Act: one for obstructing interstate commerce and one for conspiring to obstruct interstate commerce.[100] The petitioner contended that Congress did not intend to punish separately both the substantive offense and a conspiracy to commit the substantive offense.[101] Frankfurter disagreed.[102] The Court, in a five-to-four, split cited a "consistently recognized" maxim that conspiracies do not merge with substantive offenses.[103] The majority concluded that the relevant portion of the Hobbs Act was not ambiguous and thus lenity was not applicable.[104] Affirming the lower courts, Justice Frankfurter then proceeded to diminish the rule of lenity and its respect for fair play.[105] Justice Frankfurter writes that "[t]he rule [of lenity] comes into operation *at the end of the process* of construing what Congress has expressed, not at the

---

96 *See id.* at 260–61 (quoting United States v. Whitridge, 197 U.S. 135, 143 (1905)).

97 *Id.* at 261.

98 Callanan v. United States, 364 U.S. 587 (1961).

99 *Id.* at 595–96.

100 *Id.* at 587–88. The district court denied the petitioner relief, concluding that conspiring to commit a crime and committing a crime are separate offenses, and thus, a defendant can be punished separately for each violation. *Id.* at 589. The Court of Appeals affirmed. *Id.*

101 *Id.* at 589. The petitioner argued that Congress did not intend to punish a defendant for both the substantive offense and conspiracy to commit the substantive offense because both crimes are combined in one provision of 18 U.S.C. § 1951. *Id.* at 590. Thus, the petitioner contended, Congress indicated an intent to punish a defendant once for violating the one section. *Id.* at 589–90.

102 *Id.* at 597. Absent statutory evidence to the contrary, both the district court and the circuit court in *Callanan* rested on the usual rule that a conspiracy charge does not merge with the substantive offense, and thus the trial court did not err when it sentenced the petitioner twice. *See id.* at 593–96.

103 *Id.* at 593.

104 *Id.* at 596–97. The Court rested on the rule that a conspiracy to commit an offense does not merge with the substantive offense. *Id.* at 593. Thus, Congress must have intended that the substantive violation of the Hobbs Act and a conspiracy to commit a substantive violation of the Hobbs Act do not merge, and thus are separate crimes that Congress intended to separately punish. *See id.* at 593–95.

105 *Id.* at 595–97.

beginning as an overriding consideration of being lenient to wrongdoers."[106] In *Callanan*, the Court effectively relegated lenity—an important safeguard for due process rights—to a rule of last resort.

While Justice Frankfurter's analysis alludes to both the separation of powers and due process principles supporting lenity, the former subsumes the latter. According to Frankfurter, a court is required to resolve statutory ambiguity to discover Congress's un-enacted intent, thus ensuring that Congress, and not the courts, makes law. If a court is able to glean the intent of the legislature—as it did in *Callanan*—then a statute is no longer ambiguous and lenity cannot apply. Only if a court is unable to glean the intent of the legislature may it declare a statute ambiguous and construe the ambiguity against the state, thus protecting due process rights. In effect, a tie goes to the defendant, but only after the court tries but fails to resolve the ambiguity.[107] For Justice Frankfurter and the *Callanan* court, so long as a court—well-practiced and experienced in resolving complex statutory questions—can resolve a statutory question, it does not matter whether the statute is clear to the criminal defendant.

Justice Frankfurter noted in *Callanan* that the rule of lenity "only serves as an aid for resolving an ambiguity; it is not to be used to beget one."[108] According to Frankfurter, a facially ambiguous criminal statute only will trigger leniency when a court is unable to glean the intent of Congress. Thus, a defendant is owed fair warning of an equivocal criminal statute only when a court declares that a statute suffers from

---

106 *Id.* at 596 (emphasis added). Justice Frankfurter asserted that this case was not the type of case where the Court had applied lenity; therefore, lenity did not apply. *Id.* at 597. Frankfurter cited two classes of cases where lenity applies. First, lenity applies to statutory ambiguities related to the unit of prosecution. *See id.* at 596 (citing United States v. Universal C.I.T. Credit Corp., 344 U.S. 218 (1952), Bell v. United States, 349 U.S. 81 (1955), and Ladner v. United States, 358 U.S. 169 (1958)). The second class of cases dealt with merger questions—whether a substantive offense and conspiracy to commit the offense merge into one offense. *See id.* (citing Prince v. United States, 352 U.S. 322 (1957), and Heflin v. United States, 358 U.S. 415 (1959)). Justice Frankfurter concluded that the statutory question here did not involve unit of prosecution or merger questions: "This is an ordinary case of a defendant convicted of violating two separate provisions of a statute . . . ." *Id.* at 597. The Court clearly did not want to apply lenity to the case before it and so it created an artificial wall around the doctrine. Fortunately, later courts refused to limit lenity to these two classes of ambiguity. *See infra* notes 176, 177, 198.

107 *Id.* at 596 (stating that lenity "comes into operation at the end of the process").

108 *Id.* To support his tie-breaking rule, Justice Frankfurter cites to *Bell*. *Id.* (citing Bell v. United States, 349 U.S. 81 (1955)).

ultimate ambiguity: when a court tries but fails to resolve the statutory question.[109] Justice Frankfurter warns against using lenity as an "overriding consideration of being lenient to wrongdoers."[110] But by heeding his own warning, Frankfurter relegates fair warning to an afterthought, thereby punishing the defendant for the legislature's mistakes.[111]

Despite *Callanan*'s narrowing of the lenity doctrine, Justice William Brennan, in *Bouie v. City of Columbia*, attempted to reassert the importance of fair warning when the Court reversed the petitioners' convictions under a South Carolina trespass law.[112] But instead of applying lenity to an ambiguous criminal statute, Justice Brennan focused on the fair warning requirements of the Due Process Clause and concluded that the statute, as interpreted by the South Carolina Supreme Court, violated the petitioners' constitutional rights.[113] To be

---

109 *Id.*

110 *Id.*

111 *Id.* It is worth noting that four justices disagreed with the majority. *Id.* at 597 (Stewart, J., dissenting). Justice Stewart, writing for the dissent, analyzed the language of the Hobbs Act and its legislative history, to determine that Congress did not intend to impose cumulative penalties for a substantive violation and a conspiracy to violate the statute. *Id.* at 597–600. Justice Stewart also favored "the ancient rule that a criminal statute is to be strictly construed." *Id.* at 602. Indeed, Justice Stewart intimates that the test for lenity should not be statutory ambiguity in the technical sense but statutory clarity. *Id.*

112 *See* Bouie v. City of Columbia, 378 U.S. 347 (1964). In *Bouie*, the petitioners—two African American college students—sat in a booth in a restaurant reserved for white people. *Id.* at 348. After the men sat, an employee of the restaurant put up a "no trespassing" sign and asked the police to remove the students. *Id.* The students remained in the booth and continued to sit in the booth after the police arrived at the scene. *Id.* The students were charged with criminal trespass. *Id.* at 349. The state statute, S.C. CODE ANN. § 16-386 (1952), prohibited one's "entry on lands of another . . . after notice from the owner or tenant prohibiting such entry . . . ." *Id.* at 349 n.1. The petitioners argued that the owner or tenant did not provide notice of trespass when they entered the restaurant and thus the statute was inapplicable. *Id.* at 350. On appeal, the state supreme court upheld the convictions, construing the statute to apply when a person enters the land and remains on the land. *Id.*

113 *Id.* at 350–63. Justice Brennan recognized "[t]he basic principle that a criminal statute must give fair warning of the conduct that it makes a crime . . . ." *Id.* at 350–51. The question in this case is "whether a state court's construction of a criminal statute was so unforeseeable so as to deprive the defendant of the fair warning to which the Constitution entitles him." *Id.* at 354. Brennan concluded that the South Carolina Supreme Court's construction of the state trespass statute was unforeseeable and thus served to deprive the petitioners of their constitutional right to fair warning. *Id.* at 354–55. In this case, the state "statute precise on its face ha[d] been unforeseeably and retroactively expanded by judicial construction" to include a party who enters the land of another, and a party who remains on that land. *Id.* at 352.

sure, a Due Process Clause violation and the rule of lenity do overlap with respect to fair notice, but the overlap makes sense. The doctrine of lenity is supported in significant part by the idea that a court ought to construe strictly a vague or ambiguous criminal statute to protect a defendant's due process rights to fair notice.[114] The Due Process Clause violation is grounded in the idea that a vague criminal statute (or an overly broad judicial construction of a criminal statute) fails to provide fair warning and thus violates the U.S. Constitution.[115] In *Bouie*, Justice Brennan concludes that the statute itself was not ambiguous and thus presumably he had no need to construe it.[116] So, lenity—a rule of statutory construction—was not in play. Nevertheless, by relying on the Due Process Clause, Justice Brennan reasserted that fair warning and fair notice in criminal statutes are protected by the U.S. Constitution. As such, when a criminal statute is ambiguous or vague, the fair warning protections supported by the rule of lenity are fundamental.

The Supreme Court, in *United States v. Campos-Serrano*, again attempted to resuscitate lenity by reconciling Justice Frankfurter's narrow focus on Congress's intent and Justice Brennan's expansive view of fair warning.[117] In *Campos-Serrano*, Justice Stewart, writing for the majority, considered *sua sponte* whether a resident alien's counterfeit re-entry registration receipt card is prohibited under 18 U.S.C. § 1546.[118]

---

114 *See infra* note 148.

115 *See Bouie*, 378 U.S. at 353–55. The *Bouie* Court cited oft-quoted language from *Lanzetta*, that said "[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids," and *Harriss*, that said "[t]he constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute." *Bouie*, 373 U.S. at 351 (quoting Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939), and United States v. Harriss, 347 U.S. 612, 617 (1954)).

116 *Id.* at 351–52. Justice Brennan noted that the statute in question in this case is "precise on its face." *Id.* at 352. Since that statute was not ambiguous, lenity—a canon of statutory construction—is not available. *See* Callanan v. United States, 364 U.S. 587, 596 (1961) ("[The rule of lenity], as is true of any guide to statutory construction, only serves as an aid for resolving ambiguity; it is not to be used to beget one."). So, the Court was left with a pure Due Process Clause violation.

117 United States v. Campos-Serrano, 404 U.S. 293 (1971). *See infra* note 123.

118 *Campos-Serrano*, 404 U.S. at 294–95. The federal statute states, in pertinent part, "[w]hoever . . . knowingly . . . counterfeits . . . any immigrant or nonimmigrant visa, permit, or other document required for entry into the United States . . . [s]hall be fined not more than $2,000 or imprisoned not more than five years, or both." *Id.* at 294 n.1 (first alteration in original) (citing 18 U.S.C. § 1546 (1952)).

The federal statute prohibits a person from using a forged document that is required to *enter* into the United States.[119] Here, the respondent allegedly used a counterfeit document to *re-enter* the country.[120] Concluding that the statute is limited to documents required for entry, Justice Stewart reaffirmed that "penal statutes are to be construed strictly."[121] The Court then suggested an approach to reconcile the competing purposes of lenity. The Court opined that "[w]hen choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite."[122] The Court continued that the canon of lenity "does not mean that every criminal statute must be given the narrowest possible meaning in complete disregard of the purpose of the legislature."[123] Taken together, Justice Stewart suggests that when applying lenity a court ought to weigh due process concerns while deferring to Congress's constitutional authority to make law. To protect due process rights, the rule of lenity requires a strict construction of an ambiguous criminal

---

119 *Id.* at 295.

120 *Id.* at 297. The district court convicted the defendant for violating 18 U.S.C. § 1546 for using a counterfeit alien registration card to re-enter the United States. *See id.* at 294. While the court of appeals reversed the conviction on Fourth Amendment grounds, it agreed that an alien registration card used to re-enter the United States is within the purview of the statute. *Id.* at 297.

121 *Id.* at 297 (quoting Fed. Commc'ns Comm'n v. Am. Broad. Co., 347 U.S. 284, 296 (1954)).

122 *Id.* (quoting United States v. Universal C.I.T. Credit Corp., 344 U.S. 218, 221–22 (1952)). The Court explained that "[t]he principle of strict construction of criminal statutes demands that some determinate limits be established based on the actual words of the statute." *Id.* at 299.

123 *Id.* at 298 (quoting United States v. Bramblett, 348 U.S. 503, 510 (1955)). Applying this standard to the case before it, the Court determined that "Congress did speak in 'clear and definite' language." *Id.* The Court cautioned against affording statutory language its strictest possible meaning without regard to the purpose of the legislation. *Id.* Lenity's strict construction does not mean the strictest construction available. The Court continued that "[i]f an absolutely literal reading of a statutory provision is irreconcilably at war with the clear congressional purpose, a less literal construction must be considered." *Id.* While the Court was concerned that a "literal" reading of § 1956 might suggest that Congress limited the section to include only documents required for entry, the Court was unwilling, in light of Congress's purpose, to bar all documents that could be required for re-entry. *Id.* After construing the statutory language, the Court concluded that although § 1546 might cover some types of re-entry documents, it does not include the document used in the case at bar—alien registration receipt cards. *Id.* at 299–301.

statute—not the strictest construction available—that still furthers Congress's purpose in enacting the law.

C. *The Rise of Ultimate Ambiguity*

Unfortunately, the United States Supreme Court chose not to embrace Justice Stewart's efforts to rebalance the rule of lenity. Instead, the Court continued to prefer a test for lenity that undermined a criminal defendant's right to fair warning. Under this test, a court applies lenity only after it tries but fails to resolve a statutory ambiguity in a criminal statute. Here, if a court can resolve a statutory ambiguity by divining the intent of Congress, and thus preserve the separation powers, it should do so even if the resolution is unknowable, recondite, and unfair to the criminal defendant.

In 1971, the Court decided *United States v. Bass*.[124] The *Bass* Court considered whether a criminal defendant was wrongfully convicted under section 1202(a) of Title VII of the Omnibus Crime Control and Safe Streets Act of 1968.[125] The statute states that a felon "who receives, possesses, or transports in commerce or affecting commerce . . . any firearm" violates the statute.[126] At trial, evidence established that the defendant was a felon who possessed guns, but the government made no showing of whether the defendant possessed (received, or transported) the guns "in commerce or affecting commerce."[127] The defendant appealed his conviction, arguing that the statute only prohibited a possession of a firearm "in commerce or affecting commerce" and therefore Congress overstepped its authority when it enacted the statute.[128] The Court of Appeals agreed with the defendant and reversed his conviction on constitutional grounds.[129] On appeal, the Supreme

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

125 *Id.* at 337.

126 *Id.*

127 *Id.* at 338.

128 *Id.*

129 *Id.* The Court of Appeals for the Second Circuit concluded that the defendant's conviction for the possession of a firearm without a showing that the firearm was in or affecting interstate commerce would be "an unprecedented extension of federal power." *See* United States v. Bass, 434 F.2d 1296, 1300 (2d Cir. 1970) (reversing defendant's conviction on Commerce Clause grounds). The Second Circuit worried that Congress was regulating conduct without a constitutional grant of power, to wit the Commerce Clause. *Id.*

Court affirmed the Court of Appeals but on different grounds.[130] The Court concluded that the statute was ultimately ambiguous and thus lenity demanded a reading favorable to the defendant.[131]

Justice Marshall, writing for the majority in *Bass*, concluded that Congress did not speak in clear and definite terms when it enacted section 1202(a).[132] Justice Marshall determined that the statutory ambiguity persisted, but only after the Court endeavored to resolve it.[133] And so "[a]fter 'seizing every thing from which aid can be derived' [the Court was] left with an ambiguous statute," and thus lenity applied.[134] While the Court spoke importantly about the two founding principles that support lenity—fair warning and the separation of powers—the Court's holding confirmed that it had its thumb firmly on the separation of powers scale.[135] The rule of lenity and its promise to protect fair

---

130 *Bass*, 404 U.S. at 338–39.

131 *Id.* at 339, 347–49. The term "ultimate ambiguity" means a court endeavors to interpret a statutory ambiguity but, after applying the canons of statutory construction, is unable to determine Congress's intent, thus leaving a persistent or terminal or ultimate ambiguity.

132 *See id.* at 347–48 (citing United States v. Universal C.I.T. Credit Corp., 344 U.S. 218, 221–22 (1952)). The *Bass* Court noted that it was unclear whether the statutory phrase "in commerce or affecting commerce" applies to the terms "possesses" and "receives." *Id.* at 339. If the phrase does apply, then it is an element of the offense and must be proved by the government. *Id.*

133 *Id.* at 347. In its effort to glean the intent of Congress when it enacted § 1202(a), the Court used a variety of construction tools. *Id.* at 340–47. First, the Court applied plain or natural meaning and concluded that the argument was "neither overwhelming nor decisive." *Id.* at 339–40. The Court also considered other criminal statutes, the canon to avoid redundancy, explanatory statements of United States Senators, and other legislative history. *Id.* at 341–47. Exhausting its interpretative toolbox, the Court concluded that the statute was indeed ambiguous. *Id.* at 347.

134 *See id.* at 347 (quoting United States v. Fisher, 6 U.S. 358, 386 (1805)). See *supra* text accompanying notes 59–68 for discussion of the Court's misuse of *Fisher*. *See also infra* note 158.

135 *Bass*, 404 U.S. at 348–49. The Court said:

> First, "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." Second, 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.

Id. at 348 (internal citations omitted).

Two years after *Bass*, the Court decided *United States v. Enmons*, 410 U.S. 396 (1973), and affirmed its view that lenity applies, but only in cases of ultimate ambiguity. The government indicted the defendant and others for conspiring to obstruct commerce in

warning only come into play after a court tries but fails to resolve statutory ambiguity and thus cannot defer to Congress's intent. But by insisting on ultimate ambiguity before considering lenity, the Court continues to reduce fair warning to an afterthought.

After *Bass*, the Court continued to insist on ultimate ambiguity to trigger the rule of lenity. In fact, after *Bass*, the Court raised the bar even higher. In *Huddleston v. United States*, the Court considered whether a pawnbroker is a licensed gun dealer under 18 U.S.C. § 922(a)(6).[136] In 1971, Huddleston pawned three firearms to a California pawnbroker.[137] In February and March of 1972, Huddleston returned to the pawnbroker to redeem the weapons upon payment of the original loan term and to complete a Firearms Transactions Record.[138] The transaction record is mandated by 18 U.S.C. § 922(a)(6), and requires one who purchases a firearm to answer a series of questions.[139] One question asks whether the purchaser was "convicted in any court of a crime punishable . . . for a term exceeding one year."[140] Section 922(a)(6) makes it unlawful for a person "in connection with the *acquisition* . . . of any firearm . . . from a . . . licensed dealer . . . knowingly to make any false or fictitious oral or written statement . . . intended or likely to deceive such . . . dealer."[141]

violation of the Hobbs Act. *Id.* at 396–97. In this case, the defendants were utility workers on strike for better wages and other employment benefits. *Id.* at 397. The Supreme Court was asked to decide whether the Hobbs Act applies to violence committed during a lawful strike for the purpose of inducing an employer to agree to collective bargaining demands. *Id.* at 399. Writing for the majority, Justice Stewart countered the government's contention that the statute is unambiguous, explaining that "the language of the statute is hardly as clear as the Government would make it out to be." *Id.* Using the surplus language canon together with the legislative framework and history of the Hobbs Act, Justice Stewart resolved the ambiguity and concluded that the Hobbs Act does not apply to violence committed during a lawful strike. *Id.* at 399–402. Despite conceding that the statute was less than clear, thus hinting at due process concerns, the Court resolved the ambiguity and avoided the lenity question. *See id.* at 401 (reasoning that "[t]he legislative framework of the Hobbs Act dispels any ambiguity in the wording of the statute"). The *Enmons* Court reaffirmed that lenity is inapplicable when statutory language is less than ultimately ambiguous—facially less than clear but judicially resolvable. Thus, *Enmons* continued the trend to relegate fair warning to an afterthought. *See id.* at 411 (referencing lenity after resolving the ambiguity in the statute).

136 Huddleston v. United States, 415 U.S. 814 (1974).

137 *Id.* at 815–16.

138 *Id.* at 816.

139 *Id.*

140 *Id.*

141 *Id.* at 815 n.1 (alterations in original) (emphasis added).

Unfortunately, Huddleston lied on the transaction record and was later convicted in a three-count indictment for violating § 922.[142] On appeal, Huddleston argued that the statute did not apply to the redemption of a pawned firearm, since he did not *acquire* the firearm but *reacquired* it.[143] Huddleston argued in part that § 922(a)(6) was ambiguous and thus the statute ought to be strictly construed in his favor.[144]

Justice Harry Blackmun, writing for the majority, disagreed.[145] Analyzing the language and structure of the statute and its legislative history, the majority concluded that Huddleston's asserted ambiguity was contrived; the word acquisition includes reacquisition.[146] Confirming Congress's intent, the Court explained that "[it is] not at liberty to tamper with the obvious reach of the statute in proscribing the conduct in which the petitioner engaged."[147] The statutory language was simply not ambiguous enough.

Citing *Bass*, the *Huddleston* Court restated the rule of lenity—ambiguity in criminal statutes ought to be resolved in favor of the defendant—and the two ideas supporting the doctrine: fair warning and separation of powers.[148] But the Court warned that "[z]eal in forwarding these laudable policies . . . must not be permitted to shadow the understanding that 'sound rules of statutory interpretation exist to discover and not to direct the Congressional will.'"[149] Reaffirming an idea first proffered by Justice Frankfurter in *Universal C.I.T.*, the

---

142 *Id.* at 816–17.

143 *Id.* at 819–20. The Court of Appeals for the Ninth Circuit affirmed Huddleston's conviction. *Id.* at 818. The Supreme Court granted certiorari to resolve a split among the circuit courts. *Id.* at 818–19.

144 *Id.* at 830.

145 *Id.* at 831.

146 *Id.* at 820–21.

147 *Id.* at 832. It is worth noting that Justice Douglas disagreed with the majority and filed a dissenting opinion. *Id.* at 833–34 (Douglas, J., dissenting). He believed the term "acquisition" is ambiguous when the question is whether reacquisition is included within it. *Id.* at 834. As such, Justice Douglas would have resolved the ambiguity in favor of the defendant. *Id.*

148 *Id.* at 831 (majority opinion) (citing United States v. Bass, 404 U.S. 336, 347 (1971)). The Court stated that

> [t]his rule of narrow construction is rooted in the concern of the law for individual rights, and in the belief that fair warning should be accorded as to what conduct is criminal and punishable . . . . The rule is also the product of an awareness that legislators and not the courts should define criminal activity.

Id.

149 *Id.* (quoting United States *ex rel.* Marcus v. Hess, 317 U.S. 537, 542 (1943)).

Huddleston Court explained that muddy statutory language can be resolved using the tools of statutory construction and, once resolved, are outside the ambit of lenity.[150] Deference to Congress's constitutional authority to make law trumped lenity's concern for individual rights.

On its own, *Huddleston* does no more than echo the Court's preference for Congress's law-making rights over individual rights when it considers assertions of ambiguity in criminal statutes. Later opinions unfortunately have perverted *Huddleston* to further relegate lenity to a historical afterthought. For example, in *Chapman v. United States*, decided seventeen years after *Huddleston*, the Supreme Court considered whether, under 21 U.S.C. § 841(b)(1)(B)(v), a court should count blotter paper when determining whether a person distributes "1 gram or more of a mixture or substance containing . . . (LSD)."[151] The petitioner was convicted and sentenced under the statute after the trial court included the blotter paper in its weight calculation.[152] On appeal, the petitioner argued that the statutory phrase "mixture or substance" is ambiguous and thus lenity ought to apply.[153] The Supreme Court disagreed and used the language and structure of the statute and its legislative history to conclude the statute was not ambiguous.[154]

Responding to the petitioner's lenity argument, the Court offered a tortured and misleading explanation of lenity: "[t]he rule of lenity . . . is not applicable unless there is a 'grievous ambiguity or uncertainty in the language and structure of the Act,' such that even after a court has 'seized every thing from which aid can be derived,' it is still 'left with an ambiguous statute.'"[155] According to *Chapman*, the trigger for lenity is

---

150 *See id.* at 832; *see also supra* note 59 and accompanying text; *supra* text accompanying notes 63–72.

151 Chapman v. United States, 500 U.S. 453, 456–57 (1991).

152 *Id.* at 455. The applicable statute, 21 U.S.C. § 841(b)(1)(B)(v) (1984), says "[i]n the case of a violation of subsection (a) of this section involving . . . (v) 1 gram or more of a mixture or substance containing a detectable amount of . . . LSD . . . such person shall be sentenced to a term of imprisonment which may not be less than 5 years . . . ." *Id.* at 457 (alterations in original).

Here, the petitioner was convicted for selling 50 milligrams of LSD that, when combined with the blotter paper, totaled 5.7 grams. *Id.* 455–56. A paper or gelatin blotter is used to sell LSD because a dose of LSD is too small on its own and must be sold in a carrier. *Id.* at 457. On appeal, the Court of Appeals for the Seventh Circuit, sitting en banc, affirmed and held that blotter paper is included in the weight for sentencing purposes. *Id.* at 456.

153 *Chapman*, 500 U.S. at 462–63.

154 *Id.* at 459–62.

155 *Id.* at 463 (internal citations omitted).

now hopelessly unattainable.[156] In a judicial maze of authority, the *Chapman* Court cites to *Bass* quoting *Fisher* for the "seize[] every thing from which aid can be derived" phrase.[157] As explained earlier, the *Bass* Court had distorted *Fisher* when it applied *Fisher* to the lenity argument before it. *Fisher* had nothing to do with lenity, fair warning, or due process.[158] The *Fisher* Court merely said titles are fair game and that in the abstract a court may seize everything from which aid can be derived to glean the intent of Congress; *Fisher* neither intended to require ultimate ambiguity nor did it intend to convert lenity to a last resort canon.[159] *Chapman* continued to weaken lenity by validating a twenty-year-old mistake first made in *Bass*. But, the *Chapman* Court took it one step further when it distorted *Huddleston* to require a grievous ambiguity to trigger lenity.[160]

Justice Rehnquist, writing for the majority in *Chapman*, cited *Huddleston* when he wrote that lenity is not applicable unless there is "*grievous* ambiguity or uncertainty in the language and structure of the Act."[161] In the context and structure of the *Huddleston* opinion, the Court was not offering a new rule to test for lenity, but, instead, was concluding that the specific statute in question in that case was not ambiguous. The Court used the word "grievous" when it applied lenity

---

156 In the paradigmatic case under *Chapman*'s reimagined rule, a defendant who is prosecuted or sentenced under an ambiguous statute is required to show that only after applying any and all of the tools of statutory construction—most of which are unknown and unknowable to the defendant—the language in question remains very seriously uncertain.

157 *See Chapman*, 500 U.S. at 463 (citing United States v. Bass, 404 U.S. 336, 347 (1971)).

158 *See supra* text accompanying notes 61–68. Of note, the Supreme Court continued to cite *Fisher*—for a proposition of law that *Fisher* never pronounced—until the Court finally kept the distorted proposition of law but lost the cite to *Fisher*, instead choosing a ladder of abstraction that obscures the rule's progeny. For example, Justice Souter, writing for the majority in *United States v. Wells*, 519 U.S. 482, 499 (1997), wrote "[t]he rule of lenity applies only if, 'after seizing everything from which aid can be derived,' . . . we can make 'no more than a guess as to what Congress intended.'" In *Wells*, Justice Souter cited to *Reno v. Koray*, 515 U.S. 50, 65 (1995), which cited to *Smith v. United States*, 508 U.S. 223, 239 (1993), which cited to *United States v. Bass*, 404 U.S. 336, 347 (1971), which quoted *United States v. Fisher*, 6 U.S. 358, 386 (1805).

159 *See Fisher*, 6 U.S. at 386 ("Neither party contends that the title of an act can controul [sic] plain words in the body of the statute; and neither denies that, taken with other parts, it may assist in removing ambiguities. . . . [I]n such [a] case the title claims a degree of notice, and will have its due share of consideration.").

160 *Chapman*, 500 U.S. at 463.

161 *Id.* (quoting Huddleston v. United States, 415 U.S. 814, 831 (1974)) (emphasis added).

to the facts of the case; it did not purport to offer a new trigger for lenity or change the rule of lenity.[162]

The *Chapman* Court accidently announced a new and stricter rule of lenity derived from a curious and distorted reading of *Bass*, *Fisher*, and *Huddleston*. After *Chapman*, a court may conclude that lenity only applies when a statute remains seriously ambiguous after the court is patently unable to resolve the statutory question.[163] While this new rule may protect the separation of powers between Congress and the courts, the bar for ambiguity may now be so high that lenity is nearly useless to protect individual rights. The problem is exacerbated when a court relies on a statute's legislative history to resolve a facially ambiguous statute.

---

162 *Huddleston*, 415 U.S. at 830–32.

163 Some Supreme Court justices have cited affirmatively to *Chapman*'s reimagined test for lenity. For example, in *United States v. Granderson*, 511 U.S. 39, 70–71 (1994), Justice Rehnquist, writing in dissent, concluded that statutory language is not ambiguous, unless after applying the tools of construction, a "grievous ambiguity or uncertainty" remained. In 1994, Justice Thomas refused to consider lenity after concluding the statute was not "grievous[ly] ambiguous." Staples v. United States, 511 U.S. 600, 619 n.17 (1994). In 1998, Justice Breyer, writing for the majority in *Muscarello v. United States*, ruled that "lenity applies only if, 'after seizing everything from which aid can be derived,'" there remains "a grievous ambiguity or uncertainty in the statute." 524 U.S. 125, 138–39 (1998) (citing United States v. Wells, 519 U.S. 482, 499 (1997) and Staples v. United States, 511 U.S. at 619 n.17 (quoting Chapman v. United States, 500 U.S. 453, 463 (1991))). More recently, Justice Breyer wrote in *Barber v. Thomas* that "the rule of lenity only applies if, after considering text, structure, history, and purpose, there remains a 'grievous ambiguity or uncertainty in the statute . . . .'" Barber v. Thomas, 560 U.S. 474, 488 (2010) (citing *Muscarello*, 524 U.S. at 139).

The Supreme Court has also refused to consider a split in the federal circuit as enough evidence of statutory ambiguity to trigger lenity. For example, in *Moskal v. United States*, the petitioner argued, in part, that lenity ought to apply when federal courts disagree on the proper construction of an ambiguous statute. 498 U.S. 103, 107 (1990). The Supreme Court disagreed with the petitioner's contention, positing that a division of judicial authority on the resolution of statutory ambiguity is not "automatically sufficient to trigger lenity." *Id.* at 108. Five years later, in *Reno v. Koray*, 515 U.S. 50 (1995), the Court again considered whether a split in the federal circuits requires the application of lenity to protect a defendant's right to fair warning of criminal acts and punishment. *Id.* at 64–65. The Court reiterated that it does not matter if circuit courts cannot agree on the construction of an ambiguous criminal statute, so long as the Supreme Court can resolve it. *See id.* (quoting *Moskal*, 498 U.S. at 108) ("A statute is not ambiguous for purposes of lenity merely because there is a division of judicial authority over its proper construction.") (internal quotation marks omitted). The test, according to *Koray*, is whether "after seizing everything from which aid can be derived," the Court is unable to discern Congress's intent when it drafted a facially ambiguous statute. *Id.* at 65 (internal citation omitted). The Court declined to explain how an ordinary person would be able to discern whether his conduct would be criminal under a facially ambiguous statute, when federal circuit courts are unable to agree.

Post-*Chapman*, the Supreme Court routinely uses legislative history—and other canons—to avoid lenity, despite ambiguity in criminal statutes. For example, in *Simpson v. United States*, the Court considered whether the defendants could be sentenced for one crime using two statutes.[164] The defendants argued that the two statutes merged for the purposes of sentencing,[165] and that the statutory question ought to be resolved in favor of lenity.[166] Although the Court ultimately agreed with the defendants as a matter of law, it declined to apply lenity.[167] Instead, the *Simpson* Court used the "sparse" legislative history of 18 U.S.C. § 924(c) to resolve the ambiguity.[168] In 1980, in *Bifulco v. United States*, the Court determined whether a federal conspiracy statute that limits the punishment for conspiracy to "imprisonment or fine or both" allows a sentencing court to impose a special parole term when the substantive statute allows it.[169] The *Bifulco* Court looked at the applicable statute and its "scant" legislative history and concluded that Congress did not include parole in the available penalties for the conspiracy statute.[170] After resolving the statutory question in favor of the defendant, the Court adds, "[o]f course, to the extent that doubts remain, they must be resolved in accord with the rule of lenity."[171] But, the Court's gratuitous nod to lenity came after the Court already resolved the question, which happened to favor the defendant. In *United States v. Turkette*, the Court resolved an ambiguity

164 Simpson v. United States, 435 U.S. 6, 8 (1978). In *Simpson*, the defendants were convicted of robbing a bank using a firearm. *Id.* at 8–9. They were sentenced under 18 U.S.C §§ 2113(a) and (d) for robbing a bank using a dangerous weapon and 18 U.S.C. § 924(c) for using a firearm in the commission of a felony. *Id.* at 9.

165 *Id.* at 9. The *Simpson* Court relied on the legislative history of § 924(c) to conclude that Congress did not intend § 924(c) to apply with other statutes that define penalties for the use of firearms, like §§ 2113(a) and (d). *Id.* at 13.

166 *Id.* at 14–15.

167 *Id.* at 15.

168 *Id.* The *Simpson* Court pointed to a statement from Representative Poff made on the House floor during consideration of the Gun Control Act of 1968, as well as Senate and Conference Committee action. *Id.*

169 Bifulco v. United States, 447 U.S. 381, 385–86 (1980). In this case, the defendant was convicted for conspiring to violate 18 U.S.C. § 401(a)(1) (1972), a statute that proscribed distributing substantial quantities of phencyclidine, a schedule III controlled substance. *Bifulco*, 447 U.S. at 385. § 401(a)'s penalty provision allowed for a term of years in prison, a fine, or a special parole to attach after any sentence imposing a term of years. *Id.* at 383–85.

170 *Id.* at 395, 399.

171 *Id.* at 400.

in the RICO statute using, in part, its legislative history by noting "[w]e find no occasion to apply the rule of lenity to this statute" because it "only serves as an aid for resolving an ambiguity . . . at the end of the process of construing what Congress has expressed . . . ."[172]

A few years after *Turkette*, the Court considered another statutory ambiguity that could have triggered lenity but did not.[173] In *Dixson v. United States*, the Court considered whether officers in a private, not-for-profit corporation are "public officials" as defined by the federal bribery statute, 18 U.S.C. § 201(a).[174] The Court admitted that "[a]s is often the case in matters of statutory interpretation, the language of [the statute] does not decide the dispute. The words can be interpreted to support either the petitioners' or the government's reading. We must turn, therefore, to the legislative history of the federal bribery statute" to clarify Congress's intent.[175] The *Dixson* Court continued, "[i]f the legislative history fails to clarify the statutory language, our rule of lenity would compel us to construe the statute in favor of . . . criminal defendants . . . ."[176] But once again, legislative history did clarify the

---

172 United States v. Turkette, 452 U.S. 576, 587 n.10 (1981). In *Turkette*, the issue was whether the statutory term "enterprise" included both legitimate and illegitimate enterprises under RICO. *Id.* at 578. The defendant argued and the Court of Appeals agreed that RICO only applied to legitimate business enterprises. *Id.* at 579–80. The Supreme Court disagreed. *Id.* at 593.

173 *See* Dixson v. United States, 465 U.S. 482 (1984).

174 *Id.* at 484. The federal bribery statute in question, 18 U.S.C. § 201(a) (1962), defines "public official" as "an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof, . . . in any official function, under or by authority of any such department, agency, or branch of Government." *Id.* at 490 (alterations in original). The petitioners in this case were officials of United Neighborhoods, Inc. (UNI)—a non-profit in Peoria, Illinois. *Id.* at 484. The city of Peoria had designated UNI to administer two Department of Housing and Urban Development housing grants for the purpose of housing rehabilitation projects in the city. *Id.* The petitioners were later indicted under the federal bribery statute for accepting bribes and kickbacks from contractors seeking to work on UNI's housing projects. *Id.* at 485. Petitioners argued that they were not "public officials" as defined by the statute. *Id.* at 485–86.

175 *Id.* at 491.

176 *Id.* The *Dixson* Court cites to its decision in *Rewis v. United States* for the proposition that legislative history ought to be used to resolve ambiguous statutory language. *See id.* at 491 (citing Rewis v. United States, 401 U.S. 808, 812 (1971)). The *Rewis* Court construed an ambiguity in the Travel Act, 18 U.S.C. § 1952 (1964), and after reviewing the statute's legislative history resolved the ambiguity in favor of the defendant, and then added that "even if [the legislative history and statutory language] were less apparent, ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Rewis*, 401 U.S. at 812.

statutory ambiguity, allowing the Court to avoid lenity or any pretense of respecting a criminal defendant's due process right to fair warning.[177]

Legislative history is the tail wagging lenity's dog. If the rule of lenity upholds the notion that we are entitled to know in advance if our acts are criminal, then requiring us to know a statute's history to extract indicia of Congress's intent from it gravely distorts the function and purpose of the rule.

The Supreme Court has repeatedly suggested that "the touchstone of [lenity] is statutory ambiguity."[178] But ambiguity is in the eyes of the beholder, particularly for the Court when it considers lenity.[179] Since the 1950s, the Court has looked for ultimate and grievous ambiguity before it considers resolving statutory doubt in favor of a defendant. *Universal C.I.T.* and its progeny succeeded in reducing the rule of lenity to a makeweight, at least that part of lenity that insists on fair warning.[180] The problem is the tension between lenity's two opposing functions: lenity purports to defend Congress's authority to determine crime and penalty, but it also protects our fundamental due process right to know clearly the meaning and scope of crime and penalty. But when a court is asked to resolve ambiguous statutory language by "seiz[ing] every thing

---

177 *Dixson*, 465 U.S. at 493–96. Interestingly, four justices dissented from the opinion. *Id.* at 501 (O'Connor, J., dissenting). Writing in dissent, Justice O'Connor would have given more weight to the defendant's right to fair warning of criminal conduct. *Id.* at 511–12.

A year after *Dixson*, the Court did find reason to apply lenity to an ambiguous criminal statute, but only after concluding that the statute in question was ultimately ambiguous. Liparota v. United States, 471 U.S. 419, 426–28 (1985). In *Liparota*, the Court considered whether a food stamp fraud statute required the government to prove that a defendant knew that he was acting unlawfully. *See id.* at 421–22 (construing 7 U.S.C. § 2024(b)(1) (1964)). The Court examined the statute and concluded that Congress had not expressly provided a requisite mental state, and thus the statute was ambiguous regarding the required mens rea. *Id.* at 424. The Court also concluded that "the legislative history of the statute contains nothing that would clarify [Congress's intent]." *Id.* at 424–25. Faced with an ultimate ambiguity—an ambiguous statute after failing to construe it—the Court relied on a "background assumption of our criminal law" requiring a mens rea and lenity. *Id.* at 426–28. The Court explained that "the rule of lenity is not to be applied where to do so would conflict with the implied or expressed intent of Congress, it provides a time-honored interpretative guideline when the congressional purpose is unclear." *Id.* at 427. The Court reaffirmed that lenity applies at the end of the process, and only after the Court is faced with an undeniably ambiguous statute.

178 Lewis v. United States, 445 U.S. 55, 65 (1980); *see also* Burgess v. United States, 553 U.S. 124, 135 (2008) (stating that the "touchstone of the rule of lenity is statutory ambiguity").

179 *See* discussion *infra* Section II.F.

180 *See* discussion *supra* Sections II.A, II.B.

from which aid can be derived,"[181] the court is favoring the separation of powers objective to the detriment of its due process objective. Insisting on ultimate ambiguity before applying lenity frustrates a founding principle of lenity.

D. *The Pull of Lenity*

Recognizing the degradation of the rule of lenity, some justices on the United States Supreme Court have attempted to right the ship—without any real success. In 1984, in *Dixson v. United States*, Justice Sandra Day O'Connor objected to the majority's reliance on "weak" evidence of congressional intent to resolve ambiguous language in a federal bribery statute.[182] Justice O'Connor writes that "[t]he conclusion [reached by the Court] finds as little support in the cases cited by the Court as it does in the statutory language or legislative history."[183] Justice O'Connor explains that the Court failed to provide "reason strong enough to escape the *pull of the rule of lenity*."[184] In closing, O'Connor writes, "[t]he rule of lenity rests on the notion that people are entitled to know in advance whether an act they contemplate taking violates a particular criminal statute . . . . A criminal statute, after if not before it is judicially construed, should have a discernible meaning."[185] Justice O'Connor notes that lenity requires the Court to adopt a "*higher* standard" for resolving ambiguous statutory language in criminal statutes, presumably to protect fundamental notions of fair play.[186] Unfortunately, O'Connor fails to explain (or provide authority for) this "higher standard," but one could infer that she objects to resolving

---

181 United States v. Universal C.I.T. Credit Corp., 344 U.S. 218, 221 (1952) (quoting United States v. Fisher, 6 U.S. 358, 386 (1805)).

182 Dixson v. United States, 465 U.S. 482, 501 (1984) (O'Connor, J., dissenting).

183 *Id.* at 505 (internal citation omitted). The majority construed the phrase "public official" in 18 U.S.C. § 201(a) (1962), in part by parsing the legislative history of the federal bribery statute. *Id.* at 491–96 (majority opinion). The Court considered prior versions of the bribery statute, earlier drafts of § 201(a), and committee reports from both the Senate and House of Representatives. *Id.* This analysis allowed the Court to conclude that the statute was not ambiguous and thus lenity did not apply. *Id.* at 500–01.

184 *Id.* at 506 (emphasis added) (O'Connor, J., dissenting).

185 *Id.* at 511–12.

186 *Id.* at 501 (emphasis added). Justice O'Connor writes that, in this case, "the evidence of congressional intent [is] too weak to meet the higher standard for resolving facial ambiguity against a defendant when interpreting a criminal statute." *Id.*

facially ambiguous statutory language based on weak interpretative evidence with the effect of avoiding lenity. Justice O'Connor appears to oppose the idea of ultimate ambiguity as the last resort trigger for lenity.

Justice O'Connor's demand for a "*higher* standard" for resolving ambiguity in criminal statutes may have resonated with the Court, albeit briefly. One year after *Dixson*, the Court decided *Dowling v. United States*.[187] In *Dowling*, the Court was asked to resolve an ambiguity in 18 U.S.C. § 2314, the National Stolen Property Act.[188] The narrow question before the Court was whether the statute applies to interstate shipments of unauthorized bootleg recordings.[189] The Court begins its analysis by reminding readers that "when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite."[190] After examining the statutory language, judicial precedent, and the history and purpose of the National Stolen Property Act and related statutes, the Court concluded that Congress did not speak in clear and definite language.[191] The *Dowling* Court wrote that "the language of § 2314 does not 'plainly and unmistakably' cover [the petitioner's] conduct[.]"[192] Thus, the Court resolved the conflict in favor of lenity, explaining that "Congress has not spoken with the requisite clarity."[193] *Dowling* suggests

187 Dowling v. United States, 473 U.S. 207 (1985).

188 *Id.* at 208.

189 *Id.* at 213.

190 *Id.* at 214 (quoting United States v. Universal C.I.T. Credit Corp., 344 U.S. 218, 221–22 (1952)).

191 *Id.* at 214–29.

192 *Id.* at 228 (quoting United States v. Lacher, 134 U.S. 624, 628 (1890)).

193 *Id.* at 229; *accord* McNally v. United States, 483 U.S. 350 (1987). Decided two years after *Dowling*, the *McNally* Court considered whether the Mail Fraud Statute, 18 U.S.C. § 1341, includes the protection of the "right of citizenry to good government." *Id.* at 356. The Court again stated that "when there are two rational readings of a criminal statute . . . we are to choose the harsher only when Congress has spoken in *clear and definite* language," and "before one can be punished, it must be shown that his case is plainly within the statute" *Id.* at 359–60 (emphasis added) (internal citations omitted).

Justice Stevens, writing in dissent, argued that the statute was not ambiguous and, even if it was, any ambiguity was resolved by judicial construction in prior cases. *Id.* at 362, 375 (Stevens, J., dissenting). Thus, he concludes that the majority was wrong to apply lenity. *Id.* at 375. Interestingly, in a footnote, the dissent argues that the application of lenity turns in part on the *type* of litigant who seeks to benefit from it. *Id.* at 375 n.9. Here, Justice Stevens notes that the defendants "are not uneducated, or even average, citizens. They are the most sophisticated practitioners of the art of government among us." *Id.* Thus, Stevens continues, they

a rebalanced test that would trigger lenity when evidence of legislative intent is thin and statutory doubt raises due process concerns.

Six years after *Dowling*, the Court filed two opinions, each suggesting a retreat from the hardline *Universal C.I.T.* approach that favors lenity's separation of powers function over its due process function. First, in *Crandon v. United States*, the Court considered the reach of 18 U.S.C. § 209(a), which prohibits the supplementation of a government employee's salary by outside sources.[194] Here, five executives at the Boeing Company were offered positions in the executive branch of the federal government.[195] In turn, Boeing made lump sum payments to each employee to mitigate the substantial pay differential between private and public employment and to encourage them to accept the new positions.[196] A casual observer might conclude that the payments were made quid pro quo. Thus, the Court was asked to consider whether payments made to a federal employee *before* the payee accepts the government job violate the statute.[197] Of note, instead of discussing lenity at the end of the statutory analysis—usually to explain that a statute at issue is no longer ambiguous and thus lenity doesn't apply—here the Court leads off its opinion with an explanation of the "time-honored interpretative guideline" of lenity.[198]

The *Crandon* Court writes that because the statute is criminal, "it is appropriate to apply the rule of lenity in resolving *any* ambiguity in the ambit of the statute's coverage."[199] The Court continues, "[t]o the extent that the language or history of [the statute] is uncertain, [lenity] serves to ensure both that there is fair warning of the boundaries of criminal conduct and that legislatures, not courts, define criminal liability."[200] Although the Fourth Circuit used legislative history to broaden the reach of the statute to include the five Boeing employees, the Supreme Court rejected this analysis, writing "[b]ecause construction of a

"unquestionably knew that their conduct was unlawful." *Id.* Evidently, Justice Stevens would apply lenity on a sliding scale; for him, fair warning is dependent on the sophistication of the proponent. Fortunately, his idea has not advanced beyond a footnote in a dissenting opinion.

194 Crandon v. United States, 494 U.S. 152, 156 (1990).

195 *Id.* at 154.

196 *Id.*

197 *Id.* at 156–57.

198 *Id.* at 158. Later in the opinion, the Court notes when construing a criminal statute that it is "*bound* to consider application of the rule of lenity." *Id.* at 168 (emphasis added).

199 *Id.* at 158 (emphasis added).

200 *Id.*

criminal statute must be guided by the need for fair warning, it is rare that legislative history or statutory policies will support a construction of a statute broader than that clearly warranted by the text."[201] The *Crandon* Court does a few remarkable things: first, it treats lenity not as an afterthought but as an imperative when resolving doubt in a criminal statute; second, it questions the idea of ultimate ambiguity by refusing to allow legislative history—a traditional tool of statutory construction—to broaden the reach of a criminal statute; and third, it speaks affirmatively to lenity's important due process function.

Months after *Crandon*, the Supreme Court decided *Hughey v. United States*.[202] In *Hughey*, the Court considered whether the Victim and Witness Protection Act, 18 U.S.C. §§ 3579, 3580, allows a court to award restitution for losses related to alleged crimes or only offenses of conviction.[203] Holding that the statute limits restitution to offenses of conviction, the Court concluded that "longstanding principles of lenity . . . preclude our resolution of the ambiguity against petitioner on the basis of general declarations of policy in the statute and legislative history."[204] Similar to its decision in *Crandon*, the Court appears to be recalibrating its position on lenity. But, O'Connor's "higher standard" idea in *Dixson* never stuck, and the Court continued to "seize everything from which aid can be derived" to resolve statutory doubt, only applying lenity when faced with "grievous ambiguity."[205] Despite this, a more

---

201 *Id.* at 160. It is not a coincidence that Justice Scalia sided with the majority. *See* discussion *infra* Section II.E.

202 Hughey v. United States, 495 U.S. 411 (1990).

203 *Id.* at 412–13. Here, the defendant was indicted for six counts, but he plead guilty to only one count under a plea agreement in exchange for the government's agreement to dismiss the other counts. *Id.* at 413.

204 *Id.* at 422 (citing Crandon v. United States, 494 U.S. 152, 160 (1990)). Justice Scalia again sided with the majority. See *infra* Section II.E for discussion on Justice Scalia's application of lenity.

205 *See, e.g.*, DePierre v. United States, 564 U.S. 70, 88 (2011) (stating lenity only applies when "after seizing everything from which aid can be derived, the Court is left with an ambiguous statute"); Dolan v. United States, 560 U.S. 605, 621 (2010) (stating we "cannot find a statutory ambiguity sufficiently 'grievous' to warrant [lenity's] application in this case"); Barber v. Thomas, 560 U.S. 474, 488 (2010) (explaining that "lenity only applies if, after considering text, structure, history, and purpose, there remains a 'grievous ambiguity . . . in the statute'"); United States v. Hayes, 555 U.S. 415, 429 (2009) (affirming that lenity only applies "after consulting traditional canons of statutory construction," the statute remains "grievously ambiguous"); Johnson v. United States, 529 U.S. 694, 713 n.13 (2000) (noting that "[l]enity applies only when the equipoise of competing reasons cannot otherwise be resolved");

balanced view of lenity soon found an unlikely champion: Justice Antonin Scalia.

E. *Textualism and the Rule of Lenity*

Beginning relatively early in his Supreme Court career, Justice Scalia was a vocal advocate for a more aggressive (and defendant-friendly) application of lenity—particularly when the Court stretched to resolve statutory doubt and thus avoid lenity. To be sure, Scalia's real crusade was textualism and not necessarily fair warning. Justice Scalia posited that enacted "words mean what they conveyed to reasonable people at the time they were written[.]"[206] In his book *Reading Law: The Interpretation of Legal Texts*, Justice Scalia writes, "[t]extualism, in its purest form, begins and ends with what the text says and fairly implies."[207] Purpose, on the other hand, allows a court to consider any evidence of intent—including non-textual evidence—to discover the legislature's intent when it enacted a law.[208] Thus, according to Scalia, statutory ambiguity should be resolved—if at all—by analyzing the language of the law and, if necessary, by applying those interpretative tools that help explain how language is normally used or how textual meaning is normally conveyed.[209] Textualism rejects extratextual methods of resolving statutory doubt, such as legislative history, and serves to limit and narrow a court's focus when it endeavors to interpret ambiguous statutes.[210] Thus, Justice Scalia's hostility towards the Court's

Muscarello v. United States, 524 U.S. 125, 138–39 (1998) (requiring "grievous ambiguity" to apply lenity); Reno v. Koray, 515 U.S. 50, 64–65 (1995) (stating that a judicial split on the meaning of statutory language does not mean the statute is ambiguous; lenity only applies when "after seizing everything" statutory doubt remains); United States v. Granderson, 511 U.S. 39, 54 (1994) (applying lenity "where text, structure, and history fail to establish that the Government's position is unambiguously correct"); Staples v. United States, 511 U.S. 600, 619 n.17 (1994) (declining to rely on lenity when the statute was not grievously ambiguous after seizing everything from which aid can be derived).

206 ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 16 (2012).

207 *Id.*

208 *Id.* at 18.

209 *See id.* at 53 ("Interpretation or construction is 'the ascertainment of the thought or meaning of the author . . . according to the rules of language . . . .'"). Linguistic canons are canons that are based on presumptions on how language is normally used.

210 *See id.* at 56–58 (explaining textualism).

usual (and perfunctory) treatment of lenity is more of an attack on ultimate ambiguity—the Court's habit of resolving statutory doubt at all costs—rather than a full embrace of the fair warning function of the rule. Nevertheless, his critique of the Court's application of lenity is substantive and has merit.

One of Justice Scalia's first opportunities to discuss lenity was in *Moskal v. United States*.[211] In *Moskal*, the Supreme Court considered the phrase "falsely made," found in the federal stolen property statute, 18 U.S.C. § 2314.[212] The Court concluded that the statute was unambiguous as applied to the petitioner's conduct, and thus refused to consider lenity.[213] In reaching its holding, the Court considered the language of the statute and its purpose as divined from its legislative history to broaden the scope of the federal statute.[214] Justice Scalia, writing for the dissent, disagreed.[215] He objected to the Court's use of purpose and history to resolve statutory doubt to broaden the scope of the statute.[216] Justice Scalia lamented "[i]f the rule of lenity means anything, it means that the Court ought not do what it does today: use an ill-defined general purpose to override an unquestionably clear term of art . . . ."[217] Scalia seems to be suggesting that the Court's habit of insisting on ultimate ambiguity before applying lenity is misguided. Two years later, Justice Scalia joined in dissent in *Evans v. United States*.[218] *Evans* required the Court to construe the Hobbs Act, a federal extortion statute, and determine whether the Act requires a defendant to affirmatively act to induce a bribe from another.[219] Here, the petitioner—an elected official—passively acted to accept a bribe from an

---

211 Moskal v. United States, 498 U.S. 103 (1990); *see also supra* note 163.

212 *Moskal*, 498 U.S. at 106–07. The narrow issue in this case was whether a person who knowingly procures a fraudulent vehicle title must know them to have been falsely made. *Id.* Here, an accomplice doctored the car titles' odometer readings and then sent them to state authorities to issue genuine titles. *Id.* at 105–06. Moskal argued that the washed titles were genuine and not falsely made, and thus he cannot be convicted of violating § 2314. *Id.* at 107.

213 *Id.* at 109.

214 *Id.* at 109–11.

215 *Id.* at 119–32 (Scalia, J., dissenting).

216 *Id.* at 131–32.

217 *Id.* at 132.

218 Evans v. United States, 504 U.S. 255, 278 (1992) (Thomas, J., dissenting).

219 *Id.* at 256 (majority opinion). In *Evans*, the petitioner was charged under 18 U.S.C. § 1951 with accepting a bribe from an undercover FBI agent, posing as a real estate developer, in return for using his position on the DeKalb County Board of Commissioners to help the agent. *Id.* at 257.

undercover FBI agent in return for his agreement to perform specific official acts.[220] After reviewing the common law "tradition" with respect to the elements of extortion, the Court concluded that the Hobbs Act does not require an affirmative act of inducement, thereby broadening the reach of extortion.[221] The dissent charged that "[t]he Court's construction of the Hobbs Act is repugnant . . . to the basic tenets of criminal justice reflected in the rule of lenity . . . ."[222] The dissent accused the Court of spurious interpretation to affirm a conviction of a corrupt politician.[223] Obviously frustrated by the majority's tortured resolution of a statute that is less than clear, the dissent asserts that "[b]ecause the Court's expansive interpretation of the statute is not the only plausible one, the rule of lenity compels adoption of the narrower interpretation."[224] Justice Scalia endorses the dissent's discomfort with the Court's broad interpretative license with statutory ambiguity, and its willingness to resist the pull of lenity.

Justice Scalia sharpened his attack in *United States v. R.L.C.*[225] In *R.L.C.*, the Court agreed to resolve a sentencing ambiguity in the Juvenile Delinquency Act, 18 U.S.C. § 5037(c)(1)(B).[226] Justice David Souter, writing for the plurality, concluded that the statutory text was ambiguous and thus "turn[ed] to examine the textual evolution of [the statute] and the legislative history that may explain or elucidate it."[227] After an exhaustive review of the statute's history, Souter reported that

---

220 *Id.* at 257–58.

221 *Id.* at 265–68.

222 *Id.* at 290 (Thomas, J., dissenting).

223 *Id.* at 296.

224 *Id.* at 289.

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

226 *Id.* at 294. The Juvenile Delinquency Act states, in pertinent part, that "[t]he term for which official detention may be ordered for a juvenile . . . may not extend . . . the maximum term of imprisonment that would be authorized if the juvenile had been tried and convicted as an adult . . . ." *Id.* at 295 n.1. The Court considered whether the "maximum term of imprisonment" is limited by the United States Sentencing Guidelines or the substantive adult criminal statute. *Id.* at 297. Here, R.L.C. was determined to be a juvenile delinquent when he committed acts that would have been considered involuntary manslaughter under the federal statute. *Id.* at 295–97. The district court sentenced R.L.C. to three years in detention, the maximum allowed for involuntary manslaughter under the substantive statute; on appeal, the Court of Appeals for the Eighth Circuit vacated the sentence and remanded for resentencing under the United States Sentencing Guidelines, which would impose a substantially shorter sentence. *Id.* at 295–96.

227 *Id.* at 298 (plurality opinion).

"[w]e do not think any ambiguity survives" and declined to apply lenity.[228] In support of his conclusion, Justice Souter cited to *Moskal* and posited "we have always reserved lenity for those situations in which a reasonable doubt persists . . . *after* resort to 'the language and structure, legislative history, and motivating policies' of the statute."[229] While the legislative history of the statute allowed the Court to side with the defendant, Justice Souter confirmed that the Court requires ultimate ambiguity to trigger lenity.[230]

Writing for the concurrence, Justice Scalia objected strongly to the plurality's suggestion that legislative history can amend a facially ambiguous criminal statute.[231] For Scalia, once the Court concludes a statute is ambiguous—as Souter did here—the more lenient interpretation ought to prevail notwithstanding a statute's legislative history.[232] Scalia argues that using legislative history to resolve statutory doubt "compromises what we have described to be the purposes of the lenity rule."[233]

Scalia maintains that the plurality's approach disserves both the fair warning function and the separation of powers function of lenity.[234] Reiterating his textualism mantra, Justice Scalia argues that legislative history is fragmented, precursory, and extralegal; thus, it cannot represent the intent of Congress. Congress only speaks when it enacts law.[235] When legislative history is used to resolve statutory doubt, Scalia argues, it damages lenity's promise to protect vital separation of powers values.[236] Justice Scalia also argues that legislative history demeans the vital fair warning function of lenity.[237] He concedes that fair warning

---

228 *Id.* at 305.

229 *Id.* at 305–06 (quoting Moskal v. United States, 498 U.S. 103, 108 (1990)).

230 *Id.* at 304–05.

231 *See id.* at 307–08 (Scalia, J., concurring).

232 *Id.* at 307–10; *accord* Smith v. United States, 508 U.S. 223 (1993) (Scalia, J., dissenting). In *United States v. Smith*, decided a year after *R.L.C.*, Scalia writes in dissent that the statutory question at issue "is eminently debatable—and that is enough under the rule of lenity, to require finding for the [criminal defendant] here." *Smith*, 508 U.S. at 246.

233 *R.L.C.*, 503 U.S. at 308 (Scalia, J., concurring).

234 *Id.* at 308–10.

235 *See id.* at 309 (stating that "[a] statute is a statute . . . no matter how 'authoritative' the history may be").

236 *See id.* at 309 (stating that the majority's opinion "disserves the rule of lenity's other purpose: assuring that the society, through its representatives, has genuinely called for the punishment to be meted out").

237 *Id.* at 308–09.

may be "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."[238] To expect the public to know that a facially ambiguous criminal statute is unriddled by its legislative history contravenes lenity's assurance of fair notice. Justice Scalia was likely concerned that a court may one day use extralegal sources to resolve a facially ambiguous statute *against* a defendant.[239]

To be sure, Scalia's central quarrel in *R.L.C.* and the other cases is textualism, and his main beef is the use of legislative history to confirm (or rebut) ambiguous statutory language. Nevertheless, his point about lenity is valid—for lenity to mean anything, it ought to apply to a facially ambiguous criminal statute at some point before a court tries but fails to resolve it. Seven years after *R.L.C.*, Justice Scalia again wrote in dissent in a case where he disagreed with the Court's resolution of a statutory issue, and cautioned that if lenity "is no longer the presupposition of our law, the Court should say so, and reduce the rule of lenity to an historical curiosity."[240]

F. *When is an Ambiguous Statute Ambiguous?*

For decades, the United States Supreme Court has been unsympathetic to leniency in cases where it could—with effort—resolve a criminal statute's ambiguity.[241] Instead, the Court has limited lenity to those few situations where a statute remains ultimately ambiguous after

238 *Id.* at 309 (internal citation omitted).

239 *Id.* at 311.

240 Holloway v. United States, 526 U.S. 1, 21 (1999) (Scalia, J., dissenting). In *Holloway*, the issue before the Court was whether the phrase "intent to cause death or serious bodily harm" in a federal carjacking statute included a defendant's conditional intent. *Id.* at 3 (majority opinion). The Court broadened the scope of the statute to include conditional intent by examining the statute, scholarly writings on point, and the Model Penal Code. *Id.* at 9–11. Justice Scalia argued that the statute is unambiguous, but wrote "[e]ven if ambiguity existed . . . the rule of lenity would require it to be resolved in the defendant's favor." *Id.* at 20 (Scalia, J., dissenting). Scalia intimated that the justices' own debate over whether a statute is even ambiguous is enough ambiguity to trigger lenity. *Id.* at 21.

241 *See supra* notes 59, 163 and accompanying text; *supra* text accompanying notes 82, 123, 135, 163; *see also supra* text accompanying notes 70–72, 93–97, 106–11, 146–50, 155, 164–68, 173–77.

it tries but fails to resolve statutory doubt.[242] In doing so, the Court favors lenity's promise to protect a legislature's role in determining crime and penalty but weakens lenity's commitment to fair play. If the touchstone for lenity is statutory ambiguity,[243] then the real question is "how much ambigu[ity] constitutes . . . ambiguity"?[244] The Supreme Court, however, has declined to articulate an objective standard for ambiguity that could provide a meaningful trigger for lenity.

In 2013, in *Maracich v. Spears*, the Court repeated that "[t]he rule of lenity comes into operation at the end of the process of construing what Congress has expressed . . . ."[245] *Maracich* required a "*grievous ambiguity* or uncertainty in the statute" to trigger lenity.[246] Two years earlier, in *Kasten v. Saint-Gobain Performance Plastics Corp.*, the Court considered whether the phrase "filed any complaint" in the Fair Labor Standards Act includes oral complaints.[247] There, the Court posited that a statute must remain "*sufficiently ambiguous* to warrant application of the rule of lenity."[248] The *Maracich* Court failed to explain why the trigger for lenity went from sufficient ambiguity—enough or adequate ambiguity—to grievous ambiguity—serious or grave ambiguity—in the span of two years.[249] Perhaps the Court was confused by *Dean v. United States*.[250] In *Dean*, a 2009 opinion, the majority required grievous ambiguity to invoke lenity,[251] while the dissent claimed only a sufficiently ambiguous statute warrants the rule.[252]

Seemingly unsatisfied with only two tests, the Court's justices have offered no less than nine different tests to determine whether statutory

---

242 *See supra* text accompanying notes 131–34; *see also supra* notes 135, 177; *infra* text accompanying notes 245–51.

243 *See* Bifulco v. United States, 447 U.S. 381, 387 (1980) (quoting Lewis v. United States, 445 U.S. 55, 65 (1980)).

244 *See* Moskal v. United States, 498 U.S. 103, 108 (1990) (alteration in original) (quoting United States v. Hansen, 772 F.2d 940, 948 (D.C. Cir. 1985)).

245 Maracich v. Spears, 570 U.S. 48, 76 (2013) (alteration omitted) (quoting Callanan v. United States, 364 U.S. 587, 596 (1961)).

246 *Id.* (emphasis added).

247 Kasten v. Saint-Gobain Performance Plastics Corp., 563 U.S. 1, 4 (2011).

248 *Id.* at 16 (emphasis added).

249 The words sufficient and grievous are not synonymous. *Compare Grievous*, MERRIAM WEBSTER'S COLLEGIATE DICTIONARY (10th ed. 2001), *with Sufficient*, MERRIAM WEBSTER'S COLLEGIATE DICTIONARY (10th ed. 2001).

250 Dean v. United States, 556 U.S. 568 (2009).

251 *Id.* at 577.

252 *Id.* at 585 (Breyer, J., dissenting).

ambiguity is bad enough to trigger lenity. In *Lanzetta v. New Jersey*, Justice Pierce Butler said a penal statute must be *sufficiently explicit*.[253] In *United States v. Rodriquez*, Justice Souter suggests that lenity ought to apply when a statute has *two plausible interpretations*.[254] Chief Justice Rehnquist, in *Scheidler v. National Organization for Women, Inc.*, argues that lenity ought to apply when an ambiguous statute has *two rational readings*.[255] In *Muscarello v. United States*, Justice Ginsburg posits that lenity applies if the interpretation is subject to *some doubt*.[256] In *United States v. Lanier*, Justice Souter explains that the test is whether the statute is *reasonably clear*.[257] Justice Marshall, in *Moskal v. United States*, prefers a *reasonable doubt* standard after a court tries but fails to resolve the ambiguity.[258] But Justice Blackmun says in *Dowling v. United States* that lenity applies unless a statute is *plain and unmistakable*.[259]

How much ambiguity constitutes enough ambiguity to trigger lenity? It is impossible to know. But whether the statute is reasonably clear or grievously ambiguous or sufficiently ambiguous, or whether the proffered construction is plausible, or rational, or plain, is in the eye of the beholder. The Supreme Court's various attempts to test for ambiguity is either a makeweight or a symptom of the larger problem—the Court's reluctance to fully embrace the rule of lenity and the vital due process rights it protects.

III. A WAY FORWARD

The rule of lenity was doomed from the start. When the United States Supreme Court first adopted a rule of strict construction in 1820, the Court justified its cause by pointing to two primary functions that

253 Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939).

254 United States v. Rodriquez, 553 U.S. 377, 401–04 (2008) (Souter, J., dissenting); *see also* Caron v. United States, 524 U.S. 308, 316 (1998) (concluding petitioner's interpretation is not "plausible enough," thus lenity does not apply). *But see id.* at 319–20 (Thomas, J., dissenting) (concluding petitioner's interpretation is plausible, and thus lenity should apply).

255 *See* Scheidler v. Nat'l Org. for Women, Inc., 537 U.S. 393, 409 (2003) (citing McNally v. United States, 483 U.S. 350, 359–60 (1987)).

256 Muscarello v. Unites States, 524 U.S. 125, 148 (1998) (Ginsburg, J., dissenting).

257 United States v. Lanier, 520 U.S. 259, 267 (1997).

258 Moskal v. United States, 498 U.S. 103, 108–09 (1990).

259 Dowling v. United States, 473 U.S. 207, 228–29 (1985).

are in direct conflict.[260] First, the Court warned that it ought to avoid affording a criminal statute unintended breadth.[261] According to the Supreme Court, Congress, and not the courts, is charged with determining the reach and scope of crime and punishment. The legislative branch, populated by elected lawmakers, has exclusive constitutional authority to make law.[262] Thus if a court broadens the scope of enacted law, it risks usurping Congress's exclusive grant of lawmaking authority and upsetting the separation of governmental powers. A rule of strict construction—lenity—safeguards the separation of powers doctrine by requiring courts to defer to Congress when faced with statutory ambiguity.

Second, the Supreme Court also defended its rule of strict construction observing the rule's "tenderness . . . for the rights of individuals."[263] Due process requires fair warning and notice of the acts that constitute a crime and the crime's penalty.[264] Fair warning is paramount when a court considers a criminal statute because liberty, and perhaps even life, are at stake. If a court broadens the scope of a criminal statute to include conduct not fairly within it or if a court increases a penalty not obvious from its text, then a court runs afoul of fundamental due process rights protected by the Constitution. A rule of lenity safeguards due process rights by requiring courts to construe narrowly criminal statutes to include only those crimes and penalties fairly and obviously within them.

The problem, however, is that each purpose or function of the rule of lenity is at odds with the other. If a court faithfully endeavors to protect the separation of powers doctrine and defers to Congress when faced with an ambiguous criminal statute, then any statutory doubt is usually resolved fully using the dozens of tools of statutory construction available to the court without regard to lenity. Once a court discovers

---

260 *See supra* text accompanying notes 19–30, 178–81.

261 *See supra* text accompanying notes 22–26.

262 Article I of the United States Constitution states, "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." U.S. CONST. art. I, § 1.

263 United States v. Wiltberger, 18 U.S. 76, 95 (1820); *see also supra* text accompanying note 27.

264 The Fifth Amendment, made applicable to the states through the Fourteenth Amendment, states, in pertinent part, "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ." U.S. CONST. amends. V, XIV.

Congress's hidden intent, then no ambiguity remains nor any reason to apply lenity—even to a facially ambiguous statute. Only after a court has "seized every thing from which aid can be derived" and can only guess at Congress's intentions will a court apply lenity as a last resort to avoid judicially-created statutory breadth to protect the separation of powers.[265]

Conversely, if a court faithfully endeavors to safeguard due process rights, then it ought to construe narrowly all facially ambiguous statutes that fail to provide adequate notice of crime and punishment. But if a court applies lenity without any attempt to glean the intent of Congress to resolve statutory doubt, then it risks limiting Congress's authority to make law. Stated differently, if a court favors the separation of powers function of the rule of lenity, then it diminishes the due process function, and vice versa. This tension defines the problem: one side of the lenity coin is in conflict with the other.

The Supreme Court has avoided the tension by planting its judicial thumb firmly on the separation of powers side of the lenity scale.[266] If the Court can resolve statutory doubt, then it usually will. And without statutory doubt, there is no room for lenity. Thus, the doctrine has lost its due process bona fides. Curiously, the Court has declined to strike the rule and continues to cite it as a viable and important tool.[267] But if the rule of lenity is to mean anything, the Court must give due weight to both sides of the lenity equation, including fair warning. It is a question of timing. Does the rule of lenity apply at the outset when a court first recognizes statutory doubt or at the end of the process once a court concludes it cannot, after effort, resolve the ambiguity? Is lenity a substantive rule of construction of penal statutes or merely a tiebreaker to apply when a court can only guess what Congress intended?

---

265 *See supra* text accompanying notes 63–68, 148–51.

266 *See supra* text accompanying notes 132–35.

267 *See, e.g.*, Yates v. United States, 135 S. Ct. 1074, 1088 (2015) ("[I]f our recourse to traditional tools of statutory construction leaves any doubt about the meaning of [a term in a statute] . . . we would invoke the rule that 'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.'") (citation omitted); Burrage v. United States, 571 U.S. 204, 216 (2014) ("Especially in the interpretation of a criminal statute subject to the rule of lenity, we cannot give the text a meaning that is different from its ordinary, accepted meaning, and that disfavors the defendant.") (internal citation omitted) (citing Moskal v. United States, 498 U.S. 103, 107–08 (1990)); *id.* at 892 (Ginsburg, J., concurring) (agreeing with the majority that "where there is room for debate, one should not choose the construction 'that disfavors the defendant'").

The question is practical and imperative. If lenity is applied at the end of the process of statutory interpretation, then it cannot purport to defend fundamental rights to fair notice. To suggest that a person is fairly warned of criminal conduct, not because the statute is clear but because a court could clarify it, is reckless and undermines the reason for the rule. As Justice Holmes observed in 1931:

> Although it is not likely that a criminal defendant 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.[268]

The Court affirmed this idea in *Bouie v. City of Columbia*, when Justice Brennan opined in 1964 that the basic principle behind the Due Process Clause is "that a criminal statute must give fair warning of the conduct that it makes a crime . . . ."[269] And in *United States v. Harriss*, Chief Justice Warren agreed that "[t]he constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute."[270] Justice Warren continues, stating that "[t]he underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed."[271] Later, in *United States v. Lanier*, Justice Souter confirmed that the rule of lenity "ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered."[272]

These statements and others compel a reconstructing of the rule of lenity so that fair warning is a legitimate, sincere, and deliberate consideration. To that end, a criminal statute must be *reasonably clear*; and a person of ordinary intelligence must be able to *reasonably understand* what conduct is proscribed by law and what penalty is attached. If an ordinary person is not reasonably able to understand a reasonably clear statute, then lenity ought to apply to safeguard fundamental due process protections. A statute is reasonably clear if a

---

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

269 Bouie v. City of Columbia, 378 U.S. 347, 350 (1964).

270 United States v. Harriss, 347 U.S. 612, 617 (1954).

271 *Id.*

272 United States v. Lanier, 520 U.S. 259, 266 (1997).

person acting in good faith could identify how to conform his conduct to the law to avoid penalty.[273]

This test asks whether a person of average intelligence acting in good faith is able to know the law. If he or she is able to know the law, then a statute is reasonably clear. *Ignorantia juris non excusat* roughly translates to "ignorance of the law is no excuse."[274] So, while the fair warning standard in the Due Process Clause guarantees that the law is knowable, it does not pretend to require that it is known. A law is knowable when it is available and reasonably accessible to the average person. Thus, for a criminal statute to be reasonably clear for the purposes of lenity, the law taken as a whole must be knowable: it must be available and reasonably accessible to the average person. If knowable law resolves statutory doubt, then lenity does not apply. But if knowable law does not resolve statutory doubt, then a court must apply the rule of strict construction to safeguard vital due process rights.

But what is knowable law? It is the aggregate of published, authoritative, substantive legal principles, rules, and standards. It includes enacted law, judicial law, administrative rules and orders, official interpretations of law, and any other published source of authority.[275] If a criminal offense is knowable by means of these sources, then no doubt remains as to the conduct prohibited or the punishment exacted, and so lenity would not apply. In the paradigmatic case, a criminal statute is facially ambiguous as to the proscribed conduct defining an offense. If an authoritative and reasonably available source

---

273 *See supra* text accompanying note 270.

274 *Ignorantia juris non excusat*, BLACK'S LAW DICTIONARY (10th ed. 2014).

275 *See generally* MODEL PENAL CODE § 2.04(3) (AM. LAW INST. 1962). Knowable law is not a new concept. The American Law Institute, drafters of the Model Penal Code, recognized the importance of statutory clarity in criminal statutes decades ago. Generally, ignorance of the law is no excuse. But, under the Model Penal Code, ignorance of unknowable law *is* a defense to a criminal prosecution. *Id.* Under section 2.04, ignorance of the law is a defense when a statute is not published or made available prior to a person's alleged conduct or when a person:

> acts in reasonable reliance upon an official statement of the law . . . contained in (i) a statute or other enactment; (ii) a judicial decision, opinion or judgment; (iii) an administrative order or grant of permission; or (iv) an official interpretation of the public officer or body charged by law with responsibility for the interpretation, administration or enforcement of the law defining the offense.

Id. The Model Penal Code provision essentially says that a defendant is charged with knowing the law so long as the law is knowable. If a criminal law is not knowable, then a person may claim ignorance of the law as a defense to prosecution. *Id.*

of authority—a judicial opinion or an administrative regulation—resolves the ambiguity, then the statutory question is resolved. With no ambiguity remaining, a defendant could not succeed on a demand for lenity. But if an authoritative and reasonably available source of authority is not available, then the statutory ambiguity is unresolved and a court should apply lenity to protect the defendant's right to fair warning.

For example, in *United States v. Turley*, the Supreme Court construed the meaning of the term "stolen" found in the National Motor Vehicle Theft Act.[276] Rejecting an application of lenity, the Court accepted a broader interpretation of the term and opined that it is "appropriate to consider the purpose of the Act and to gain what light we can from its legislative history."[277] Later, in *Dixson v. United States*, the Court considered whether officers in a private, not-for-profit corporation are "public officials" as defined by the federal bribery statute, 18 U.S.C. § 201(a).[278] Justice Marshall, writing for the majority, admitted that "the language of [the statute] does not decide the dispute. . . . We must turn, therefore, to the legislative history of the federal bribery statute" to clarify Congress's intent.[279] Justice Marshall continued, "[i]f the legislative history fails to clarify the statutory language, our rule of lenity would compel us to construe the statute in favor of . . . criminal defendants . . . ."[280] Declining an appeal to lenity,

---

276 United States v. Turley, 352 U.S. 407, 408 (1957). The statute in question stated, in pertinent part: "Whoever transports in interstate or foreign commerce a motor vehicle, vessel or aircraft, knowing the same to have been stolen, shall be fined . . . or imprisoned not more than five years, or both." *Id.*

277 *Id.* at 412–13.

278 Dixson v. United States, 465 U.S. 482, 484 (1984). The federal bribery statute in question, 18 U.S.C. § 201(a), defines "public official" as "an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof . . . in any official function, under or by authority of any such department, agency, or branch of Government." *Id.* at 490 (alteration in original).

279 *Id.* at 491.

280 *Id.* The *Dixson* Court cites to its decision in *Rewis v. United States* for the proposition that legislative history ought to be used to resolve ambiguous statutory language. *See id.* at 491 (citing Rewis v. United States, 401 U.S. 808, 812 (1971)). The *Rewis* Court construed an ambiguity in the Travel Act, 18 U.S.C. § 1952, and after reviewing the statute's legislative history resolved the ambiguity in favor of the defendant, and then added that "even if the [legislative history and statutory language] were less apparent, ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Rewis*, 401 U.S. at 811–12 (internal citation omitted).

the Court rejected a strict interpretation of the statutory term after discovering favorable legislative history.[281]

In both *Turley* and *Dixson*, legislative history clarified statutory ambiguity, allowing the Court to avoid lenity.[282] Under a reconstructed view of lenity, the Court would avoid a statute's legislative history, because statutory history is neither an authoritative source of substantive law nor is it available to the average person; hence, it is unknowable to the average defendant. Thus, doubt remains as to the scope of the ambiguous statutory terms and lenity ought to apply.

Under the current law of lenity, due process problems also emerge when a court resorts to the canons of statutory construction to resolve statutory ambiguity in a criminal statute. First, it is impossible to predict which canons a court may choose to employ when it endeavors to resolve statutory doubt. Second, it is impossible to predict how much weight a court will give any particular canon of construction. As such, the canons as a class are unknowable to the average criminal defendant. For example, in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, the Court considered whether the Department of the Interior's interpretation of the term "harm" in section 3 of the Endangered Species Act was a permissible construction of the statute.[283] Concluding that it was a permissible construction, the Court employed no less than six tools of statutory construction to reach its conclusion:

---

281 *Dixson*, 465 U.S. at 491–98.

282 *See Turley*, 352 U.S. at 413–17; *Dixson*, 465 U.S. at 491–98.

283 Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 690–92 (1995). Section 9 of the Endangered Species Act makes it unlawful for any person to "*take* any [endangered] species within the United States." *Id.* at 691 (emphasis added) (quoting 16 U.S.C. § 1538(a)(1)(B)). In turn, section 3 of the Act defines "take" as "to harass, *harm*, pursue, hunt, shoot, wound, kill, trap, capture, or collect . . . ." *Id.* (emphasis added) (quoting 16 U.S.C. § 1532(19)). The Department of the Interior defined the statutory term to include both direct and indirect harm to endangered species. *Id.* at 692.

(1) the plain meaning rule;
(2) the rule to avoid surplusage;
(3) statutory purpose;
(4) the whole statute rule;
(5) the golden rule exception; and
(6) legislative history.[284]

Because the Court has declined to attach precedential weight to the application of the canons or to determine each canon's relative weight, it is impossible to know how a court will resolve statutory doubt using the canons.[285] Because a person is unable to predict how a court may resolve statutory ambiguity, lenity ought to apply.

The reconstructed rule of lenity would prevent a court from broadening criminal statutes using traditional tools of statutory construction and applying the court's revealed and clarified statute to the defendant at bar. If a court relies on sources other than knowable law—such as canons of construction or legislative history—to resolve statutory doubt, then the court risks violating the fair notice requirements of due process. A person deciding whether to engage in certain conduct would have no way of discerning a future court's choice of interpretative tools or methodology. Often, a court is tasked with ferreting out Congress's intent buried in a maze of canons and contradictory history. So, while a court may be able to resolve statutory doubt, it is too late to allow the defendant meaningful notice of the crime or penalty. The better approach is to inquire whether a statute was reasonably and objectively clear to the defendant after considering all available and accessible authoritative sources.

A reconstructed rule of lenity no longer favors the separation of powers function of lenity, and it gives real teeth to the fair warning function of the rule. In effect, it expands the fair warning function of lenity but may limit the rule's application to those cases where a court

---

284 *Id.* at 697–98, 700–08. It is worth noting that Justice Scalia, writing for the dissent, employed the plain meaning rule, *noscitur a sociis*, the whole statute rule, the rule to avoid redundancy, and legislative history to conclude the agency's interpretation was not permissible. *Id.* at 717–30 (Scalia, J., dissenting).

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

considers statutory questions of first impression. If a case presents a statutory question not already resolved by an authoritative (and knowable) source, then lenity applies because a defendant could not have known the proscribed conduct or attached penalty. Not only does a reconstructed rule of lenity protect fundamental due process rights to fair warning, but it also guards against retroactive application of new law applied to existing facts.[286] For example, in *Bouie v. City of Columbia*, the Supreme Court considered whether a judicial construction of a criminal trespass statute that broadened the scope of the statutory language violated the Due Process Clause's right to fair warning and, when applied retroactively to the case at bar, violated the Ex Post Facto Clause found in Article I of the U.S. Constitution.[287] Concluding that it did, the Court reversed the defendants' convictions, thus conflating the importance of fair warning with the dangers of retroactivity.[288]

This is not to say that a court ought to ignore the important separation of powers function of the rule of lenity. As first described in *United States v. Wiltberger*, the rule of strict construction guards against judicial encroachment of Congress's law-making authority.[289] When confronted with statutory ambiguity, a court is supposed to glean the intent of Congress and not impose its own view. So, the rule of strict construction or lenity requires a court to choose the narrower construction of a statute when it cannot decipher Congress's intent.[290] But if a court is able to glean the intent of Congress, it should. The resolution of statutory doubt, however, should *not* be applied to the defendant at bar. Justice Brennan, in *Bouie v. City of Columbia*, dealt with this very issue when he ruled that, while a judicial construction of an ambiguous criminal statute "is of course valid for the future, it may not be applied retroactively . . . to impose criminal penalties for conduct

286 *See* Bouie v. City of Columbia, 378 U.S. 347, 350–54 (1964); *see also supra* notes 112–17 and accompanying text.

287 *Bouie*, 378 U.S. at 349, 352–54.

288 *Id.* at 362–63.

289 *See supra* notes 19, 26 and accompanying text; *see also supra* text accompanying notes 22–24.

290 *See Bouie*, 378 U.S. at 350–55 (1964) (holding that an unforeseeable and retroactive expansion of a statute by judicial construction violates a defendant's due process right to fair warning); *see also supra* notes 112–13, 115–16 and text accompanying notes 112–16 (discussing the facts of *Bouie* and the overlap between lenity and Due Process Clause violations with respect to fair notice).

committed at a time when it is not fairly stated to be criminal."[291] A court should resolve statutory doubt but may properly decline to apply the resolved statute to the case at bar to safeguard critical due process rights protected by the rule of lenity.

A reconstructed rule of lenity would respect the two key functions that drive the rule—fair notice and separation of governmental powers. But the fundamental and personal right to fair warning would resume its place alongside the separation of powers factor and no longer play a secondary and trivial role. If a criminal statute is not reasonably clear after considering knowable and authoritative sources such that a person of average intelligence may not be able to discern what conduct is criminal, then a court ought to strictly construe it to protect fair notice and guard against judicial encroachment of a legislative function. For the rule of lenity to mean anything, it must honor its original purpose to secure fundamental notions of liberty found in the Due Process Clause.

CONCLUSION

Lenity was doomed from the start. The rule of lenity purports to serve two important constitutional objectives. First, it serves to preserve the separation of governmental powers. Second, lenity serves the constitutional right of fair warning found in due process. But while the United States Supreme Court purports to uphold both Constitution-based rationales, it routinely favors one over the other. The problem lies in the tension between lenity's two competing functions. When a court resolves statutory doubt by gleaning the intent of the enacting legislature, it preserves the legislature's constitutional role to make law. But when a court resolves statutory doubt, there is no longer a reason to apply lenity. So, the court routinely avoids examining the serious due process questions that lenity is intended to cure.

A reconstructed rule of lenity resolves this tension and restores fair warning to its proper role in the lenity analysis. Here, a court may resolve statutory doubt without regard to lenity if the court employs knowable and authoritative sources—a judicial opinion or an administrative interpretation—to resolve statutory doubt. But when a court employs unknowable sources—legislative history or the canons of

291 *Bouie*, 378 U.S. at 362.

statutory construction—lenity compels a strict application of the statutory term to the defendant in the case while it fully resolves the ambiguity for prospective applications. This view not only honors our long-held understanding of fair warning of crimes and punishment but also guards against retroactive application of criminal statutes. The rule of lenity is the only canon of statutory construction designed to serve two critical constitutional objectives. It is worth preserving, but only if both sides of the lenity equation matter.