COLLAR CORRECTION FOR LENITY: MODIFYING THE RULE OF LENITY TO PROMOTE MORE EQUITABLE APPLICATION TO WHITE-COLLAR AND BLUE-COLLAR DEFENDANTS

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INTRODUCTION

Centuries ago in England, when most crimes were punishable by death, judges—aware of the unfairness of this system—construed penal statutes narrowly.[1] This was "to stem the march to the gallows" and to protect citizens from this overly harsh regime.[2] From these harsh origins arose the rule of lenity, which instructs that when the scope of a criminal statute is ambiguous, courts should select the less harsh—i.e., more lenient—interpretation of the statute.[3] This principle can serve constitutional functions: lenity safeguards due process by ensuring that the public has fair notice about the reach of criminal laws, and it safeguards separation of powers by limiting the punishment power to the legislature, rather than the judiciary.[4]

But the modern rule of lenity is applied inconsistently and unevenly. In courts, including the Supreme Court,[5] and in the legal academy,[6] the debate about how to apply lenity is a live one, based largely on disagreement about the level of statutory ambiguity required to trigger lenity.[7] Several leading scholars have identified that the Supreme Court has repeatedly applied the rule of lenity to protect white-collar defendants while declining to apply the rule to protect those convicted of blue-collar crimes.[8] This "suggests something of a white-collar/blue-collar class distinction in the [lenity] doctrine as applied."[9]

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

2. *See id.*

3. *See* United States v. Bass, 404 U.S. 336, 347 (1971) ("[A]mbiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." (quoting Rewis v. United States, 401 U.S. 808, 812 (1971))).

4. *See* Wooden v. United States, 142 S. Ct. 1063, 1083 (2022) (Gorsuch, J., concurring).

5. Supreme Court Justices have expressed their disagreement about when to apply lenity in recent cases, including 2022's *Wooden v. United States*. *Compare id.* (Gorsuch, J., concurring) *and id.* at 1075 (Sotomayor, J., concurring) (finding lenity applicable), *with id.* at 1076 (Kavanaugh, J., concurring) (presenting a different "trigger" for lenity and arguing lenity should rarely apply). As recently as the 2023–2024 term, the Court recognized "two grammatically permissible readings" of a sentencing statute but rejected the defendant's call for lenity because it found that the language at issue was not "genuinely ambiguous." *See* Pulsifer v. United States, 144 S. Ct. 733, 737 (2024). In that case, too, Justice Gorsuch would have applied lenity, on the basis of a "reasonable doubt" about which reading was better. *See id.* at 755–56 (Gorsuch, J., dissenting).

6. *See infra* Part I.B.2 for a brief discussion of scholars' varying proposals for how to change lenity.

7. *See* David S. Romantz, *Reconstructing the Rule of Lenity*, 40 CARDOZO L. REV. 523, 567 (2018). Professor Romantz notes that "the real question is 'how much ambigu[ity] constitutes . . . ambiguity'?" *Id.* (alteration in original) (quoting Moskal v. United States, 498 U.S. 103, 108 (1990)). Romantz identifies nine tests that the Supreme Court has used to assess whether lenity may apply. *See id.*

8. *See* WILLIAM N. ESKRIDGE, JR., JAMES J. BRUDNEY & JOSH CHAFETZ, LEGISLATION AND STATUTORY INTERPRETATION 317–18 (3d ed. 2022).

9. *Id.*

This Essay picks up the baton from those scholars to examine how the modern Supreme Court applies—or declines to apply—lenity in cases involving white-collar and blue-collar crimes (sometimes called "street crimes"). In a selection of cases from 1990 to the present, discussed herein, the Supreme Court indeed has been more likely than not to invoke lenity in favor of white-collar defendants and reject arguments for lenity from blue-collar defendants.[10] This Essay argues that the lack of clarity around the rule of lenity may permit judicial bias to play an outsized role in its application. This Essay then argues for a shift to a modified version of lenity to guard against this "class distinction" and uphold lenity's constitutional functions.

I. THE RISE AND FALL OF LENITY: FROM A SHIELD AGAINST DEATH TO AN INCONSISTENT AND CONTROVERSIAL INTERPRETIVE CONSIDERATION

Part I.A of this Essay traces the history of lenity from its origins as a bulwark against a harsh criminal regime in England, to its U.S. constitutional functions, to its diminution since the mid-twentieth century. Part I.B then presents the modern variety in application of the rule and discusses some scholarly suggestions for strengthening lenity.

A. The History of Lenity

Lenity's origins trace back hundreds of years to England, where courts sought to protect defendants against the Crown's harsh punishments.[11] In the thirteenth century, many crimes (even nonviolent ones) were punishable by death; courts extended "the benefit of clergy" to protect clergymen from the capital punishments of common law courts by sending them to ecclesiastical courts.[12] As the number of capital crimes expanded, courts extended this benefit—for example, to laypeople who could read—but Parliament responded by statutorily excluding crimes from the benefit of clergy.[13]

In this harshly punitive environment, "judges invented strict construction to stem the march to the gallows."[14] In dealing with "trivial" offenses punishable by death, courts interpreted statutes remarkably narrowly—for example, reading the theft of one horse or the "theft of a colt" as outside the scope of a statute prohibiting "stealing horses."[15] Although this doctrine of strict construction served to protect English citizens from the death penalty,

10. *See generally infra* Part II.

11. *See* Romantz, *supra* note 7, at 526.

12. *See* Phillip M. Spector, *The Sentencing Rule of Lenity*, 33 U. TOL. L. REV. 511, 514–15 (2002) (citing Jerome Hall, THEFT, LAW, AND SOCIETY 68 (1935) and Sir James Fitzjames Stephen, 1 A HISTORY OF THE CRIMINAL LAW OF ENGLAND 459 (1883)).

13. *See* SIR JOHN SPELMAN, THE REPORTS OF SIR JOHN SPELMAN VOL. 2, 327–34 (J.H. BAKER ED. 1978) (94 Selden Soc'y) (discussing the expansion of the benefit of clergy and the reaction against it by King Henry VIII and the sixteenth century Parliament); Spector, *supra* note 12, at 515–16.

14. *See* Jeffries, *supra* note 1, at 198.

15. *See* Spector, *supra* note 12, at 518 (first citing 2 & 3 Edw. 6, cl. 33 (1548); then citing Rex v. Henry Beaney, 168 Eng. Rep. 874 (1820)).

Professor Philip M. Spector describes this practice as more of "a heroic act of mercy than a credible work of statutory interpretation."[16]

In the early nineteenth century, the U.S. Supreme Court adopted the rule of strict construction—also known as the rule of lenity[17]—and identified its constitutional basis and functions.[18] In 1820, Chief Justice John Marshall described "the well known rule that . . . a penal statute . . . is to be construed strictly."[19] As Professor David S. Romantz points out, Chief Justice Marshall introduced constitutional grounding for the rule distinct from the British version.[20] Under Chief Justice Marshall's conception, the rule "is founded on the tenderness of the law for the rights of individuals"—i.e., due process—"and on the plain principle that the power of punishment is vested in the legislative, not the judicial department"—i.e., separation of powers.[21]

The historical version of the rule of strict construction placed lenity earlier in the statutory interpretation sequence than it is today, such that courts consulted fewer sources of meaning to try to resolve ambiguity before turning to lenity.[22] Under the historical version of the rule, if "the statutory text, linguistic canons, and structure" still left a "reasonable doubt about the statute's meaning," courts would apply lenity—without looking to statutory purpose or legislative history.[23]

By the mid-twentieth century, the Supreme Court began moving the rule of lenity to the end of the statutory interpretation process. Justice Felix Frankfurter advocated consulting every possible source of meaning—"seiz[ing] every thing from which aid can be derived"—before looking to lenity.[24] As Professor Shon Hopwood points out, Justice Frankfurter reinforced this shift and new test in the 1961 decision *Callanan v. United States*[25] by describing lenity as belonging "at the end of the process of construing what Congress has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers."[26] The Court has continued to weaken the rule since then, applying various triggers to determine when to apply lenity.[27]

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16. *See id.* at 519.
17. *See* Jeffries, *supra* note 2, at 198.
18. *See* Romantz, *supra* note 7, at 527–28 (discussing United States v. Sheldon, 15 U.S. 119 (1817) and United States v. Wiltberger, 18 U.S. 76 (1820)).
19. *See Wiltberger*, 18 U.S. at 94; *see also* Romantz, *supra* note 7, at 527–28.
20. *See* Romantz, *supra* note 7, at 528.
21. *See Wiltberger*, 18 U.S. at 95; *see also* Romantz, *supra* note 7, at 528 (identifying this "dual purpose of lenity").
22. *See* Shon Hopwood, *Restoring the Historical Rule of Lenity as a Canon*, 95 N.Y.U. L. REV. 918, 927–28 (2020) (citation omitted).
23. *See id.*
24. *See* United States v. Universal C.I.T. Credit Corp., 344 U.S. 218, 221–22 (1952) (quoting United States v. Fisher, 6 U.S. 358, 386 (1805)); *see also* Romantz, *supra* note 7, at 536–37 (discussing *Universal C.I.T.* and quoting the same language).
25. 364 U.S. 587 (1961).
26. *See* Hopwood, *supra* note 22, at 928 (quoting *Callanan*, 364 U.S. at 596).
27. *See id.* at 929–30.

B. When Does Lenity Apply? The Wide-Ranging Triggers That Courts Employ

1. Modern Judicial Variety in Applying Lenity

Today, courts vary significantly in the level of statutory ambiguity they require before turning to lenity; as discussed in Part II, the lack of clarity and consistency in applying the rule may permit judicial predispositions to play an outsized role in criminal cases.

The variation in when lenity may apply flows from two related elements: (1) the degree of ambiguity courts require before turning to lenity and (2) lenity's place in the statutory interpretation sequence.[28] Requiring more ambiguity or placing lenity closer to the end of the interpretive sequence—i.e., after most or all other interpretive tools are applied—reduces the chance that lenity can play a role.[29] As Professor Romantz argues, this reduces the opportunities for lenity to serve its fair notice function.[30]

In terms of interpretive sequence, scholars note that lenity may come "dead last," after all other tools, as is the modern trend.[31] Or, as Justice Antonin Scalia advocated, lenity may come second, after judges consult plain text but before they look to other tools.[32]

For courts assessing what degree of ambiguity is required to trigger lenity, "grievous ambiguity" appears to be the strictest standard.[33] This term dates back to *Huddleston v. United States*,[34] in which the Supreme Court rejected the petitioner's argument for lenity because it "perceive[d] no grievous ambiguity or uncertainty in the language and structure of the [a]ct."[35] As the section below illustrates, courts do not define the term "grievous" when they invoke this trigger despite the modern propensity towards dictionary usage.[36]

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28. Professor James J. Brudney compares a "front-end presumption effectively shaping the interpretive process" to a "mere[] . . . tiebreaker at the back end of that process." *See* James J. Brudney, *Canon Shortfalls and the Virtues of Political Branch Interpretive Assets*, 98 CAL. L. REV. 1199, 1208, 1208 n.64 (2010).

29. *See* Romantz, *supra* note 7, at 569.

30. *See id.*

31. *See* Zachary Price, *The Rule of Lenity as a Rule of Structure*, 72 FORDHAM L. REV. 885, 891 (2004); *see also* Intisar A. Rabb, *The Appellate Rule of Lenity*, 131 HARV. L. REV. F. 179, 189–91 (2018); Maisie A. Wilson, Note, *The Law of Lenity: Enacting a Codified Federal Rule of Lenity*, 70 DUKE L.J. 1663, 1677–81 (2021) (identifying "lenity-last" and "lenity-second" approaches in the case law).

32. *See* Price, *supra* note 31, at 891–93.

33. *See* Huddleston v. United States, 415 U.S. 814, 831 (1974) (applying the "grievous ambiguity" standard); *see also* Shon Hopwood, *Clarity in Criminal Law*, 54 AM. CRIM. L. REV. 695, 739 (2017) (describing "grievous ambiguity" as the most "stringent" of the lenity triggers (quoting *Huddleston*, 415 U.S. at 831)). Professor Hopwood places the triggers on a spectrum, from grievous ambiguity on the strictest end to "requir[ing] Congress to have spoken in 'language that is clear and definite'" before choosing the harsher of two readings on the other end. *See id.* (quoting Cleveland v. United States, 531 U.S. 12, 25 (2000)).

34. 415 U.S. 814 (1974).

35. *See id.* at 831.

36. *See, e.g.*, Jeffrey L. Kirchmeier & Samuel A. Thumma, *Scaling the Lexicon Fortress: The United States Supreme Court's Use of Dictionaries in the Twenty-First Century*, 94

Another version—perhaps at the opposite end of the spectrum from grievous ambiguity[37]—is that courts will require "clear and definite language" from Congress to choose the harsher of two readings of a statute.[38] In other words, courts require clear language from Congress in order *not* to invoke lenity. Other non-"grievous" standards for invoking lenity include 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."[39] Courts may also reject a harsher interpretation "when such an interpretation can be based on *no more than a guess* as to what Congress intended."[40]

2. Scholars' Suggestions for a Stronger Version of Lenity

Among scholars who advocate for more permissive application of the rule,[41] there is disagreement on the cutoff point for looking at potential sources of meaning.[42] Courts before the 1950s applied a stronger version of lenity, applying the rule earlier in the interpretive sequence and with a lower bar for finding ambiguity.[43] Professor Shon Hopwood argues for a return to this historical rule, in which lenity is applied "if reasonable doubts remain" after consulting "the text, linguistic canons, and the structure of the statute."[44] Hopwood notes that such a rule would serve ends including "democratic accountability," "individual liberty," and "fair warning."[45] Because this rule would prohibit courts from considering purpose or legislative history, it aligns with modern textualism and alleviates the fair notice concerns that using legislative history presents.[46] Professor Romantz advocates a version of lenity that would permit courts to resolve ambiguity by consulting the text and "knowable law" but not interpretive canons or legislative history.[47]

MARQ. L. REV. 77, 85–86 (2010) (noting that the Supreme Court's use of dictionaries in its opinions in the 1990s and 2000s reached the "highest rates . . . in its history").

37. *See supra* note 33.

38. *See* Cleveland v. United States, 531 U.S. 12, 25 (2000) ("[W]e think 'it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite.'" (quoting United States v. Universal C.I.T. Credit Corp., 344 U.S. 218, 222 (1952))).

39. *See* United States v. Villanueva-Sotelo, 515 F.3d 1234, 1246 (D.C. Cir. 2008) (emphasis added) (quoting Moskal v. United States, 498 U.S. 103, 108 (1990)).

40. *See id.* (emphasis added) (quoting Ladner v. United States, 358 U.S. 169, 178 (1958)).

41. To be sure, not all scholars support a stronger version of the rule; some even suggest abandoning lenity entirely. *See, e.g.*, Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 S. CT. REV. 345, 396–97 (1995) (suggesting abolishing lenity, in part to facilitate limited judicial "criminal lawmaking power").

42. A comparative analysis of scholarly proposals for changing the rule of lenity is beyond the scope of this Essay. However, some discussion is necessary for grounding my own proposal, which is indebted to the scholarly work on the subject.

43. *See supra* notes 20-25 and accompanying text.

44. *See* Hopwood, *supra* note 22, at 921.

45. *See id.*

46. *See id.* at 934–36.

47. *See* Romantz, *supra* note 7, at 571, 574. Romantz defines knowable law as "the aggregate of published, authoritative, substantive legal principles, rules, and standards,"

Romantz argues that if a criminal statute is not "reasonably clear" and "reasonably understand[able]" to ordinary people, then lenity must apply.[48] Romantz's proposal emphasizes fair notice concerns; he argues that relying on sources of meaning beyond "knowable law" would fail to provide the fair notice that Due Process requires.[49] Romantz acknowledges that "ignorance of the law is no excuse," but points to the Model Penal Code for the idea that "act[ing] in reasonable reliance upon an official statement of the law" can be a defense.[50]

The inconsistent and undisciplined use of lenity is not just concerning because of the general idea that any one individual might be denied due process by a statute too ambiguous to provide fair notice. It is also concerning in the applied aggregate, wherein one class of defendants gets a different process than another class. Part II examines a set of Supreme Court cases indicating that the modern version of lenity can generate precisely such results.

II. LENITY AS APPLIED TO WHITE- AND BLUE-COLLAR CRIMES: A PROBLEMATIC INCONSISTENCY

To narrow the scope of analysis and allow for more direct comparison, this Essay focuses on theft-related crimes, such as fraud in the white-collar context and burglary in the blue-collar context. Comparing the application of lenity to such crimes reveals a judicial willingness to apply lenity in the white-collar context that is not extended to blue-collar defendants. Part I.A discusses research about potential judicial predispositions. Part II.B presents several white- and blue-collar criminal cases in which the Supreme Court has invoked or rejected the rule of lenity. Part III.C analyzes the Court's varying approaches to lenity in these cases.

A. Judges May Not Approach Defendants' Backgrounds with a Blank Slate

Empirical research suggests some relationship between a judge's liberal or conservative status and their attitude toward white-collar crime. In a survey of white-collar cases between 1971 and 1994 conducted by Professor J. Kelly Strader, some conservative Justices appeared significantly more likely to side with the defendant in white-collar cases than in non-white-collar cases.[51] Others were only slightly more likely to do so, or showed no difference at

including "enacted law, judicial law, administrative rules and orders, official interpretations of law, and any other published source of authority." *Id.* at 571.

48. *See id.*

49. *See id.* at 570–71 (quoting Bouie v. City of Columbia, 378 U.S. 347, 350 (1964)) (noting that the Due Process Clause requires "that a criminal statute must give fair warning of the conduct that it makes a crime").

50. *See id.* at 571 n.275 (quoting MODEL PENAL CODE § 2.04(3)(b) (AM. L. INST. 1962)).

51. *See* J. Kelly Strader, *The Judicial Politics of White Collar Crime*, 50 HASTINGS L.J. 1199, 1230 (1999) (noting that Justice Scalia and Justice William H. Rehnquist were respectively 10.86 and 6.10 times more likely to side with a white-collar defendant than a non-white-collar defendant).

all.[52] Liberal Justices, on the other hand, ranged from being slightly (0.47 times for Justice John Paul Stevens) to fairly significantly (6.67 times for Justice Thurgood Marshall) more likely to side with the government in white-collar than non-white-collar cases.[53]

As Professor Strader argues, even though white-collar crimes arguably cause more actual harm than blue-collar crime, the lack of "physical harm" in white-collar cases may inform why conservative Justices depart from "their usual law-enforcement biases."[54] At the same time, liberal Justices may view white-collar defendants' abuses of power and privilege as reducing the need for the Court to check prosecutorial power.[55] Strader states that "liberal justices . . . are inclined to view non-violent crimes far more seriously than conservatives."[56] Some prosecutors may take a view that is similarly lenient to that of conservatives regarding white-collar crime.[57] For instance, in 93 percent of the 1,242 cases the Occupational Safety and Health Administration (OSHA) investigated from 1982 to 2002 in which employers' "'willful' safety violations" caused worker deaths, OSHA opted not to prosecute.[58] These predispositions may relate to the differences among the Justices in their willingness to apply lenity to white-collar defendants as compared to blue-collar defendants.

B. White- Versus Blue-Collar Crime

This section compares the Court's approaches to ambiguity in a selection of white- and blue-collar criminal cases. Part II.B.1 examines the white-collar cases, in which the Court tends to welcome lenity as additional support for its reading. Part II.B.2 discusses several blue-collar cases, in which the Court tends to reject defendants' calls for lenity. Perhaps unsurprisingly, the triggers for ambiguity vary in these cases.

1. The Court's Lenity Toward White-Collar Defendants

In the white-collar context, the Supreme Court tends to counter the government's proposed broad readings of criminal statutes first by turning to other interpretive principles—for example, to federalism or something approaching a clear statement rule.[59] The Court then turns to lenity as additional support for its narrower reading; although lenity does not operate as a presumption, the Court looks to it as a well-established principle that can bolster an argument.

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52. *Id.* at 1215, 1230.
53. *Id.* at 1230.
54. *Id.* at 1267.
55. *See id.* at 1267–68.
56. *Id.* at 1268.
57. *See* Stuart P. Green, *Moral Ambiguity in White Collar Criminal Law*, 18 NOTRE DAME J.L. ETHICS & PUB. POL'Y 501, 516 (2004).
58. *See id.*
59. *See, e.g.*, Cleveland v. United States, 531 U.S. 12, 24–25 (2000) (rejecting a proposed broad reading of the relevant statute that lacked a clear congressional directive).

In the 2000 mail fraud case *Cleveland v. United States*,[60] the Court addressed whether the federal mail fraud statute, 18 U.S.C. § 1341, "reaches false statements made in an application for a state license."[61] Section 1341[62] prohibits the use of mail for "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises."[63] The defendants were convicted of fraudulently obtaining state licenses to operate video poker machines by hiding their ownership interest in the business when they applied for the licenses.[64] The issue was whether fraudulently obtaining these licenses was the same as depriving the state of property, such that the conduct was proscribed by § 1341.[65]

The government argued that the state had both regulatory and property interests in the licenses.[66] The Court unanimously rejected the government's arguments based on its mistaking regulatory interests for property interests and on federalism principles; the government's reading would constitute a "sweeping expansion of federal criminal jurisdiction" without "a clear statement by Congress."[67]

The Court deployed lenity as an additional reason to reject the government's broad reading, explaining that any ambiguity in defining "property" under the statute would be resolved in the defendant's favor under the rule of lenity.[68] The Court added that the rule was "especially appropriate" there because of mail fraud's status as a predicate offense.[69] The Court justified raising lenity not based on "grievous" ambiguity, but rather on the broad principle that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity."[70]

In *Skilling v. United States*,[71] the Court examined whether the former executive of an Enron subsidiary was improperly convicted of "conspiracy to commit 'honest-services' wire fraud" under 18 U.S.C. §§ 371, 1343, and 1346.[72] The issue was whether Skilling's actions—which included "misrepresenting the company's fiscal health," but not taking bribes or kickbacks—were proscribed by the statute.[73] Skilling and others had made representations to the public "overstating the company's financial well-being" to improve its stock prices.[74] However, Skilling had not taken bribes

60. 531 U.S. 12 (2000).
61. *Id.* at 15.
62. 18 U.S.C. § 1341.
63. *See Cleveland*, 531 U.S. at 15 (quoting 18 U.S.C. § 1341).
64. *See id.* at 16–17. The defendants sought to prevent their financial problems from hurting their application. *See id.* at 17.
65. *See id.* at 15.
66. *See id.* at 20–22.
67. *See id.* at 24–25.
68. *See id.* at 25.
69. *Id.*
70. *See id.* at 25 (quoting Rewis v. United States, 401 U.S. 808, 812 (1971)).
71. 561 U.S. 358 (2010).
72. *Id.* at 367.
73. *See id.* at 368, 413.
74. *See id.* at 368–69.

or kickbacks, which had formed the "core" of the Court's honest-services fraud jurisprudence.[75] Skilling argued that the honest-services fraud statute was unconstitutionally vague, providing insufficient notice to the public about the conduct it prohibited and allowing too much prosecutorial discretion.[76] Following the Court's own edict to "construe, not condemn, Congress' enactments" when possible,[77] the Court constrained the scope of § 1346 to what Justice Ruth Bader Ginsburg described as the "core" and "vast majority" of honest services cases[78]—bribes and kickbacks. This avoided the due process issues connected to a broader reading that would criminalize more conduct.[79]

The Court again invoked lenity as additional support to counter the government's broader reading.[80] The Court applied lenity based on the mere "ambiguity" trigger from *Cleveland*[81] and explained that the statute could not be read more broadly "absent Congress' clear instruction otherwise."[82] Again, the Court emphasized the appropriateness of lenity given that § 1346 violations are predicate offenses.[83]

Justice Scalia concurred in the judgment but would have invalidated the statute as void for vagueness.[84] He argued that the Court, in dealing with statutory ambiguity that presented fair notice concerns, rewrote rather than narrowed the statute; he criticized the majority's move as "invention" rather than "interpretation."[85]

On at least one occasion, the Court has rejected a white-collar defendant's argument for lenity. In *Shaw v. United States*,[86] the defendant used a Bank of America customer's account information to steal the customer's money.[87] Shaw was convicted of violating 18 U.S.C. § 1344(1), which "makes it a crime 'knowingly [to] execut[e] a scheme . . . to defraud a financial institution.'"[88] The Court rejected the defendant's argument that his intent to "cheat only a bank depositor, not a bank" removed his action from the statute's scope.[89] Based largely on case law, the Court unanimously found for the government because the bank "had property rights in [the customer's]

75. *See id.* at 404. The Court had abandoned the "intangible-rights doctrine" in *McNally v. United States*. 483 U.S. 350 (1987); *see Skilling*, 561 U.S. at 401–02. In 1988, Congress passed a statute protecting "honest services" based on the same protection in cases pre-dating *McNally*. *Skilling*, 561 U.S. at 401–02.
76. *See Skilling*, 561 U.S. at 402–03.
77. *Id.* at 403.
78. *See id.* at 407.
79. *Id.* at 408.
80. *See id.* at 409–11.
81. *See supra* note 67 and accompanying text.
82. *Skilling*, 561 U.S. at 410–11.
83. *See id.* at 411 (citing Cleveland v. United States, 531 U.S. 12, 25 (2000)).
84. *See id.* at 415–17 (Scalia, J., concurring).
85. *See id.* at 422 (Scalia, J., concurring).
86. 137 S. Ct. 462 (2016).
87. *See id.* at 466.
88. *See id.* at 465 (alteration in original) (quoting 18 U.S.C. § 1344(1)).
89. *See id.*

bank account" and because the statute did not require actual property loss by the bank.[90]

The Court rejected Shaw's argument that "[i]f doubt remains," "any ambiguity concerning [the] scope should be resolved in favor of lenity."[91] In his brief, Shaw cited to *Cleveland* for the proposition that "[l]enity is 'especially appropriate'" for statutes involving predicate offenses.[92] The Court found the statute sufficiently clear to reject lenity, explaining that lenity applies only at the end of the interpretation process[93] and only in cases of "grievous ambiguity or uncertainty."[94]

2. The Court's Rejection of Lenity for Blue-Collar Defendants

When addressing lenity arguments from blue-collar defendants, the Supreme Court has repeatedly rejected lenity, finding sufficient clarity from statutory analyses that lenity does not apply. Although the set of cases discussed in this Essay is limited, the blue-collar cases in this data set contain no instances of the majority *directly* extending lenity to defendants. Only dissenting opinions include support for lenity, and the Court's majority opinions discuss lenity either not at all or very briefly.

In *James v. United States*,[95] for example, the majority did not address lenity at all,[96] while the dissent argued that lenity should have applied.[97] There, the Court considered whether attempted burglary is a violent felony under the Armed Career Criminal Act's (ACCA) residual clause.[98] The statute requires a fifteen-year mandatory minimum sentence for a defendant with "three prior convictions 'for a violent felony or a serious drug offense.'"[99] The "residual clause" covers "crimes that 'otherwise involv[e] conduct that presents a serious potential risk of physical injury to another.'"[100]

The 5–4 majority looked to statutory text and structure as well as legislative history to determine that Congress did not intend to "categorically exclude attempt offenses" from the residual provision.[101] Then, the majority applied a "categorical approach" to determine whether attempted burglary generally might fall under the residual clause.[102] Its analysis found that attempted burglary carries risk at least equal to—and possibly greater than—

90. *See id.* at 466–67.
91. *See* Brief for the Petitioner at 40, Shaw v. United States, 137 S. Ct. 462 (2016) (No. 15-5991); *Shaw*, 137 S. Ct. at 469.
92. *See* Brief for the Petitioner, *supra* note 91, at 40–41 (quoting Cleveland v. United States, 531 U.S. 12, 25 (2000)).
93. *See Shaw*, 137 S. Ct. at 469.
94. *See id.* (quoting Muscarello v. United States, 524 U.S. 125, 138–39 (1998)).
95. 550 U.S. 192 (2007).
96. *See id.* at 192–215.
97. *See id.* at 219 (Scalia, J., dissenting).
98. *See id.* at 197.
99. *See id.* at 195 (quoting 18 U.S.C. § 924(e)(1)).
100. *Id.* at 197 (quoting 18 U.S.C. § 924(e)(2)(B)(ii)).
101. *See id.* at 198–201
102. *See id*. at 201–02.

that associated with completed burglary, so attempted burglary fell within the statute's ambit.[103]

Justice Scalia, joined by Justices Stevens and Ginsburg in dissent, rejected the majority's comparative risk approach, instead emphasizing that it is a "similar degree of depravity" necessitating "punishment or . . . deterrence" that justifies "similar punishment by statute."[104] Justice Scalia rejected the majority's similar risk test as leading to "unacceptable" "indeterminateness."[105] He urged that the Court should have applied lenity to "give this text the more narrow reading of which it is susceptible," based in part on its fair notice function.[106] Rather than pointing to grievous ambiguity, Justice Scalia noted the "good deal of ambiguity" that would arise from using a similar-or-slightly-less risk standard for applying the residual clause.[107]

In *Wooden v. United States*,[108] the Supreme Court considered whether the defendant's burglary of ten storage facility units in one night constituted ten separate "occasions" or only one under the ACCA.[109] The majority looked first to the "ordinary meaning of 'occasion,'" including dictionary definitions.[110] It then constructed a test that considered "a range of circumstances" including "timing," "[p]roximity of location," and "the character and relationship of the offenses."[111] The Court used this test to find that the defendant's burglary of ten storage facility units in one night constituted not ten separate "occasions," but only one, siding with the defendant.

In his concurrence, Justice Neil M. Gorsuch argued that this multifactor test was likely to yield confusion[112] and that the "key to this case" was, instead, lenity.[113] Justice Gorsuch invoked a spin on the "reasonable doubt persists" trigger, writing that lenity means that "any reasonable doubt about the application of a penal law must be resolved in favor of liberty."[114] Because "reasonable minds could differ" regarding the number of occasions at issue, the Court should apply lenity to determine that Wooden's burglary comprised only one occasion.[115] Justice Gorsuch explained that the "grievous ambiguity" standard was ill founded[116] and argued that lenity should apply earlier in the statutory interpretation process—specifically, when there is "no clear answer" after applying "traditional tools of statutory

103. *See id.* at 203–04.
104. *See id.* at 217 (Scalia, J., dissenting).
105. *See id.* at 219.
106. *See id.* at 219 (internal citations omitted).
107. *See id.*
108. 142 S. Ct. 1063 (2022).
109. 18 U.S.C. § 924(e)(1); *Wooden*, 142 S. Ct. at 1067, 1070–71.
110. *See Wooden*, 142 S. Ct. at 1069.
111. *See id.* at 1070–71.
112. *See id.* at 1080 (Gorsuch, J., concurring).
113. *See id.* at 1081.
114. *See id.*
115. *See id.*
116. *See id.* at 1084–85.

interpretation."[117] Justice Gorsuch would not have courts consider "legislative history or the law's unexpressed purposes."[118] In a separate concurrence, Justice Kavanaugh rejected lenity, urging that lenity comes at the end of the statutory interpretation process and referring to the "grievous ambiguity" standard.[119]

In *Holloway v. United States*,[120] the Court considered the meaning of the intent requirement of the federal carjacking statute, 18 U.S.C. § 2119.[121] The case addressed whether the statute required "*unconditional* intent to kill or harm in all events" or also covered *conditional* intent—i.e., "to kill or harm *if necessary* to effect a carjacking."[122] The majority, looking to statutory language in context, determined that the logical reading was to cover "both conditional and unconditional intent."[123] The majority pointed to legislative history as support for Congress's "broad deterrent purpose" in criminalizing carjacking,[124] as well as federal and state precedent for the idea that conditional intent to kill is still "intent."[125] The majority also called it "reasonable to presume that Congress was familiar with the cases and the scholarly writing that have recognized that the 'specific intent' to commit a wrongful act may be conditional."[126] The majority rejected the petitioner's lenity argument in a footnote, finding that statutory analysis provided enough clarity that the Court was not in a place where it could "make no more than a guess as to what Congress intended."[127]

Justice Scalia, in dissent, wrote that conditional intent is not intent at all.[128] Based on a plain meaning—i.e., "common usage"—understanding of intent, Justice Scalia argued that it is incorrect to say that one intends "to do something" conditioned on "an event that is not virtually certain, and that [one] hope[s] will not occur."[129] After finding that the statute unambiguously did not cover conditional intent, Justice Scalia invoked lenity as additional support: "[e]ven if ambiguity existed . . . the rule of lenity would require it to be resolved in the defendant's favor."[130]

Justice Scalia noted that the government's brief presented lenity as a tool applied primarily to statutes that might be used to criminalize apparently

117. *See id.* at 1085–86.
118. *See id.* at 1086.
119. *See id.* at 1075 (Kavanaugh, J., concurring).
120. 526 U.S. 1 (1999).
121. *See id.* at 3 (noting that the statute criminalizes "[c]arjacking 'with the intent to cause death or serious bodily harm'" (quoting 18 U.S.C. § 2119)).
122. *See id.* (emphasis added).
123. *See id.* at 7–8
124. *See id.* at 9, n.7.
125. *See id.* at 9–10.
126. *See id.* at 9. The majority did not explain why it was reasonable to make this assumption. *See id.*
127. *See id.* at 12, n.14 (quoting Muscarello v. United States, 524 U.S. 125, 138 (1998)).
128. *See id.* at 13–14 (Scalia, J., dissenting).
129. *See id.* at 14.
130. *See id.* at 20.

innocent acts.[132] But he pointed to two cases in which the Court applied lenity to prevent enhanced punishment without clarity from Congress.[133] Justice Scalia forcefully wrote that if lenity "is no longer the presupposition of our law, the Court should say so."[134] But otherwise, he argued, lenity "ha[d] undeniable application in the present case," necessitating a narrower reading of the statute's intent requirement—i.e., that it required unconditional intent.[135]

In this case set, the closest the Supreme Court has come to invoking lenity in a blue-collar defendant's favor was in *United States v. Davis*.[136] In *Davis*, the Court addressed a circuit split regarding one of two definitions of the phrase "crime of violence" in 18 U.S.C. § 924(c).[137] As the Court noted, violating this subsection leads to substantial additional mandatory minimum sentences.[138] The defendants, who had used firearms while robbing gas stations, argued that one of these definitions was "unconstitutionally vague."[139] Here, as in the pro-white-collar-defendant cases discussed above, the Court referred to "lenity's teaching that ambiguities"—i.e., not only *grievous* ambiguities—"about the breadth of a criminal statute should be resolved in the defendant's favor."[140] Justice Gorsuch referred to lenity to support his rejection of the government's constitutional avoidance argument.[141] Justice Gorsuch wrote that using "constitutional avoidance to narrow a criminal statute . . . accords with the rule of lenity," while using avoidance to expand the statute's scope—as the government sought—"would place these traditionally sympathetic doctrines at war with one another."[142]

As in *Wooden*, Justice Kavanaugh strongly disagreed with Justice Gorsuch's invocation of lenity, urging that "lenity is a tool of last resort that applies 'only when, after consulting traditional canons of statutory construction,' grievous ambiguity remains."[143]

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132. *See id.* at 20 (citing Brief for the United States at 31, Holloway v. United States, 56 U.S. 1 (1999) (No. 97-7164)).

133. *See id.* at 20 (first citing Ladner v. United States, 358 U.S. 169, 178 (1958); and then citing Bell v. United States, 349 U.S. 81, 83 (1955)).

134. *See id.* at 21.

135. *See id.*

136. 139 S. Ct. 2319, 2333 (2019).

137. *See id.* at 2324, 2325. Subsection (c)(3)(A) defines "crime of violence" in part as an offense that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. § 924(c)(3)(A). Subsection B, on the other hand, refers to an offense "that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. § 924(c)(3)(B).

138. *See Davis*, 139 S. Ct. at 2324.

139. *See id.* at 2324–25.

140. *Id.*

141. *See id.* at 2333.

142. *Id.*

143. *See id.* at 2351–52 (Kavanaugh, J., concurring) (quoting United States v. Hayes, 555 U.S. 415, 429 (2009) and collecting cases).

C. Takeaways: Meaningful Differences in Lenity Triggers and Outcomes

The Court has appeared more ready to embrace lenity in the white-collar context, albeit as additional support—rather than as the primary basis—for its decisions.[144] Blue-collar defendants, meanwhile, have not been able to win the majority's support for lenity[145] except in the particular—and very limited—example of *Davis*.[146]

In these white-collar cases, lenity was not strictly necessary to the outcome: the Court did not invoke lenity as a decisive factor in determining whether the conduct at issue was proscribed by statute.[147] But the Court did invoke lenity as additional support for defendants.[148] Lenity's role may have been more significant in *Skilling*, given Justice Scalia's critique of the Court's narrowing of the statute as "invention"[149]; there, lenity was one among several tools the Court used to buttress its conclusion.

In both *Cleveland* and *Skilling*, the Court invoked lenity based on *mere* "ambiguity," not *grievous* ambiguity,[150] and described lenity as "especially appropriate" given that violating the statute constituted a predicate offense.[151] Both the low ambiguity threshold and reference to predicate offenses in these fraud cases may evince some degree of judicial sympathy when an ambiguous criminal statute could be used to subject a defendant to additional punishment for other crimes. But this sympathy has not carried through to the Court's construction of the Armed Career Criminal Act, a statute that is also tied to predicate offenses.

In *James*, the majority's complex, risk-related analysis did not reference lenity at all, while Justice Scalia invoked lenity as support for his position that the majority's test would lead to "unacceptable" ambiguity.[152] There, lenity was a simplifying force; because the majority's reading would lead to too much ambiguity in determining future prohibited acts, a lenity-oriented reading would instruct the Court to narrow the statute's scope.[153]

In *Wooden*, Justice Gorsuch's concurrence also referred to lenity as a simplifying force. Rather than the majority's potentially confusing multifactor test to determine whether incidents counted as one or more "occasions," the fact that "reasonable minds could differ" about this meant

144. *See supra* Part II.A.
145. *See supra* Part II.B.
146. *See supra* notes 136–43 and accompanying text.
147. *See id.*
148. *See supra* notes 59–70 and accompanying text (discussing the *Cleveland* court's explanation that lenity cut against the government's broad reading); *see also supra* notes 71–85 and accompanying text (discussing the *Skilling* court's use of lenity to narrow the scope of another predicate offense).
149. *See supra* note 85.
150. *See supra* note 70 and accompanying text (discussing *Cleveland*); *see also supra* notes 80–82 and accompanying text (discussing *Skilling*).
151. *See supra* notes 69, 83 and accompanying text.
152. *See supra* notes 95–107 and accompanying text.
153. *See supra* notes 105–07 and accompanying text.

that, under lenity, this should count as only one occasion.[154] Justice Sonia Sotomayor agreed that lenity was clarifying on the issue.[155]

In this set of cases, the only time a Supreme Court majority invoked lenity in a blue-collar defendant's favor, it did so quite indirectly. In *Davis*, Justice Gorsuch referred to mere "ambiguity" and invoked lenity in support of constitutional avoidance.[156] Because this was another indirect application of the rule—and far from critical in deciding the issue before the Court—this case does not provide a clean example of the Court leaning on lenity to find for a blue-collar defendant.

The fact that no Supreme Court majority directly invokes lenity in these blue-collar cases (with the exception of *Davis*) does not appear to be the product of statutory clarity or less ambiguity in blue-collar statutes. Each of these cases yielded opinions other than majority opinions; even in *Wooden*, where the outcome was in favor of a blue-collar-defendant, opinions among Justices differed significantly enough to generate four concurrences. If these blue-collar statutes were straightforward enough that lenity had no place whatsoever, these decisions would not likely yield so much debate or such complicated analyses—such as the categorical and multifactor tests in *Holloway* and *Wooden*, respectively—to reach their conclusions.

III. A MODIFIED RULE OF LENITY WOULD HELP REDUCE THE GAP BETWEEN WHITE- AND BLUE-COLLAR CRIMES AND FULFILL LENITY'S CONSTITUTIONAL ROLES

Adopting a modified version of the historic rule of lenity would best help courts correct for the apparent inequity in application of the rule to white-collar as opposed to blue-collar defendants; such an approach would also serve fair notice and separation of powers functions.

Courts should apply a version of lenity that rests between Professors Hopwood's and Romantz's proposals.[157] A court interpreting a criminal statute should look to the text and structure of a statute, then to linguistic canons; finally, the court may look to "knowable law"[158] that was relevant at the time and location of the underlying offense. If these sources do not remove "reasonable doubts" about the law's scope, the court should select the narrower reading of the law.

Professor Hopwood's proposal does not include knowable law,[160] while Professor Romantz explicitly excludes the linguistic canons for their unpredictability in the fair notice context.[161] But permitting courts to consult both of these sources helps ensure that a new version of lenity does not undermine the judiciary's interpretive powers.

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154. *See supra* notes 112–18 and accompanying text.
155. *See* Wooden v. United States, 142 S. Ct. 1063, 1074–75 (2022).
156. *See supra* notes 112–19.
157. *See supra* Part I.B.2.
158. This is the term used by Professor Romantz. *See* Romantz, *supra* note 7, at 571.
160. *See* Hopwood, *supra* note 22, at 948.
161. *See* Romantz, *supra* note 7, at 573.

Allowing courts to look to the knowable law in a relevant jurisdiction may help lend insight into a defendant's state of mind, if that defendant relied on an interpretation of the law.[162] It also helps ensure that lenity alone does not disrupt stare decisis without good reason; applying lenity before looking to sources of law that Romantz describes as "authoritative"[163] might have precisely that effect. Admittedly, the canons are much debated, and scholars have found a gap between the linguistic canons that congressional staffers consider in drafting laws and those that courts apply in interpreting laws.[164] However, removing these historic tools from courts' toolchests might unnecessarily hamper courts' ability to make reasoned, well-informed interpretations of criminal laws. This could upset the balance of powers and, more immediately and pragmatically, might simply tie judges' hands too much for them to be open to a new, stronger version of lenity.

By permitting courts to consider these sources of meaning but prohibiting broadening readings of statutes based on legislative history, this version of lenity would serve fair notice without changing the balance of powers that lenity is also meant to protect. This version of the rule is particularly valuable in the context of this study, because it would help ensure that blue-collar defendants get as good a chance of receiving lenity as white-collar defendants.

This is clear from applying this version of lenity to *Holloway v. United States*.[165] This case is ripe for testing with a new rule because both the majority and Justice Scalia's dissent eventually found the text "unambiguous,"[166] but discerned two entirely different meanings; while the majority held that intent included conditional intent,[167] Justice Scalia wrote that intent plainly excluded conditional intent.[168] By shifting lenity earlier in the statutory interpretation sequence and requiring less ambiguity, the information the Court could entertain in understanding the statute would change.

The majority in *Holloway* considered not only a "commonsense reading" of the statutory text,[169] but also legislative history for the idea that Congress had a "broad deterrent purpose" in passing the statute.[170] The Court further presumed congressional familiarity with conditional specific intent.[171] Here, statutory text and structure and linguistic canons did not remove "reasonable doubt" about the statute's reach.[172] If the Court had next looked to lenity, it

162. *See supra* notes 47–50 and accompanying text.
163. *See* Romantz, *supra* note 7, at 575.
164. *See* Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside-an Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 930 (2013).
165. 526 U.S. 1 (1999).
166. *See supra* notes 127, 130 and accompanying text.
167. *See supra* notes 124–27 include and accompanying text.
168. *See supra* notes 127–30 and accompanying text.
169. *See Holloway*, 526 U.S. at 7.
170. *See id.* at 9, n.7.
171. *See id.* at 9–10.
172. The court did not discuss other sources of knowable law. *See generally id.*

would have found that the narrower reading excluded the broad, conditional intent that it read the legislative history to support.[173] Without this legislative history, the basis for the Court's understanding of the statute's scope would have been significantly weakened. The Court likely would have needed to apply lenity to find that the narrower reading of the statute—i.e., requiring not conditional but actual intent—was the just reading and the one that provided fair notice to the public.

This version of the rule of lenity would require clearer statements by Congress.[174] If a court's lenity-based reading of a statute did not align with congressional intent, Congress would need to amend the statute to better reflect its intent. This, too, would serve the balance of powers, and ensure that courts interpret laws while only Congress creates them.[175]

This is not to suggest that courts cannot consider legislative history in the criminal law context, only that legislative history should not supersede lenity given the fair notice concerns discussed above. Indeed, in a case in which legislative history indicated that the conduct at issue should be covered, but the aforementioned tools left a reasonable doubt that the conduct fell within the statute's scope, a court could invite Congress to amend the law to reflect congressional intent. This would not be as instant a change as, for example, codifying a rule requiring Congress to make a clear statement about the scope of a criminal statute. But given lenity's origins in the common law, courts shifting the rule of lenity themselves appears more appropriate—and more likely to occur.

CONCLUSION

As these cases illustrate, the rule of lenity continues to be applied inconsistently, and the impact is more than a mere curiosity about a historic rule. Uneven application of the rule works to the disadvantage of blue-collar defendants as compared to white-collar ones. By applying lenity when statutory text and structure, linguistic canons, and "knowable law" leave a reasonable doubt about a criminal statute's scope, courts can more evenly administer justice and ensure that blue-collar defendants are given fair opportunities in court.

173. The legislative history was particularly limited here; even the majority describes the "legislative history relating to the carjacking amendment" as "sparse." *See id.* at 9, n.7.

174. This is similar to Professor Carissa Byrne Hessick and Professor Joseph E. Kennedy's proposals for "criminal clear statement rules," which go beyond lenity to cover non-ambiguous statutes. *See* Carissa Byrne Hessick & Joseph E. Kennedy, *Criminal Clear Statement Rules*, 97 WASH. U. L. REV. 351, 366 (2019).

175. *See id.* at 390–91 (discussing the balance-of-powers problems with broad criminal statutes).