THE BETTER PART OF LENITY

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In her thoughtful evaluation of the report titled, *Without Intent: How Congress is Eroding the Criminal Intent Requirement in Federal Law*,[1] Geraldine Moohr explores the contribution of the federal criminal law's diminished *mens rea* requirements to the problem of "overcriminalization." Overcriminalization is a neologism that defies uncontroversial definition, but that generally refers to the unjustified use of the criminal law to punish conduct that is not blameworthy in any traditional sense.[2] This comment expands on Professor Moohr's response to *Without Intent's* recommendation that Congress pass legislation codifying the rule of lenity,[3] a judicial canon of construction applicable specifically to criminal laws, which holds that ambiguous criminal laws should always be construed narrowly, in the manner most favorable to the criminal defendant.[4] Like Professor Moohr, I am concerned that a codified rule of lenity may be interpreted and applied by the courts in a way that could "undermine the goal of the recommendation."[5] The following analysis summarizes the current state of the law and makes some predictions about the likely effect of a codified lenity in order to help those battling the phenomenon of overcriminalization to evaluate the perils and rewards of this particular strategy.

Lenity has been a part of the English common law for several centuries, and was in use long before the ratification of the United States Constitution.[6] The Supreme Court recognized the rule of lenity as a principle of U.S. law as early as 1820 in *United States v. Wiltberger*, where the Court held that a federal statute criminalizing manslaughter "on the high seas" did

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1 *See* BRIAN W. WALSH & TIFFANY M. JOSLYN, WITHOUT INTENT: HOW CONGRESS IS ERODING THE CRIMINAL INTENT REQUIREMENT IN FEDERAL LAW (2010).

2 *See* Geraldine Moohr, *Playing With the Rules: An Effort to Strengthen the* Mens Rea *Standards of Federal Criminal Law*, 7 J.L. ECON. & POL'Y 685, 686 (2011).

3 *See* WALSH & JOSLYN, *supra* note 1, at 28.

4 *See* 3 NORMAN J. SINGER & J.D. SHAMBIE SINGER, STATUTES AND STATUTORY CONSTRUCTION § 59:3 at 167 (7th ed. 2007) ("[P]enal statutes should be strictly construed against the government . . . .").

5 Moohr, *supra* note 2, at 707.

6 *See* John Calvin Jefferies, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 198 (1985). *See also* United States v. Wiltberger, 18 U.S. 76, 95 (1820) ("The rule that penal laws are to be construed strictly is perhaps not much less old than construction itself.").

not apply to manslaughter committed on an American vessel in an inland Chinese river way.[7]

Jurists and scholars advance two traditional justifications for the rule of lenity. The oldest justification for the rule, predating the American Revolution, is that the criminal law should provide fair notice to citizens of what behavior it will punish.[8] Because of the grave consequences of a criminal conviction, "the law-making body owes a duty to citizens and subjects of making unmistakably clear those acts for the commission of which the citizen may lose his life or liberty."[9] Where the legislature has instead been ambiguous, the rule of lenity ensures fair notice by adopting a narrow interpretation of the statutory language.[10]

The other frequently invoked justification for the rule of lenity is that it prevents judicial usurpation of the legislative power to determine what conduct is criminal.[11] In this capacity, Cass Sunstein explains, it is a kind of non-delegation doctrine: "One function of the lenity principle is to ensure against delegations [of the lawmaking authority to the judicial branch]. Criminal law must be a product of a clear judgment on Congress's part."[12] In the absence of such a clear judgment, a broad interpretation of an ambiguous criminal statute raises the "fear that expansive judicial interpretations will create penalties not originally intended by the legislature."[13]

Lenity is only one of many canons of construction that judges traditionally use when interpreting statutory law. The canons can be very

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7 *Id.* at 95-96, 103. *See also* Lawrence M. Solan, *Law, Language, and Lenity*, 40 WM. & MARY L. REV. 57, 91 (1998).

8 *See* Hari M. Osofsky, *Domesticating International Criminal Law: Bringing Human Rights Violators to Justice,* 107 YALE L.J. 191, 202 (1997).

9 Snitkin v. United States, 265 F. 489, 494 (7th Cir. 1920).

10 Lenity performs this function well enough when the conduct criminalized by one plausible reading of the statute is a wholly included subset of the conduct criminalized by the alternative reading, but it doesn't provide clear guidance on how a court should interpret a statute with multiple plausible meanings, each of which would make criminal some conduct that would be innocent under an alternative reading. The Court faced this problem in *Skilling v. United States* when interpreting the so-called "honest services fraud" statute. 130 S. Ct. 2896 (2010). The majority, invoking lenity, construed the statute to cover only the conduct prohibited by all plausible interpretations of the law. *See id.* at 2930-31. Justice Scalia, while concurring in the judgment, strongly objected to this approach:

> [I]t is obvious that mere prohibition of bribery and kickbacks was not the intent of the statute. To say that bribery and kickbacks represented "the core" of the doctrine, or that most cases applying the doctrine involved those offenses, is not to say that they *are* the doctrine. All it proves is that the multifarious versions of the doctrine *overlap* with regard to those offenses. . . . Among all the [interpretations] of honest-services fraud, not one is limited to bribery and kickbacks. That is a dish the Court has cooked up all on its own.

Id. at 2939 (Scalia, J., concurring).

11 Ratzlaf v. United States, 510 U.S. 135, 148-49 (1994) (citing United States v. Bass, 404 U.S. 336, 347-350 (1971)).

12 Cass Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 332 (2000).

13 3 SINGER & SINGER, *supra* note 4, § 59:4, at 190 .

roughly divided into two main groups: "language canons" and "substantive canons."[14] Language canons help judges discern the objective meaning (for textualists) or intended meaning (for intentionalists) of the statutory text.[15] "The rule of the last antecedent," or the rule that a more specific statutory provision should, if applicable, take precedence over a conflicting general provision, is a good example of a language cannon. By contrast, substantive canons do not necessarily help judges to discover legislative intent, although they are often couched in terms of "presumptions" about it.[16] Rather, they resolve ambiguities in favor of certain constitutional or public policy values.[17]

The rule of lenity is a substantive canon that resolves statutory ambiguities in favor of protecting constitutional rights from potential legislative or judicial incursion.[18] One of lenity's justifications, the provision of fair notice to citizens about the content of the criminal law, is "rooted in fundamental principles of due process . . . ."[19] The other justification—that only the legislature is constitutionally empowered to decide what conduct is criminal—is grounded in separation of powers doctrine.[20]

At this point, one might reasonably ask: what on earth does it mean for a judicial canon of construction to be rooted or grounded or "in the shad-

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14 *See* James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1, 12 (2005). Jacob Scott has also created a helpful taxonomy of canons. *See generally* Jacob Scott, *Codified Canons and the Common Law of Interpretation*, 98 GEO. L.J. 341 (2010).

15 *See* Brudney & Ditslear, *supra* note 14, at 12-13. Examples include the rule of last antecedent, which limits the effect of a proviso to the clause that immediately precedes it, and the rule that a more specific statutory provision should, if applicable, take precedence over a conflicting general provision. *See* [2A] SINGER & SINGER, *supra* note 4, § 47:33. *Cf.* United States v. Hayes, 129 S. Ct. 1079, 1086 (2009) (declining to apply the rule of the last antecedent because it is "not an absolute," but can be overcome by other evidence of meaning (quoting Barnhart v. Thomas, 540 U.S. 20, 26 (2003))).

16 *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 27 (Amy Gutmann ed., 1997).

17 *See* Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 113-14 (2010); *see also* YULE KIM, CONG. RESEARCH SERV., 97-589, STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS CRS-17 (2008). For example, the canon that an ambiguous statute should be construed in a way that promotes a public interest rather than a private one is not a method of determining which interpretation is more objectively correct or truer to Congressional intent. Rather, it places a judicial thumb on the scale in favor of a particular public policy. Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 226, 252 (1986). The canon that ambiguous statutes should be construed not to apply retroactively is similarly grounded in constitutional considerations rather than epistemic ones. KIM, *supra* note 17, at 20-21.

18 *See* Scott, *supra* note 14, at n.267.

19 Dunn v. United States, 442 U.S. 100, 112 (1979).

20 1 SINGER & SINGER, *supra* note 4, § 4:6, at 149-50 ("The doctrine of separation of powers does not permit a legislature to abdicate its function by passing statutes which operate at the discretion of the courts, or under which courts are allowed to determine conditions in which the statute will be enforced.").

ow" of the constitution?[21] Canons grounded in the Constitution are essentially specific applications of the more general judicial canon of constitutional avoidance,[22] which holds that courts should avoid unnecessarily addressing constitutional issues in cases that can be resolved by other means.[23] In the context of statutory construction, if one interpretation of a statute will raise grave constitutional questions, while another will not, courts usually choose the interpretation that avoids raising the constitutional question.[24] Supporters of constitutional avoidance view it as an exercise in judicial restraint: if a court is faced with a choice between narrowly construing a statute and striking it down entirely, choosing the narrow construction preserves as much of the legislature's policy as possible, thereby deferring to it's lawmaking prerogative.[25]

Jurists widely accept the validity of most common canons of construction, but there is much less agreement about when and how they should be deployed. In practice, the multiplicity of available canons and lack of consensus about the roles they play in the overall scheme of statutory interpretation afford individual judges wide latitude with respect to their use.[26] This does not mean that the judiciary should abandon the canons; in their absence, judges would have to resolve the inevitable ambiguities in statutory law with even less guidance. It does mean, however, that careful analysis of the purposes of different canons, and their relationship to each other and to the constitutional system, could yield a substantially more coherent and predictable interpretive methodology than we have today.

While judges almost universally acknowledge lenity as a valid canon, the case law reflects two major competing views about when the rule comes into play to resolve a statutory ambiguity. The current majority view might

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21 Scott, *supra* note 14, at 389.

22 *See* William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 600 (1992).

23 *See* Ashwander v. TN Valley Auth., 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). Some scholars have criticized the avoidance canon as hostile to congressional intent. *See* Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1573-1601 (2000).

24 *See* Skilling v. United States, 130 S. Ct. 2896, 2929 (2010) ("The elementary rule is that *every reasonable construction* must be resorted to, in order to save a statute from unconstitutionality." (quoting Hooper v. California, 155 U.S. 648, 657 (1895))).

25 The canonical presumption in favor of the severability of unconstitutional provisions in larger statutory schemes has a similar rationale. *See* 2 SINGER & SINGER, *supra* note 4, § 44:1, at 580-81 ("Courts recognize a duty to sustain an act whenever this may be done by proper construction, and extend the duty to include the obligation to uphold part of an act which is separable from other and repugnant provisions.").

26 Some scholars even suggest that judges make use of this latitude to advance their preferred public policies through opportunistic use of the canons. *See*, *e.g.* Jonathan R. Macy & Geoffrey P. Miller, *The Canons of Construction and Judicial Preferences*, 45 VAND. L. REV. 647, 660 (1992).

appropriately be called the "lenity last" view.[27] Lenity should be used, on this account, only when "a reasonable doubt persists about a statute's intended scope even *after* resort to 'the language and structure, legislative history, and motivating policies' of the statute."[28] "Lenity last" is a seldom used, last ditch tiebreaker, invoked only when every other clue to the legislature's intent has been examined without success.

On the competing minority view, lenity should apply immediately if the statutory text alone, interpreted with the aid of the language canons, fails to yield a single clear meaning. Justice Scalia is the most prominent champion of this "lenity first" approach, in part because his textualist judicial philosophy holds that lawmakers' intentions have no legal force unless they are plainly expressed in the language of statutes that have passed by a constitutionally adequate vote. If textualism is correct, then "lenity first" is obviously the right methodological approach, because it is improper to consider extrinsic evidence of legislative intent anyway.

But one need not be a textualist to embrace "lenity first." Some nontextualists view "lenity first" as a good way to protect criminal defendants' constitutional right to fair notice of the content of the criminal law.[29] For example, Justice Kennedy sometimes consults legislative history when interpreting civil law, but in criminal cases he joins opinions that justify the "lenity first" approach on due process grounds.[30]

In light of all of this, what exactly will change if Congress passes a statute codifying the rule of lenity? More specifically, can we expect a codified rule of lenity to combat the problem of overcriminalization more effectively than the current judicial canon alone? The answers to these questions, as Professor Moohr warns, are more uncertain than proponents of codification have acknowledged.

The uncertainty arises because Congress can't comprehensively regulate via statute the judicial activity of interpreting statutes. This is no mere

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[27] *See* 3 SINGER & SINGER, *supra* note 4, § 59:4, at 188-89 ("The rule [of lenity] comes into operation at the end of the process of construing what Congress has expressed, not at the beginning . . . .").

[28] United States v. R.L.C., 503 U.S. 291, 305-06 (1992) (quoting Moskal v. United States, 498 U.S. 103, 108 (1990)).

[29] Justice Scalia also regularly invokes due process in support of the "lenity first" approach. *See id.* at 309 (Scalia, J., concurring) ("It may well be true that in most cases the proposition that the words of the United States Code or the Statutes at Large give adequate notice to the citizen is something of a fiction, albeit one required in any system of law; necessary fiction descends to needless farce when the public is charged even with knowledge of Committee Reports." (citation omitted)).

[30] *See, e.g.*, Nat'l Cable & Telecomm. Ass'n v. Gulf Power, Inc., 534 U.S. 327, 358-59, 360 (2002) (consulting legislative history to determine the Federal Communications Commission's powers over broadband internet and cable). *See also R.L.C.*, 503 U.S. at 307 (Scalia, J., concurring, joined by Kennedy, J. & Thomas, J.) (joining Justice Scalia's opinion which applied the "lenity first" approach).

constitutional difficulty;[31] it is a theoretical impossibility.[32] If the current Congress codifies the rule of lenity, the courts will then have to interpret the new lenity statute and reconcile it with potentially conflicting language in other statutes by using their own judicial canons of interpretation. Because Congress cannot take over the judicial task of statutory interpretation, even if it would like to do so, judges will treat codified canons as additional grist for the mill of judicial interpretation, rather than as literal instructions to the judiciary about how to do its job.

In the worst-case scenario for overcriminalization's opponents, codifying lenity would have the perverse effect of solidifying the current majority view that lenity is a last resort in the game of statutory interpretation. Judges already committed to the more popular "lenity last" view would interpret a new statutory lenity in accordance with the judicial canon of common law usage, according to which, when the legislature employs words or concepts with well-settled common law meanings, courts should assume that it intends the words to mean what they do at common law.[33] Despite occasional vigorous dissents[34] and concurrences[35] arguing against it, the "lenity last" view has generally prevailed in recent Supreme Court cases.[36] It would be a pyrrhic victory for the forces arrayed against overcriminalization if, by persuading Congress to codify lenity, Congress placed the legislative imprimatur on its most impotent iteration. We already have "lenity last." What advocates of codification really want to do is to replace "lenity last" with "lenity first."

But, for better or worse, Congress probably lacks the constitutional authority pass a law requiring judges to adopt "lenity first." Such a law would have to instruct judges not to consider legislative history or other available extrinsic evidence of legislative intent when interpreting criminal statutes. Congress could try announcing, by statute, that such evidence does not re-

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31 Constitutional objections are at least plausible. *See* Scott, *supra* note 14, at 410 (raising the possibility that "legislative control over judicial interpretive methodology is unconstitutional. The claim here would be that statutory interpretive rules impermissibly intrude on the judicial power . . . .").

32 Immanuel Kant (Paul Guyer, Allen Wood ed.), Critique of Pure Reason, Cambridge University Press, 1998, p. 268 "[T]o show generally how one ought to subsume under these rules, i.e., distinguish whether something stands under them or not, this could not happen except once again through a rule. But just because this is a rule, it would demand another instruction for the power of judgment, and so it becomes clear that although the understanding is certainly capable of being instructed and equipped through rules, the power of judgment is a special talent that cannot be taught but only practiced."

33 Scott, *supra* note 14, tbl. 11.

34 *See, e.g.*, United States v. Hayes, 129 S. Ct. 1079, 1093 (2009) (Roberts, J., dissenting) ("If the rule of lenity means anything, it is that an individual should not go to jail for failing to conduct a 50-state survey or comb through obscure legislative history.").

35 *See, e.g.*, *R.L.C.*, 112 S. Ct. at 1339 (Scalia, J., concurring).

36 *See, e.g.*, United States v. Granderson, 511 U.S. 39, 54 (1994) ("In these circumstances—where text, structure, and [legislative] history fail to establish that the Government's position is unambiguously correct—we apply the rule of lenity and resolve the ambiguity in [the defendant's] favor."). *See also* Dean v. United States, 129 S. Ct. 1849, 1856 (2009); *Hayes*, 129 S. Ct. at 1088-89.

flect its intent. But this would not really be an empirical claim about the relationship between the contents of committee reports and the contents of the minds of members of Congress; it would be a legal claim about what kind of legislative intent the Constitution requires, and the judiciary remains the final authority on questions of constitutional law.[37] Similarly, if the "lenity last" majority on the bench does not think that due process requires the text of criminal statutes alone to provide fair warning to citizens, then Congress cannot tell them otherwise.

Still, a carefully drafted statute indicating that ambiguous language in criminal laws is intended in its narrower sense might navigate successfully between the Scylla of impotence and the Charybdis of unconstitutionality. If it did, the result would be something that must inartfully be called "lenity in-the-middle." In this scenario, the new statutory lenity would just be additional textual evidence of legislative intent (or statutory meaning, for textualists), to be thrown in the mix with all the rest. For this reason, "lenity in-the-middle" would have a less sweeping and permanent effect on the law than reformers might hope. Its reach could be limited by court decisions that reconcile it with contrary language elsewhere in the criminal code, such as the specific instruction in the text of the Racketeer Influenced and Corrupt Organizations Act (RICO) directing that it be liberally construed.[38] According to the canon that specific congressional directives generally prevail over more general ones, the instruction in RICO could trump the lenity statute.[39] Future Congresses, whose members usually wish to appear tough on crime, might routinely include RICO-like language in future criminal laws. Contrary instructions in future criminal laws might also take precedence on the basis of the canon that newer statutes impliedly repeal or limit the reach of inconsistent older ones.[40] And, of course, Congress would be free to repeal statutory lenity on the heels of some unpopular future court decision.

In the best case scenario, the judiciary would respond to the codification of lenity by recognizing two rules of lenity instead of one: the new statutory lenity would guide inquiries into legislative intent in the limited way described above, and the old judicial canon would protect due process rights and police the separation of powers. If competently pursued, this approach would result in marginally greater protection for criminal defendants; they would retain whatever constitutional protection the judicial canon

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37 *See* Marbury v. Madison, 5 U.S. 137, 177-78 (1803); United States v. Klein, 80 U.S. 128, 147 (1871).

38 *See* Pub. L. No. 91-452 § 904(a), 84 Stat. 922 (1970) ("The provisions of this title . . . shall be liberally construed to effectuate its remedial purposes.") (codified as amended at 18 U.S.C. § 1961-68 (2006)).

39 *See* Scott, *supra* note 14, at 366.

40 *See, e.g.*, Credit Suisse v. Billing, 551 U.S. 264, 279 (2007) (holding that new federal statutes regulating securities had impliedly repealed inconsistent provisions in older antitrust legislation).

currently provides and receive an additional boost from statutory lenity's status as evidence of congressional intent. I am concerned, however, that it is unrealistic to expect judges and criminal defense lawyers to regularly juggle two lenities for only marginal benefit. If they failed to do so, the new statutory lenity might cause the old judicial canon of lenity to fall even further by the wayside.

This would be an unfortunate and unintended outcome for the authors of *Without Intent*. For them, "the tenderness of the law for the rights of individuals" is the better part of lenity.[41] Because this part of lenity is rooted in constitutional due process principles, its renaissance must take place within the court system itself.

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