
LENITY AND THE MEANING OF STATUTES

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ABSTRACT

Ordinary canons of statutory interpretation try to encode linguistic rules into jurisprudence. Their purpose is to figure out the meaning of a text, and their outcome is to determine the meaning of the text. Both the purpose and the outcome are linguistic.

The rule of lenity is not an ordinary canon of statutory interpretation. The rule of lenity's outcome is to determine the meaning of a text, giving ambiguous criminal statutes a narrow interpretation, but its purpose is public policy, protecting defendants when ambiguous statutes failed to give fair notice that their actions would be punished. Unlike the ordinary canons of statutory interpretation, lenity encodes into jurisprudence not a linguistic rule, but a policy rule. Thus, a discrepancy arises: lenity's outcome is linguistic, but its purpose is non-linguistic.

This Article makes the following three contributions. First, it analyzes the nature of the discrepancy between lenity's purpose and outcome. Second, it demonstrates that this discrepancy leads to doctrinal issues in how the rule of lenity is applied. Sometimes the rule of lenity is over-inclusive: it is applied even when there is no violation of fair notice. Sometimes the rule of lenity is under-inclusive: the rule of lenity fails to protect certain defendants that were misled by ambiguous criminal statutes. Third, this Article argues that we can align lenity's purpose and

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outcome by reforming lenity into an excuse in criminal law, and this theoretical reformation will resolve the aforementioned doctrinal issues.

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INTRODUCTION

Short-barreled rifles are often used for criminal purposes because their shorter length allows them to be more easily concealed.¹ For that reason, § 5821 of the Internal Revenue Code levies an excise tax on the manufacture of short-barreled rifles, while no such tax is levied on the

1. See *United States v. Thompson/Ctr. Arms Co.*, 504 U.S. 505, 517 (1992).

manufacture of long-barreled rifles.²

Thompson/Center Arms, a firearms manufacturer, packaged as one unit the following separate parts that were to be put together by the customer: a shoulder stock, a pistol, and a barrel extension.³ For convenience, I will call this unit of three parts the “Thompson/Center kit.” Putting the three pieces together—attaching the shoulder stock to the handle of the pistol and the extension to the barrel of the pistol—the customer would end up with a long-barreled rifle.⁴ If the customer only attached the shoulder stock to the pistol handle without using the barrel extension, then they would end up with a short-barreled rifle.⁵

Thus, the following legal issue arose in *United States v. Thompson/Center Arms Co.* Is Thompson/Center Arms liable for the § 5821 excise tax? Does the manufacture of the Thompson/Center kit count as an instance of manufacturing a short-barreled rifle?

The Supreme Court stated that § 5821 is ambiguous about what counts as the manufacture of a short-barreled rifle and that the Thompson/Center kits sat squarely in the penumbra.⁶ On one hand, Thompson/Center Arms intended for the kits to be put together into a long-barreled rifle, but on the other hand, the kit made it tremendously easy for consumers to put together a short-barreled rifle regardless of Thompson/Center Arms’s intention.⁷ Were the Court to construe § 5821’s language broadly, Thompson/Center Arms would be liable for the excise tax on short-barreled rifles, but were the Court to construe the statute’s language narrowly, Thompson/Center Arms would not be liable.

To resolve whether § 5821 should be given a broad or narrow reading, the Court applied the rule of lenity, which gives all ambiguous criminal statutes a narrow meaning, thus absolving Thompson/Center Arms of liability on the excise tax.⁸ This is a surprising application of the rule. The rule of lenity is a rule of statutory interpretation meant to apply only to criminal statutes to protect criminal defendants, yet it was applied in *Thompson/Center* to determine the meaning of a civil tax statute in favor of a civil plaintiff. Because the company had already paid the tax and was suing for a refund, no criminal penalties were at stake for

2. I.R.C. § 5821.

3. *Thompson/Ctr. Arms*, 504 U.S. at 507.

4. *Id.* at 508.

5. *Id.*

6. *Id.* at 513–24.

7. Compare *id.* at 523 (Scalia, J., concurring), with *id.* at 524–25 (White, J., dissenting).

8. *Id.* at 517–18.

Thompson/Center Arms.⁹

Thompson/Center's holding presents a major problem for the administration of tax law. The standard rule in civil law grants deference to an administrative agency's interpretation of the relevant laws.¹⁰ The rule of lenity runs in the opposite direction, interpreting statutes in favor of the taxpayer over the agency, the Internal Revenue Service ("IRS").¹¹ This poses a special danger to the IRS's enforcement efforts against abusive tax shelters that prey on indeterminacies in the tax law.¹²

Despite this problem, the Court's hands were bound by a technicality. According to the rule of lenity, criminal statutes should be interpreted narrowly such that uncertainty about the meaning of the statute is resolved in a way lenient to the defendant.¹³ Section 5821 is, like tax law generally, a civil statute, but it is also a criminal statute because its meaning has implications for criminal liability. Under § 5871, criminal penalties would be imposed for non-compliance with § 5821.¹⁴ Section 5821 plays a dual role, determining how much tax one is required to pay and, thereby, defining the actus reus for criminal liability. Thus, although *Thompson/Center Arms* was litigating the civil matter of how much tax it owed, because the outcome of this case might have criminal implications down the road, § 5821 would need to be read narrowly, following the rule of lenity.¹⁵

Thompson/Center thus establishes that the rule of lenity applies to statutes that serve both a criminal and civil purpose, even if the issue at bar is a purely civil one,¹⁶ because the interpretation of dual-purpose statutes in the civil context necessarily carries over to define criminal liability.¹⁷ Tax laws generally play this dual role since they determine civil tax liability,

9. *Id.* at 505.

10. See Ryan D. Doerfler, *Can a Statute Have More than One Meaning*, 94 N.Y.U. L. REV. 213, 233 (2019); Kristin E. Hickman, *Of Lenity, Chevron, and KPMG*, 26 VA. TAX REV. 905, 912–21 (2007); Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 210 n.106 (2006); Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2115–16 (1990). The topic of deference to the IRS's interpretations of the tax law is much discussed, but it begins with the case law *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–44 (1984); *Nat'l Muffler Dealers Ass'n v. United States*, 440 U.S. 472, 476–77 (1979); *Skidmore v. Swift & Co.*, 323 U.S. 134, 139–40 (1944).

11. See *infra* Section III.B.2.

12. See also Marvin A. Chirelstein & Lawrence A. Zelenak, *Tax Shelters and the Search for a Silver Bullet*, 105 COLUM. L. REV. 1939, 1950 (2005) (analyzing the formation of tax shelters and their interplay against countervailing measures).

13. *United States v. Kozminski*, 487 U.S. 931, 952 (1988).

14. I.R.C. § 5871.

15. *United States v. Thompson/Ctr. Arms Co.*, 504 U.S. 505, 517–18 (1992).

16. See *id.*

17. See *id.* at 518 n.10.

and criminal penalties are imposed for non-compliance with tax law.¹⁸ Using lenity to narrowly interpret the meaning of a tax statute will both limit the reach of criminal sanctions for tax evasion and also limit the assignment of civil tax liability.¹⁹

The purpose of the rule of lenity, however, is to protect fair notice for criminal defendants.²⁰ When statutes are ambiguous, citizens can be misled into thinking that their actions were permitted rather than prohibited. The law fails to communicate the expected standard of behavior. Given the severity of criminal punishment and the moral condemnation that attaches, we ought to be especially concerned about criminal defendants who did not receive fair notice of the law.²¹ Thus, when a defendant's act is a borderline case of an ambiguous criminal statute, the law absolves them of criminal liability as a recognition of its own failure to provide fair notice that such an act would be punished.

Since the rule of lenity was supposed to provide fair notice in punishment, its application to civil tax law, where no punishment is at stake, grossly oversteps its purpose.²² Even if a taxpayer loses a case determining their civil tax liability, so long as they continue to pay said tax liabilities, they would avoid criminal penalties.²³ I call this overstep of lenity's purpose the "too much lenity" problem.

On my analysis, the central theoretical issue with the rule of lenity is the discrepancy between the rule's purpose and outcome. The rule of lenity's purpose is to ensure fair notice about which actions are punished under the law.²⁴ The rule's outcome, as a canon of statutory interpretation,

18. See *infra* Section III.B.1.

19. See *Thompson/Ctr. Arms*, 504 U.S. at 506, 517–18.

20. Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345, 345 (1994).

21. See *infra* Section I.B.

22. *United States v. Fisher*, 6 U.S. 358, 390 (1805); see also Andy S. Grewal, *Why Lenity Has No Place in the Income Tax Laws*, 81 MO. L. REV. 1045, 1051–53, 1051 n. 45 (2016) (arguing that there is no unique taxpayer-favorable interpretation as lenity would require); Hickman, *supra* note 10, at 932–33 (noting that tax shelters will be harder to police if lenity is applied to civil tax law).

23. See I.R.C. § 7201.

24. Notice of the laws that govern individuals has long been held to be a central tenet of the rule of law. 2 ST. THOMAS AQUINAS, *SUMMA THEOLOGICA* pt. I–II, q. 90, art. 4; 1 JEREMY BENTHAM, *Essay on the Promulgation of Laws, and the Reasons Thereof*, in *THE WORKS OF JEREMY BENTHAM* 155, 157 (Edinburgh, William Tait 1843); LON L. FULLER, *THE MORALITY OF LAW* 39 (1964); JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* 83–84 (Richard H. Cox ed., Harlan Davidson, Inc. 1982) (1690) (noting that lack of notice leads to uncertainty about the future); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179–80 (1989); see Roscoe Pound, *Theories of Law*, 22 YALE L.J. 114, 117 (1912) (noting that publication of laws demonstrating the importance of fair notice extends back to ancient Greece). This value has been considered doubly important where the laws impose criminal punishment. *United States v. Fisher*, 6 U.S. 358, 390 (1805); John Gardner, *Introduction* to H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW*,

is to determine the meaning of a statute.²⁵ The rule of lenity has a linguistic outcome, but a non-linguistic purpose. Thus, lenity's purpose and outcome are not consistent with one another.²⁶

This application of lenity as a canon of statutory interpretation, which I call the "semantic rule of lenity," is incongruous with its normative purpose of fair notice in criminal law, resulting in its encroachment into civil matters where no punishment is at stake. Unlike other canons of statutory interpretation, which aim to figure out the meaning of a statute, substantive canons, like the rule of lenity, aim to implement normative principles, like fair notice.²⁷ Therein lies the disconnect. The purpose of the rule of lenity does not have anything to do with the ascertainment of meaning, yet the rule ends up determining the meaning of the statute.²⁸ The resulting problem of too much lenity demonstrates that this disconnect leads to real consequences.

But notice that this is a contingent feature of the rule of lenity. Lenity need not be applied as a canon of statutory interpretation. Its purpose merely requires us to let go those criminal defendants who never received fair notice of punishment. Other legal doctrines that require us to absolve certain defendants of guilt—for example, excuses such as insanity or duress—do not involve determining the meanings of statutes.²⁹ So why should the rule of lenity perform this odd, dangerous, vestigial function of determining the meaning of statutes? If the proximate aim is to absolve defendants of liability when their actions were not unambiguously criminalized by Congress, we can and ought to do so without invoking the semantics of statutes.

Challenging the standard semantic application of lenity, I will instead argue for the unorthodox position that lenity should be reworked from a canon of statutory interpretation to an excusing condition specific to criminal law.³⁰ In that way, lenity would be applied in the same manner as the doctrines of duress or insanity, as an affirmative defense to prosecution

at xiii, xxxix–xlili (2d ed. 2008) (putting forth that rule of law values "apply with particular force to the criminal law" because punishment is intended to inflict suffering on the punished and clarity in law makes statutes more effective in guiding action); Scalia, *supra*, at 1180.

25. See *infra* note 60 and accompanying text.

26. See *infra* Part II.

27. See *infra* Part II.

28. See *infra* note 60 and accompanying text.

29. See, e.g., MODEL PENAL CODE §§ 2.09(1), 4.01 (AM. L. INST., Proposed Official Draft 1962).

30. Other academics have proposed less radical revisions that are more amenable to agency deference such as Dan Kahan, *Is Chevron Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469, 507–11 (1996). These less radical approaches, however, fail to solve the linguistic ambiguity problem and the higher-order vagueness problem outlined in Part III.

rather than a canon of statutory interpretation. Without any of the semantic baggage that currently burdens the rule of lenity, excuses can apply in criminal law without extending into civil law and thus avoid the too much lenity problem. For instance, when a taxpayer is just litigating the issue of how much taxes they will have to pay for such-and-such economic transaction because they disagree with the IRS about the meaning of a statute, the courts should use ordinary interpretative principles that would best allow the tax law to serve its function of justly and efficiently collecting revenue.³¹ But if that same taxpayer was being tried for tax evasion because the statute at issue was ambiguous—as § 5821 was with regard to Thompson/Center kits—then lenity should be applied as an excuse, an affirmative defense, in order to protect fair notice of punishment.³²

Viewed top-down, this Article can be understood to present the following argument for my conclusion that lenity should be applied as an excusing condition in criminal law rather than as a canon of statutory interpretation: First, I demonstrate that lenity's purpose of fair notice of punishment does not match its outcome of determining the meaning of statutes. Second, I analyze three distinct doctrinal problems that stem from this mismatch between purpose and outcome. Third, I solve these problems by showing how the legal system can unite lenity's purpose and outcome by instituting lenity as an excuse rather than a rule of statutory interpretation. Because of this conceptual harmony, the three aforementioned problems are solved if we apply lenity as an excusing condition in criminal law. Each step presents novel contributions to the literature.

Part I explicates the rule of lenity and justifies the doctrine as upholding the structural rule of law value of fair notice. Fair notice is best understood as a structural consideration about the legal system. The laws must be structured so as to provide a path safe from punishment along which ordinary citizens can walk.³³ In our society, this path is marked by published statutes delineating which acts are permissible and which are impermissible. Fair notice is thus essential to providing a genuine choice to avoid punishment.

Part II shows that lenity's purpose and outcome are at odds with one another. Whereas ordinary rules of statutory interpretation have the purpose

31. See *infra* Section III.B.2.

32. See *infra* Part IV.

33. For a discussion of the theory underlying excuses in criminal law, see H.L.A. HART, *Legal Responsibility and Excuses*, in PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW, *supra* note 24, at 28; Sanford H. Kadish, *Excusing Crime*, 75 CALIF. L. REV. 257, 263–65 (1987).

of trying to figure out the meaning of a statute and the outcome of determining the meaning of a statute, the rule of lenity has the purpose of protecting criminal defendants and the outcome of determining the meaning of a statute.³⁴ Thus, while ordinary rules of statutory interpretation have a semantic purpose and semantic outcome, the rule of lenity has a semantic outcome and a non-semantic purpose.

Part III demonstrates three doctrinal problems that arise from the mismatch between the rule of lenity's purpose and outcome.

Section III.A presents the linguistic ambiguity problem. To use a stylized example, suppose a statute ambiguously imposes criminal penalties for starting a fire next to a "bank." Defendant A started a fire next to a financial bank. Defendant B started a fire next to a river bank. Because of the ambiguity, neither Defendant A nor B had fair notice that their actions were prohibited. However, because neither interpretation of the word "bank" lets both defendants go free, the rule of lenity cannot resolve the fair notice problem here. This is the problem of linguistic ambiguity.

Section III.B presents the too much lenity problem, introduced above. In this Section, I consider the impact of a lenity-driven tax regime both in terms of the areas of tax law where lenity is most likely to be applied and its contrast to the deference regime it replaces.

Section III.C demonstrates the problem of higher-order vagueness. Applying the semantic rule of lenity to a vague statute that prohibits a certain category of actions changes the meaning of the statute to prohibit only clear cases of that category of actions.³⁵ For instance, a statute may say "do not drive dangerously," but after the court applies the rule of lenity, the statute means "do not drive clearly dangerously."³⁶ The problem is that the new meaning that the rule of lenity has assigned will itself be vague. Just as vague predicates have borderline cases of which items qualify as members of the category, there is also vagueness one level up about which items qualify as borderline cases.³⁷ If the vagueness of "do not drive dangerously" violates fair notice, then construing the statute to mean "do not drive clearly dangerously" will not satisfy fair notice because what counts as "clearly dangerous" is itself a vague matter as some driving is

34. See William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1111, 1127 (2017).

35. See Michael S. Moore, *Semantics, Metaphysics, and Objectivity in the Law*, in VAGUENESS AND LAW 127, 134 (Geert Keil & Ralf Poscher eds., 2016).

36. Though heavily simplified, the vagueness of "do not drive dangerously" is not too far off from the vagueness of actual safe driving statutes. See *infra* note 171 and accompanying text.

37. See Moore, *supra* note 35; JOSEPH RAZ, *Legal Reasons, Sources, and Gaps*, in THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 53, 73–74 (1979).

clearly clearly dangerous and some driving only *borderline* clearly dangerous. The semantic rule of lenity is thereby under-inclusive, creating vagueness at a higher-order but failing to take that second-order vagueness into account for purposes of fair notice.³⁸

Part IV connects the legal theory set out in Parts I and II with the doctrinal analyses of Part III to support my ultimate proposal that lenity be provided solely as an excuse in criminal law instead of its current application as a canon of statutory interpretation. In criminal law theory, excuses are most often understood in comparison to justifications, another category of affirmative defense. Whereas justifications typically serve to make an act permissible—for instance, killing another is not morally wrong if done in self-defense—excuses absolve an actor of criminal liability for their wrongful conduct when the actor lacked a genuine choice to follow the law.³⁹ For instance, a browbeater may have threatened to bust the defendant’s kneecaps unless the defendant commits a criminal act for the browbeater’s benefit. In such a situation, because the browbeater’s coercive threat left the defendant no choice in the matter, the law affords the defendant an excuse of duress.⁴⁰

The semantic rule of lenity functions more closely to justification; by assigning a narrow meaning to a statute, it shrinks what counts as impermissible. The semantic rule of lenity, when it applies, concludes that the defendant’s actions were not prohibited by law.⁴¹ However, I argue that the purpose of lenity instead aligns most closely with that of an excuse. Though lenity may seem an unlikely bedfellow to doctrines such as duress or insanity, I demonstrate that all of these doctrines aim to protect citizens who lacked a genuine choice to follow the law. In cases such as duress, one lacks the choice because of some coercive threat. In cases of lenity, one lacks the choice because one was not given fair notice about which acts would be punished. Although, in contrast to justification, the defendants may have done some prohibited act in these cases, punishing them would nevertheless go against the rule of law principle of preserving a path safe from punishment.

By shedding lenity of its semantic cloak, jurisprudence can avoid the three aforementioned doctrinal problems. Providing lenity as an excuse rather than fixing the meaning of a statute would allow the law to absolve both Defendant A and Defendant B (from the “bank” example above) of

38. See *infra* Section III.C.

39. See Michael S. Moore, *Choice, Character, and Excuse*, 7 SOC. PHIL. & POL’Y 29, 32–35 (1990).

40. MODEL PENAL CODE § 2.09(1) (AM. L. INST., Proposed Official Draft 1962).

41. See, e.g., *United States v. Kozminski*, 487 U.S. 931, 952 (1988).

criminal liability since both defendants lacked fair notice that their actions would be punished. By restricting lenity to criminal law, taking the form of an excuse stops lenity from creeping into civil law, thereby solving the too much lenity problem. Because the excuse would not determine the meaning of the statute, issues of higher-order vagueness do not require additional iterations of lenity, thereby solving the higher-order vagueness problem.

Part V considers two counterarguments to the excuse of lenity. The first counterargument states that the excuse is unnecessary because strict construction of the civil tax code⁴² is good jurisprudence. In response, I analyze the ways that the teleology of tax law is distinct from the teleology of criminal law. Tax law helps citizens figure out how much to contribute to the public fisc as a matter of distributive justice.⁴³ Unlike criminal law, tax law is not meant to sanction prohibited behaviors—a tax on income, for instance, is not meant to morally condemn those who earn income.⁴⁴ Since tax law is not meant to serve as a system of incentives, ex-ante notice is far less important. Furthermore, choosing strict construction over the best interpretation will undo the effort to justly allocate social burdens, to the detriment of the very people who relied on the tax law to serve this function. The second counterargument against the excuse of lenity states that a legislature could satisfy the requirement of fair notice by letting citizens know by statute that the rule of lenity will not be applied to the criminal code. I argue that such a move is tantamount to notifying the public that there will be no fair notice given.

I. THE RULE OF LENITY

At its core, the rule of lenity is a rule of statutory construction that resolves any “uncertainty concerning the ambit of criminal statutes” in favor of the defendant.⁴⁵ Often, such uncertainty can arise due to linguistic indeterminacy, the most common type of which is vagueness.⁴⁶ In these cases, the meaning of the vague statute is narrowly interpreted to include only clear, prototypical cases of the criminal statute.⁴⁷ Such narrow construction is justified by the rule of law value of fair notice. Fair notice allows citizens who wish to avoid punishment to seek safety in reading the

42. By “tax code” and “the Code” I mean to refer to the Internal Revenue Code of 1986, as amended.

43. Jeessoo Nam, *Taxing Option Luck*, 11 U.C. IRVINE L. REV. 1067, 1115–17 (2021).

44. Criminal law, in contrast, carries moral condemnation. *United States v. Bass*, 404 U.S. 336, 348 (1971) (noting also the general seriousness of criminal penalties); Doerfler, *supra* note 10.

45. *See, e.g.*, *United States v. Kozminski*, 487 U.S. 931, 952 (1988).

46. *See* Lawrence M. Solan, *Multilingualism and Morality in Statutory Interpretation*, 1 LANGUAGE AND L. 5, 8 (2014).

47. Moore, *supra* note 35.

statute and choosing to avoid those actions that carry criminal penalties.

A. LENITY'S OUTCOME: STATUTORY CONSTRUCTION

Indeterminacy of meaning (linguistic indeterminacy) is a universal feature across natural languages.⁴⁸ Statutes, since they are written in natural language, sometimes have indeterminate meanings.⁴⁹ Such instances can give rise to what we may call *hard cases* or *legally ambiguous cases*,⁵⁰ where the statute gives no direction one way or another to those cases that straddle the indeterminacy.⁵¹

Of course, even when the statute gives no direction, a case at bar cannot go unresolved. One way to resolve a case in which there is no resolution provided by the statute itself is to have what legal theorists call a “closure rule.”⁵² A closure rule simply determines which way a judge should rule when the law is unclear one way or another, acting as a tie breaker of sorts.⁵³ The rule of lenity is often held by jurists to be a paradigm closure rule.⁵⁴ When a criminal statute fails to resolve a case because its meaning is indeterminate with respect to the facts at bar, then the judge must assign the statute a narrow meaning that favors the criminal defendant.

In law, by far the most common sort of linguistic indeterminacy arises from vagueness.⁵⁵ Consider, for instance, the well-trodden “no vehicles in

48. The legal philosopher Joseph Raz went as far as to say that not only is indeterminacy of meaning universal across natural languages, but that indeterminacy of meaning is also universal within a natural language. Raz claims, “all, and not only some, nouns, verbs, adverbs, and adjectives of a natural language are vague.” RAZ, *supra* note 37, at 73. It is difficult to see how this could be true. As a counterexample, consider that we sometimes use the verb *is* to denote numerical identity, the relation between an object and itself. For instance, we may say “Superman is Clark Kent” or even “Clark Kent is Clark Kent.” The word “is” in these cases do not admit of borderline cases; of any object, once we had enough information regarding that object, we would definitively be able to say that it is or is not Clark Kent. See Gareth Evans, *Can There Be Vague Objects?*, 38 ANALYSIS 208, 208 (1978) (formally proving that there can be no indeterminate cases of identity).

49. See RAZ, *supra* note 37, at 73.

50. See Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1057 (1975).

51. This is not the only way that statutes can fail to guide. The meaning of a statute may simply be unknown to many readers. Perhaps this lack of knowledge is best exemplified by the following account of the Constitutional Convention’s discussion of the phrase “direct tax” in U.S. CONST. art. I, § 9, cl. 4. See generally Ari Glogower, *A Constitutional Wealth Tax*, 118 MICH. L. REV. 717 (2020) (detailing the constitutional apportionment requirement for direct taxes and the interpretative difficulties surrounding the term “direct tax”). “Mr. King asked what was the precise meaning of *direct taxation*? No one answered.” JAMES MADISON, NOTES OF THE DEBATES IN THE FEDERAL CONVENTION OF 1787, at 494 (Ohio Univ. Press 1966) (1787).

52. Moore, *supra* note 35.

53. *Id.*; Lawrence M. Solan, *Law, Language, and Lenity*, 40 WM. & MARY L. REV. 57, 115 (1998).

54. Moore, *supra* note 35.

55. See Solan, *supra* note 46. Although vagueness is the most common sort of linguistic

the park” statute:

NO VEHICLES IN THE PARK ACT: Any person who brings or drives a vehicle into a federal park shall be guilty of a misdemeanor, which may be punished by a fine.⁵⁶

From the language of the statute, no one can deny that driving an automobile into a federal park is prohibited. In contrast, we may be quite uncertain about whether someone who pushed a wheelbarrow into a federal park is criminally liable under the statute since it is uncertain whether a wheelbarrow is or is not a vehicle in this context. The term “vehicle” is vague since it admits of borderline cases where the application of the term “vehicle” is indeterminate.

An instance of a vague predicate is *prototypical* or *core* if and only if it is clearly a member of the predicate’s category.⁵⁷ A *borderline* or *penumbral* case of a vague predicate is an object that is neither clearly a member nor clearly not a member.⁵⁸ Thus, a sedan is a prototypical vehicle while wheelbarrows are borderline cases that do not clearly fall into nor outside of the vehicle category.

When it comes to vague statutes, the rule of lenity is best cashed out using this distinction between clear and borderline cases.⁵⁹ Under the rule, a vague criminal statute will be assigned a narrow meaning that includes only the clear cases of the vague categories. For instance, the narrow interpretation of “vehicle” includes automobiles but not wheelbarrows. The rule of lenity, like statutory interpretation more generally, is semantic in that it operates to determine the meaning of the statute.⁶⁰

Courts are supposed to employ the rule of lenity in the realm of criminal law.⁶¹ Under such a rule, the destruction of a fish was not found to be a violation of a statute prohibiting the destruction of “tangible objects”

indeterminacy, it is certainly not the only sort. *See id.*

56. This standard example originates from H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607–15 (1958). The variation I use here is closer to that from William N. Eskridge, Jr., *No Frills Textualism*, 119 HARV. L. REV. 2041, 2041 (2006).

57. *See* Hart, *supra* note 56, at 607.

58. *Id.*

59. *See, e.g.*, Moore, *supra* note 35.

60. *See* United States v. Thompson/Ctr. Arms Co., 504 U.S. 505, 518 n.10 (1992) (“The rule of lenity, however, is a rule of statutory construction whose purpose is to help give authoritative meaning to statutory language.”); Grewal, *supra* note 22, at 1053; Hickman, *supra* note 10, at 916–17. Statutory interpretation is ordinarily a matter of construing the meaning of a statute. Steven A. Dean & Lawrence M. Solan, *Tax Shelters and the Code: Navigating Between Text and Intent*, 26 VA. TAX REV. 879, 880 (2007); *see also* Lawrence M. Solan, *Statutory Inflation and Institutional Choice*, 44 WM. & MARY L. REV. 2209, 2213, 2213 n.14 (2003) (“But once the courts interpret a statute . . . , the ruling becomes part of the meaning of the statute . . .”).

61. WILLIAM N. ESKRIDGE, JR., ABBE R. GLUCK & VICTORIA F. NURSE, STATUTES, REGULATION, AND INTERPRETATION 494–95 (2014).

in a federal investigation,⁶² and transporting a stolen airplane did not count as transporting a stolen “vehicle.”⁶³ These were, in the eyes of the court, not prototypical cases of the statutes’ language.

B. LENITY’S PURPOSE: FAIR NOTICE

Courts have typically appealed to fair notice, sometimes referred to as “due-process notice,”⁶⁴ as the principal justification for the rule of lenity.⁶⁵ Punishment of criminal activity is serious both in the severity of its costs on the punished and in the moral condemnation that attaches to it.⁶⁶ For the exercise of the sword of government in doling out punishments to individuals, rule of law is of principal order. A central criterion of rule of law is that those who are subject to the threat of such force be given fair warning that they are under such threat.⁶⁷ In our society, such notice is primarily given by the publication of criminal statutes. But publication is only the first step. Statutory notice is fair only when the content of the prohibitions can be readily ascertained from the published statute. Thus, when Emperor Caligula posted new statutes high on the top of Roman columns to prevent the citizenry from reading them, he failed to give fair notice to his citizens.⁶⁸

Posting laws where no one can read them is not the only way to violate fair notice. Notice can be unfair due to a statute’s linguistic indeterminacy. Similar to how linguistic indeterminacy can fail to give guidance to judges on how to rule on hard cases, linguistic indeterminacy fails to provide guidance to citizens on what sort of behavior is prohibited by law. Consider the following illustration of this aspect of fair notice

62. *Yates v. United States*, 574 U.S. 528, 528–30 (2015).

63. *McBoyle v. United States*, 283 U.S. 25, 26–27 (1931). Though *McBoyle* does not mention the rule of lenity by name, it is nevertheless understood to be, and is cited for, applying the rule. *E.g.*, *United States v. Lanier*, 520 U.S. 259, 266 (1997).

64. *See, e.g.*, Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2094 (2002). There are also other justifications that appear to be distinct from the fair notice value, such as non-delegation—courts cannot legislate criminal law, *United States v. Wiltberger*, 18 U.S. 76, 92 (1820)—and that the rule has a long history in criminal law interpretation, ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 29 (new ed. 2018). These alternative reasons for the rule of lenity are not counterarguments to what I present herein in that their truth does not imply the falsity of my conclusions. My argument is unmotivated only if one thinks the rule of lenity is not justified by the fair notice principle.

65. *See Kahan, supra* note 20. For clear statements of the fair notice principle, see *Liparota v. United States*, 471 U.S. 419, 427 (1985) (“[T]he rule of lenity ensures that criminal statutes will provide fair warning concerning conduct rendered illegal”); *McBoyle*, 283 U.S. at 27. The rule of law value of fair notice is also the most popular justification in academia. Kahan, *supra* note 20, at 349, 349 n.12.

66. *See United States v. Bass*, 404 U.S. 336, 347–50 (1971); Doerfler, *supra* note 10.

67. *See supra* note 24 and accompanying text.

68. Timothy Lynch, *Introduction to IN THE NAME OF JUSTICE: LEADING EXPERTS REEXAMINE THE CLASSIC ARTICLE “THE AIMS OF THE CRIMINAL LAW”*, at vii, xi (Timothy Lynch ed., 2009).

employing hypothetical expectations about a vague statute.

When one reads a vague criminal statute, so one version of the fair notice story goes, one thinks not of the borderline cases, but instead the prototypical cases. For instance, it is most likely that bringing a wheelbarrow into the park never crosses an individual's mind as they read the words, "Any person who brings or drives a vehicle into a federal park shall be guilty of a misdemeanor." The mental representation of the concepts conveyed by a statute typically does not include borderline cases.⁶⁹ As a result, punishing someone for a borderline violation of a criminal statute would go against the natural reading of the statute. They would not have been given fair notice that their conduct would be subject to punishment but rather misled into thinking that they were following the law by the vagueness of the statute.⁷⁰ In order to preserve the important rule of law value of fair notice, the rule of lenity requires a narrow construction of such statutes.

Leading cases on the rule of lenity often explicitly endorse a similar story regarding the expectations that readers of a vague statute are likely to have. For instance, in *McBoyle v. United States*, the Supreme Court applied the rule of lenity to rule that airplanes were outside the scope of the phrase "motor vehicle" as it was used in a federal criminal statute.⁷¹ The opinion justifies excluding airplanes from the motor vehicle category by stating that the "motor vehicle" phrase "evoke[s] in the common mind only the picture of the vehicles moving on land."⁷² Courts are worried about the lay citizen reading a statute and naturally having only the prototypical instances come to mind.

Importantly, the analysis just described is meant to be focused on the statute itself rather than the defendant. That is, for any given statute, the test is not to see if the defendant in the instant case actually read the statute. Many, perhaps most, defendants have not.⁷³ Instead, the analysis looks at the statute itself and how the text comes across to the ordinary reader. If the indeterminacy of a statute risks misleading readers, the rule of lenity

69. Solan, *supra* note 53, at 65–75, provides a helpful look into the scientific research on how individuals cognitively represent concepts through the use of "prototypes for categories."

70. See *United States v. Santos*, 553 U.S. 507, 523 (2008) (noting that lenity must apply "lest those subject to the criminal law be misled").

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

72. *Id.*

73. See *id.*; Dru Stevenson, *Toward a New Theory of Notice and Deterrence*, 26 CARDOZO L. REV. 1535, 1536, 1536 n.8. Tax law presents somewhat of an exception to this general observation since individuals who aim to get around the tax law typically employ agents who do take the time to read the tax code and advise them of what is and is not permissible behavior with regard to paying one's taxes. See Kahan, *supra* note 20, at 400. Thus, the expectations story is less of a fiction when it comes to tax law.

attempts to limit punishment in such instances by requiring a narrow construction of the statute.⁷⁴ The rule of lenity aims to correct a deficiency in the law itself.⁷⁵

H.L.A. Hart's rule of law account of excusing conditions to criminal liability can provide additional theoretical grounding to the concept and value of fair notice. On Hart's account, people should be able to avoid law's sanctions if they so choose.⁷⁶ There is an important security provided by knowing that we will be safe from punishment so long as we choose to follow the laws set out for us.⁷⁷ However, if we read a statute and naturally think only of the prototypical cases, then we will think that we are following the law when we commit borderline violations of that statute. Punishments for non-prototypical violations of a criminal law statute subvert the safety of choice to follow the law. The park-goer does not think that they violate the "no vehicles in the park" statute when pushing a wheelbarrow across the park gates. If it were not for the rule of lenity, their having read the law and intention to follow it would provide no assurance that they are safe from punishment; the court could arrive at an interpretation that they had never expected by considering a wheelbarrow a vehicle.

Hart's position here can be understood as a safe path argument. It is a minimal requirement of a legal system that it provide at least one path safe from punishment along which ordinary citizens can walk. The clearest violation of a safe path is the criminalization of both an action and its absence. For instance, suppose that criminal law both required citizens to wear a face mask and forbid citizens from wearing a mask. It may even be the case that both laws, understood separately, are reasonable—perhaps the legislature passed the first law to minimize transmissions of an infectious disease and the legislature passed the second law because the purchase of face masks by laypeople caused a shortage for healthcare workers.⁷⁸

74. See *McBoyle*, 283 U.S. at 27.

75. See also *id.* (reinforcing the value of fair notice even if criminals do not "carefully consider the text of the law"); *United States v. R.L.C.*, 503 U.S. 291, 309 (1992) (Scalia, J., concurring) (citing *McBoyle*, 283 U.S. at 27); HART, *supra* note 33, at 50 ("[T]he fact that only a few people, as things are, consider the question Shall I obey or pay?, does not in the least mean that the standing possibility of asking this question is unimportant . . ."); Paul H. Robinson, *Fair Notice and Fair Adjudication: Two Kinds of Legality*, 154 U. PA. L. REV. 335, 372 (2005).

76. HART, *supra* note 33; cf. Moore, *supra* note 39, at 31–40 (presenting arguments in favor of the choice theory of excuses at the individual level of moral responsibility).

77. HART, *supra* note 33, at 48; see Kadish, *supra* note 33, at 263 (noting that on Hart's account, excuses further "the satisfaction people derive in knowing that they can avoid the sanction of the law if they choose.").

78. One can see similar, though not identical, policy considerations at play in *N95 Respirators, Surgical Masks, Face Masks*, U.S. FOOD AND DRUG ADMIN., (June 14, 2020) (on file with author).

However, having both laws at once clearly violates the safe path requirement. There would be no way for a citizen to avoid punishment in a system that punishes both an action and its absence. In this situation, we would say that there is no safe path at all.

The absence of fair notice likewise violates the safe path principle. This is because the presumed safe path for ordinary citizens is the option to read the law and avoid the prohibited acts. When fair notice is violated, for instance by the punishment of non-prototypical violations of law, this safe path is upturned. These citizens' reading of a vague statute would mislead them into thinking that they are outside the reach of punishment only to have the rug pulled out from under their feet. The state cannot be said to have provided its citizens a genuine choice to avoid punishment because the citizens were misled about which actions would lead to punishment. Vague statutes thus compromise the availability of a path safe from punishment along which ordinary citizens can walk. Lenity aims to protect for citizens a genuine choice to avoid punishment.⁷⁹

In sum, it is a rule of law principle that the government may not punish an individual without having first given fair notice that such actions would be punished. Such a principle protects the ability of citizens to find out which acts are punished and avoid committing such acts. The statutory notice that government gives to citizens is fair only insofar as citizens can naturally discern which of their acts are prohibited from reading the statute. Without lenity, citizens can be misled by a vague statute into thinking that they are safe from punishment. The significance of this rule of law value has been thought by some to endow on the rule of lenity a "quasi-constitutional status" due to its role in protecting fair notice.⁸⁰

79. Lenity, however, is not the only way to preserve a genuine choice to avoid punishment. For example, another way to preserve a "safe path" would be for the crime's mens rea to require knowledge that one's action is a rule violation. *See infra* Section III.B.1. Alternatively, one might see a company like Thompson/Center Arms Co. as following yet another safe path—it paid the required taxes, then litigated for a refund, thereby avoiding punishment. Such a method, however, is not a safe path along which ordinary citizens can walk. This maneuver is made possible in the first instance by the fact that the company noticed the indeterminacy of the statute as it came to Thompson/Center kits. As the Court expressed in *McBoyle*, many readers may not recognize that there is indeterminacy in a statute. Second, the costs of litigation can be prohibitively expensive, making this option practically unavailable in many instances.

80. Kahan, *supra* note 20, at 346.

II. A MISMATCH BETWEEN PURPOSE AND OUTCOME

Part I, in the process of explicating the rule of lenity, has presented two propositions that deserve further consideration: (1) the rule of lenity determines the meaning of criminal statutes,⁸¹ and (2) the rule of lenity is best justified by the normative principle of fair notice. The second proposition has to do with the rule of lenity's purpose. The first proposition has to do with lenity's mechanism; in order to carry out its purpose of fair notice, the rule of lenity stipulates a narrow meaning to a linguistically indeterminate statute. Though each proposition is well-accepted—one would not have trouble finding Supreme Court opinions⁸² or law school casebooks⁸³ that repeat these truths—it nevertheless seems to me that the two propositions are at odds with one another. Lenity's purpose is normative, but its outcome is semantic.

By definition, to interpret a text is to ascertain its meaning.⁸⁴ The rule of lenity is not an attempt to *ascertain* the meaning of a statute; it instead *stipulates* a narrow meaning to a statute in order to protect fair notice.⁸⁵ Thus, it is odd that the rule of lenity, which does not even purport to ascertain the meaning of a statute, is nevertheless a canon of statutory “interpretation.”⁸⁶ If the purpose of the rule of lenity is something other than figuring out the meaning of a statute, then why does it end up determining the meaning of the statute?

This oddity of the rule of lenity may be best understood in contrast to more ordinary canons of statutory interpretation. For example, many canons rely on “maxims of word meaning”⁸⁷ or rules of grammar⁸⁸ to help piece together the meaning of a text. For these canons, their purpose and outcome are aligned. These rules rely on linguistic premises to ascertain the meaning of a text,⁸⁹ so it makes sense that the outcome of applying these rules is to determine the meaning of statutes.

Canons of statutory interpretation can be analytically divided into

81. See *supra* note 60 and accompanying text.

82. See, e.g., *United States v. Thompson/Ctr. Arms Co.*, 504 U.S. 505, 518 n.10 (1992); *Liparota v. United States*, 471 U.S. 419, 427 (1985); *McBoyle v. United States*, 283 U.S. 25, 27 (1931).

83. See, e.g., *ESKRIDGE ET AL.*, *supra* note 61, at 494–95; SANFORD H. KADISH, STEPHEN J. SCHULHOFER, CAROL S. STEIFER & RACHEL E. BARROW, *CRIMINAL LAW AND ITS PROCESSES* 159–60 (9th ed. 2012).

84. See, e.g., Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. 549, 559–60 (2009).

85. See *supra* Part II.

86. *ESKRIDGE ET AL.*, *supra* note 61, at 494.

87. *Id.* at 450–57.

88. *Id.* at 458–64.

89. See *id.* at 448–49.

three categories. While *textual* canons “[find] meaning from the words of the statute” and *reference* canons determine “what other materials might be consulted to figure out what the statute means,” *substantive* canons like the rule of lenity instead implement normative principles external to the task of interpretation like fair notice.⁹⁰ Substantive canons, in contrast to the other two types of canons, are not concerned with “finding” or “figuring out” what the statute means.⁹¹ Substantive canons are grounded in normative policy principles rather than interpretative principles.

Putting these distinctions to work, one can only conclude that the rule of lenity is a canon of statutory “interpretation” in name only. The purpose of the rule of lenity is to protect criminal defendants who failed to receive fair notice that their conduct would be punished.⁹² Rather than interpreting a text, the rule assigns the words of a statute narrow meaning in order to implement normative principles concerning rule of law values. The canon is not a rule of interpretation *proper* because it never seeks to interpret, that is, ascertain the meaning of, a statute.⁹³ The rule of lenity has a semantic outcome—determining the meaning of a statute—which is flatly inconsistent with its non-semantic purpose.

Notice also that the problem I have outlined here does not depend on any particular theory of statutory interpretation. The discrepancy between the rule of lenity’s purpose and outcome relies only on the distinction between *figuring out* a meaning and *stipulating* a meaning. The rule of lenity stipulates the meaning of a statute instead of trying to figure out what the statute means. On no theory of statutory interpretation is providing fair notice for criminal defendants a way of figuring out the meaning of a statute.⁹⁴ Providing fair notice is, on its face, neither a way of getting at the plain or ordinary meaning of a text nor uncovering the purpose of a statute, so it cannot be understood as either a textualist or purposive doctrine of interpretation.⁹⁵ The discrepancy between the rule of lenity’s purpose and outcome should worry legal scholars of all stripes.

90. *Id.*

91. *See id.*; see William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1111, 1127 (2017).

92. *See supra* Section I.B.

93. *See also* Balkin, *supra* note 84 (aligning “interpretation proper” with “the ascertainment of meaning”).

94. *See* ESKRIDGE ET AL., *supra* note 61, at 318–46 (explicating various views about textualist and purposive approaches to statutory interpretation).

95. *See id.* at 301.

III. THREE DOCTRINAL PROBLEMS

The theoretical disconnect between lenity's purpose and outcome just outlined in Part II entails thorny doctrinal consequences. This Part explores three such doctrinal consequences: the rule of lenity cannot handle linguistic ambiguity,⁹⁶ the rule oversteps its boundaries and enters civil law,⁹⁷ and the rule fails to resolve issues of fair notice that result from higher-order vagueness.⁹⁸

A. LINGUISTIC AMBIGUITY

Consider the following hypothetical. The word "bank" may refer to either the financial institution ("financial bank") or the land next to a river ("river bank"). Suppose the Bank Safety Act criminalizes starting a fire within one hundred feet of a bank, and it is indeterminate which of the two meanings should be applied to the term "bank." As argued in Section I.B, such indeterminacy of meaning violates the principle of fair notice. Suppose further that two defendants are on trial, Defendant A for having set fire next to a financial bank, and Defendant B for having set fire next to a river bank.

The rule of lenity states that an indeterminate text must be interpreted in favor of the defendant.⁹⁹ But which one? Giving the statute either meaning will absolve one of the defendants but still condemn the other. The rule of lenity is like the Buridan's ass unable to choose between two identical stacks of hay. If the court rules that "bank" refers to financial banks, then Defendant A will be held criminally liable, and if the court rules that "bank" refers to river banks, then Defendant B will be held criminally liable.¹⁰⁰ This is because the statute's indeterminacy arises from linguistic ambiguity rather than vagueness.

Linguistic ambiguity should be understood as distinct from another kind of ambiguity discussed earlier, what one might call *legal ambiguity*.¹⁰¹ What judges and practicing lawyers most often mean when they use the term *ambiguity* is a general kind of uncertainty about the application of a statute.¹⁰² Legal ambiguity can arise for a variety reasons. One such reason

96. See *infra* Section III.A.

97. See *infra* Section III.B.

98. See *infra* Section III.C.

99. See *United States v. Kozminski*, 487 U.S. 931, 952 (1988); Lawrence M. Solan, *Pernicious Ambiguity in Contracts and Statutes*, 79 CHI.-KENT L. REV. 859, 861 (2004).

100. Recall that the rule of lenity assigns meaning to a statute, see *supra* Section I.A, and a statute can have just one meaning, *United States v. Santos*, 553 U.S. 507, 522–23 (2008).

101. See *supra* note 50 and accompanying text.

102. See Solan, *supra* note 99.

for legal ambiguity, discussed in the previous part of this Article, is the vagueness of language.¹⁰³ Another reason for legal ambiguity is the kind of linguistic indeterminacy we saw with the two meanings of *bank*, what I refer to here as *linguistic ambiguity*.

Vagueness in language concerns how far out to draw the boundaries of certain terms, for instance how broadly we draw the category of manufacturing a short-barreled firearm.¹⁰⁴ When linguists use the term *ambiguity*, they are instead referring to terms that can have disparate meanings altogether, such as the two possible meanings of the term *bank*.¹⁰⁵ Put succinctly, vagueness concerns interpretations that differ in degree while ambiguity concerns interpretations that differ in kind. Whereas in cases of vagueness, the court can choose between broad and narrow readings because the narrow reading is a proper subset¹⁰⁶ of the broad reading, in cases of ambiguity, there is no narrow interpretation because neither the river bank meaning nor the financial bank meaning is a proper subset of the other. Either reading of *bank* holds one defendant culpable while letting the other go free.

Plainly, this result of the rule of lenity is inconsistent with the demands of the rule's fair notice purpose. Neither Defendant A nor Defendant B had fair notice that their action was punishable because the statute was ambiguous between their two readings. One could read the Bank Safety Act and come away thinking that it permits starting fires next to financial banks or come away thinking that it permits starting fires next to river banks. Given the indeterminacy of meaning, both are natural readings of the statute. The law does not clearly mark the path safe from punishment. Since neither defendant received fair notice, it would be unfair to punish either defendant.

Thus, the rule of lenity's outcome is under-inclusive with respect to its purpose. Though the rule of lenity's purpose of protecting fair notice would dictate absolving both defendants of criminal liability, its semantic outcome is unable to provide such a result.¹⁰⁷

103. See *supra* note 55 and accompanying text.

104. Solan, *supra* note 46.

105. *Id.*

106. "Set A is a proper subset of set B ($A \subset B$) if all of the elements of set A are members of set B, but there is at least one element of set B that is not a member of set A ($A \neq B$)." *Proper Subset*, MATHEMATICS GLOSSARY, <http://www.learnalberta.ca/content/memg/Division03/Proper%20Subset/index.html> [<https://perma.cc/T6N9-AQJH>].

107. This also means that the rule of lenity cannot be a closure rule, a rule that dictates for judges how to resolve cases where the law is unclear, since there is a class of cases (namely linguistic ambiguity cases) where the rule of lenity does not provide any resolution. See Part I.A. for a discussion of closure rules.

At this point, the astute reader might raise the following objection. Thus far, by focusing on the fact that *bank* has just two possible meanings, I have obscured a third option that would work best. When it comes to linguistically ambiguous statutes, the objection states, the rule of lenity should say that the statute has no meaning at all. That is, the Bank Safety Act should be construed not to criminalize any behavior because its use of the term *bank* has no meaning. Following this rule, both Defendants A and B would go free, and the result would thus comport with the demands of fair notice.

In response to this objection, suppose that there is a third defendant, Defendant C. Defendant C started a fire next to a financial bank that happened to be located on a river bank. On either meaning of *bank*, Defendant C is guilty and, thus, had fair notice their actions were prohibited by law. Defendant C cannot possibly claim that the ambiguity in the statute would mislead someone into thinking that their actions were permissible. If the court construes the Bank Safety Act to have no meaning at all, then it would let Defendant C go, despite the fact that they had fair notice of punishment. The rule would still fail to serve its purpose.

The hypothetical Bank Safety Act demonstrates one way the disconnect between the rule of lenity's purpose and outcome could lead to its being under- or over-inclusive, but a critic may nevertheless contend that such ambiguities appear rarely in the actual law. When will a reader actually be faced with the term "bank" in a statute and be unable to figure out whether it refers to river banks or financial institutions? Usually, the context and purpose of a statute will make one meaning the clearly right interpretation for a linguistic ambiguity, thereby eliminating any indeterminacy.¹⁰⁸

In part, I agree with the critic and, in part, I disagree. I concede I have no quantitative measurement of how often courts are faced with linguistic ambiguity, so these cases may indeed be rare. Scholars have noted real examples where the courts have had to interpret linguistically ambiguous statutes, but it is not obvious how often such ambiguities appear.¹⁰⁹ Where I disagree with the critic is that I fail to see how this is a criticism. There is, at minimum, a conceptual problem at issue—the rules and principles of our legal system fail to conceptually form a coherent whole. The hypothetical example I used here lays bare a real incoherence in our legal system. Uncovering this previously unnoticed incoherence deepens our

108. See Lawrence M. Solan, *Linguistic Issues in Statutory Interpretation*, in THE OXFORD HANDBOOK OF LANGUAGE AND LAW 87, 89 (Lawrence M. Solan & Peter M. Tiersma eds., 2012).

109. Lawrence M. Solan, *The Interpretation of Legal Language*, 4 ANN. REV. LINGUISTICS 337, 342–43 (2018).

understanding of the rule of lenity. Moreover, even if linguistically ambiguous statutes are rare, the incoherence of the rule of lenity will still have other critical real-world consequences as the next Section of this Article will show.

B. TAX LAW'S RULE OF LENITY

Incongruous with its purpose to provide fair notice of punishment, the rule of lenity leads to narrow constructions of texts even outside of the criminal context. For instance, in *United States v. Thompson/Center Arms Co.*, the Supreme Court, relying on the rule of lenity, assigned a narrow meaning to the phrase "making of a firearm" with regard to an excise tax levied on the manufacture of firearms under I.R.C. § 5821.¹¹⁰ The statute's definition for "firearm" included short-barreled rifles, but excluded pistols and long-barreled rifles. The taxpayer packaged as one unit three parts that could be connected together: a shoulder stock, a pistol, and a barrel extension. As before, let us call this unit of three parts a "Thompson/Center kit." Putting the three parts together would create a long-barreled rifle, on which no excise tax is laid. Putting just the shoulder stock and pistol together would create a short-barreled rifle on which excise tax is laid.

The Court stated that the manufacture of a Thompson/Center kit was not clearly an instance of making a firearm, but was also not clearly *not* an instance of making a firearm.¹¹¹ Its next move, surprisingly, was to apply the rule of lenity. The Court assigned a narrow meaning such that only *clearly* making a firearm would count under § 5821. Since making the Thompson/Center kit is not clearly an instance of making a firearm, § 5821 does not here apply. Therefore, under the rule of lenity, the taxpayer need not pay any excise tax on the manufacture of a Thompson/Center kit.

The imposition of tax is a civil matter, not a criminal one. Thompson/Center Arms had paid the excise tax and was merely bringing suit to get a refund of those payments.¹¹² Recall that the rule of lenity was justified under the context of punishment and the special kind of notice that the harshness of punishment demands.¹¹³ It seems no more appropriate to apply the rule of lenity in a civil matter than it would to apply a beyond a reasonable doubt standard of evidence to civil trials.¹¹⁴ So why was the rule of lenity being used within the context of tax law? The Court's winding

110. *United States v. Thompson/Ctr. Arms Co.*, 504 U.S. 505, 518–19 (1992).

111. *Id.* at 513–17.

112. *Id.*

113. *See supra* note 24 and accompanying text.

114. *See also Thompson/Ctr. Arms*, 504 U.S. at 525–26 (Stevens, J., dissenting) (analyzing the incongruence between the purposes of civil law and the rule of lenity).

reasoning proceeds as follows. To begin, § 5871 imposes criminal penalties for nonpayment of the § 5821 excise tax on firearms. I.R.C. § 5821 is, by that fact, both a criminal statute and a tax statute (or “dual-purpose statute”).¹¹⁵ Therefore, the rule of lenity should apply to § 5821 within the context of criminal law to assign a narrow meaning to the phrase “making of a firearm.” The meaning of a single statute cannot fluctuate depending on what the statute is being used for.¹¹⁶ This principle of consistency in statutory interpretation is well grounded.¹¹⁷ (Using technical language of utterances, types, and tokens, it is easier to state this proposition more precisely: though a single utterance type may have multiplicity of meaning depending on context, a single utterance token cannot.¹¹⁸) Therefore, if the rule of lenity requires assigning a narrow meaning to “making of a firearm” in the criminal law context, the narrow meaning assigned to “making of a firearm” applies to cases of civil tax law as well.

Thompson/Center stands for the principle that the rule of lenity

115. *Id.* at 518 n.10.

116. *United States v. Santos*, 553 U.S. 507, 522–23 (2008). Other cases also echo this point. Justice Stevens, in his dissent for *Thompson/Center*, states that we should cabin the rule of lenity to criminal law. *Thompson/Ctr. Arms*, 504 U.S. at 525 (Stevens, J., dissenting). None of the other Justices agreed. I side with the eight Justices on the linguistic point, though I side with Justice Stevens that lenity must be cabined. *See infra* Section IV.

117. But Ryan Doerfler argues that dual-purpose statutes sometimes have multiple meanings: one meaning in the civil context and another meaning in the criminal context. Doerfler, *supra* note 10, at 228–38. Given the technical nature of this topic, I would need a separate essay to address the multiple meanings argument in full. For the moment, I merely relegate a brief summary of my disagreement to this footnote. Almost everyone holds the *Thompson/Center* view of interpretation that statutes are univocal, with just one meaning across different contexts. Doerfler himself speaks as though almost everyone agrees that statutes are univocal—presumably, such universal assent is what makes Doerfler’s contrary conclusion so interesting. *Id.* at 213, 216–18, 223 (stating that courts would find Doerfler’s own conclusion to be “madness”). Central to Doerfler’s claim is his premise that Congress sometimes intended multiple meanings. *Id.* at 243. But how can Congress have the intention for multiple meanings if everyone believes that statutes have just one meaning? As a general principle, one cannot intend what one believes will fail. *See generally* Stephanie Rennick, *Things Mere Mortals Can Do, but Philosophers Can’t*, 75 ANALYSIS 22, 23–24 (2015) (noting that this necessary condition for intention is widely accepted). For instance, I cannot intend to jump from the sidewalk to the roof of a skyscraper because I know I will not make it. (If you have doubts, I urge you to form such an intention yourself.) Similarly, legislators should believe readers will not interpret their statutes to have multiple meanings since the generally accepted view of interpretation, as mentioned above, is that statutes have just one meaning. Therefore, applying the principle that one cannot intend what one believes will fail, legislators cannot intend their statutes to communicate multiple meanings.

118. Lawrence B. Solum, *The Fixation Thesis*, 91 NOTRE DAME L. REV. 1, 38 (2015). Types are the general abstractions, and tokens are the “particular concrete instances.” *Id.* at 37. Thus, the word “I,” *qua* type, could refer to any speaker of the term. Since the identity of the speaker is a feature of the context under which the word is being used, we say that the term “I” is context dependent. The word “I,” when used within a particular context, *qua* token, only refers to one person, the actual speaker. The same can be said of legal expression types, such as the Model Penal Code, which is replicated across many tokens by the state-by-state uptake of the model. *Id.* Note also that I use the term “utterance” broadly to encompass inscriptions. For helpful further discussion of the type-token distinction in the context of constitutional interpretation, see *id.* at 35–41.

properly applies to dual-purpose statutes. This abstract principle has left unresolved the concrete questions of exactly how lenity will change the interpretation and administration of civil law. Does lenity apply to all tax statutes? Where lenity does apply, what is its effect, counterfactually speaking? Though there is a lot of uncertainty in this area of jurisprudence, the following Sections analyze these two questions in order.

It should be noted that there are also dual-purpose statutes outside of the tax realm in areas ranging from securities law to environmental law, where violations of civil law can carry criminal penalties.¹¹⁹ Thus, I intend for my analysis of lenity in tax law to be valuable in itself as well as serving as an illuminating case study for the problem more generally across the variety of dual-purpose statutes in the law.

1. The “Willfulness” Requirement

The dual-purpose nature of tax law will serve as the starting point of the inquiry.¹²⁰ I.R.C. § 5821 is not the only statute that carries criminal penalties for non-compliance. I.R.C. §§ 7201 and 7203 assign criminal penalties to nonpayment and evasion of any tax imposed under the tax code, Title 26.¹²¹ Similar provisions assign criminal penalties for various procedural violations.¹²² So, one might reasonably conclude that the rule of lenity ought to apply to the interpretation of tax laws generally.

However, the Court in *Thompson/Center* implies that the rule of lenity need not be applied to all tax laws because § 7201 and related statutes can only be violated if the taxpayer acts “willfully.”¹²³ The willfulness requirement of § 7201 already builds in notice as a pre-condition of punishment since the willfulness requirement is a requirement that the taxpayer know of and understand the law that they are breaking. Though the opinion is not explicit about either the rule or the underlying principle, the Court appears to be taking the position that the willfulness requirement satisfies the requirement of fair notice,¹²⁴ so no application of the rule of

119. Doerfler, *supra* note 10 at 221.

120. See Solan, *supra* note 60, at 2237–51 (discussing the limited application of the rule of lenity to dual purpose statutes).

121. See Hickman, *supra* note 10, at 938–40.

122. E.g., I.R.C. § 7202.

123. *United States v. Thompson/Ctr. Arms Co.*, 504 U.S. 505, 506 (1992).

124. However, the protection provided by the willfulness requirement is not strictly greater than the protection provided by the rule of lenity. Suppose that *Thompson/Center Arms Co.* was being tried criminally, and we had conclusive proof that the company believed it was breaking the law when it did not pay any excise taxes on the manufacture of *Thompson/Center* kits. This would be an instance of a defendant believing it is violating the law when it is only doing so with a borderline case. In such an instance, applying only the rule of lenity would provide protection for the defendant and applying only the willfulness requirement will not. Therefore, the protection provided by the willfulness requirement

lenity to the general tax law is required.¹²⁵

The *Thompson/Center* opinion's use of the willfulness requirement as a dam against applying the rule of lenity is colorable, but not without cracks. The first crack in the dam is that not all tax statutes require willfulness. *Thompson/Center* presented just such a case, as § 5871 had no willfulness language. In those instances, it is clear that the rule of lenity should apply. The second crack in the dam is that it is not some necessity of tax law that its violations be punished only if such violations are willful. The willfulness requirement of tax law, as this Section argues, is contestable and contingent.

Generally, ignorance of the law is not an excuse.¹²⁶ One is not released from criminal liability for not having known about the existence of a law criminalizing that particular conduct. Justice Oliver Wendell Holmes gave an oft-cited defense of the doctrine, "to admit the excuse at all would be to encourage ignorance where the law-maker has determined to make men know and obey."¹²⁷ Such a deterrence rationale satisfies the utilitarians.¹²⁸ Retributivists, in contrast, have tended to consider the mistake of law doctrine a thornier problem.¹²⁹ In particular, retributivists have found the lack of an excuse for mistake of law unfair when applied to *mala prohibita* offenses¹³⁰ and in cases where the defendant was not culpable for his ignorance of the law.¹³¹

is not strictly (in the logical sense) greater than the protection provided by the rule of lenity; there are some cases in which defendants would prefer a rule of lenity over the willfulness requirement. The argument that willfulness acts as a dam against applying the rule of lenity must instead be grounded in the notion that fair notice exists to protect expectations. Insofar as the defendants believed they were breaking the law, it violates no expectation to punish them. As we have seen, however, the notice value is best understood as a structural claim about the legal system itself rather than any particular defendant. See *supra* Part I.

125. See *Thompson/Ctr. Arms*, 504 U.S. at 506–18; cf. *United States v. O'Hagan*, 521 U.S. 642, 644 (1997) (stating that a willfulness requirement negates what would otherwise be unfairness from applying an "indefinite" statute).

126. Some lawyers may more easily recognize this doctrine in its Latin formulation as *ignorantia legis neminem excusat*. E.g., *Vartelas v. Holder*, 566 U.S. 257, 280 (2012) (Scalia, J., dissenting) (setting out the principle that ignorance of law is no excuse and its Latin formulation).

127. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 41 (Routledge 2019) (1881).

128. See also JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* 159–60 (8th ed. 2018) (characterizing Justice Holmes's "most commonly accepted explanation for the general no-defense rule" as utilitarian). See generally JEREMY BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* (Batoche Books 2000) (1781) (discussing the general principles of utilitarian views on punishment).

129. Though most contemporary legal philosophers are retributivists, mistake of law has mostly received utilitarian justifications. Douglas Husak, *Mistake of Law and Culpability*, 4 CRIM. L. & PHIL. 135, 135–36 (2010).

130. DRESSLER, *supra* note 128, at 158; Michael L. Travers, Comment, *Mistake of Law in Mala Prohibita Crimes*, 62 U. CHI. L. REV. 1301, 1322–23 (1995).

131. DRESSLER, *supra* note 128, at 159; Husak, *supra* note 129, at 139 (characterizing the state of the literature and proposing some rebuttals).

Tax law presents an exception to the rule that mistake of law does not excuse. I.R.C. § 7201 provides that “[a]ny person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony.”¹³² The “willfulness” requirement of § 7201, as interpreted in *Cheek v. United States*, is a legislative exception to the rule that ignorance of law does not excuse.¹³³

As the court stated in *Cheek*, the central idea behind this exception is that “[t]he proliferation of statutes and regulations has sometimes made it difficult for the average citizen to know and comprehend the extent of the duties and obligations imposed by the tax laws.”¹³⁴ Knowledge of a body of law as complicated as tax law requires either ability and effort devoted to understanding the requirements of tax law or the resources to hire an able person who has devoted time to studying the tax law. When the barrier to knowledge of tax law is so high, it would be unfair to punish individuals who have violated the tax law due to *ignorantia legis*.¹³⁵ The Court’s reasoning thus echoes the aforementioned retributivists’ fairness concerns regarding cases in which defendants are not culpable for their ignorance of the law. For this reason, knowledge of law has been understood to be required for criminal liability across cases interpreting several criminal tax statutes.¹³⁶

Whether ignorance of tax law should be an excuse is a matter of balancing costs and benefits of such a rule. As the law becomes more complex, the unfairness of punishing a mistake of law increases.¹³⁷ However, exempting mistake of law cases adds costs to the litigation process and lowers deterrence effects when people who know the law can credibly claim in court that they did not.¹³⁸ Whereas legislatures have typically found that the balance tips against allowing ignorance of law as an excuse to criminal liability generally, Congress has found the balance

132. I.R.C. § 7201.

133. *Cheek v. United States*, 498 U.S. 192, 205 (1991) (“[T]he willfulness requirement in the criminal provisions of the Internal Revenue Code . . . require[s] proof of knowledge of the law.”). However, statutes explicitly requiring willfulness are not always interpreted this way. At times, such statutes are construed to require only knowledge of the facts rather than the law. *See, e.g.*, *United States v. Overholt*, 307 F.3d 1231, 1246 (10th Cir. 2002).

134. *Cheek*, 498 U.S. at 199–200.

135. *See* DRESSLER, *supra* note 128, at 158, 164–65.

136. Sharon L. Davies, *The Jurisprudence of Willfulness: An Evolving Theory of Excusable Ignorance*, 48 DUKE L.J. 341, 344, 344 n.10 (1998).

137. DRESSLER, *supra* note 128, at 158.

138. 1 JOHN AUSTIN, LECTURES ON JURISPRUDENCE: OR THE PHILOSOPHY OF POSITIVE LAW 498 (4th ed. 1879); DRESSLER, *supra* note 128, at 165 (“Courts would become hopelessly enmeshed in insoluble questions regarding the extent of a defendant’s true knowledge of the relevant law.”).

tips in favor of allowing ignorance as an excuse when it comes to issues of tax law.¹³⁹

Reasonable minds, of course, can disagree with Congress about the outcome of the cost-benefit analysis. The cost-benefit balancing is contingent on not only the complexity of law and our valuation of the competing normative principles, but also the positive facts. For instance, suppose that the Treasury Department could provide a pre-populated tax return for low- and middle-income individuals. State-level implementation in California has been successful in providing pre-populated returns for those with simple tax situations,¹⁴⁰ and pre-populated tax returns could plausibly be implemented at the federal level as well,¹⁴¹ the proposal even having been a part of then-Senator Barack Obama's presidential campaign platform.¹⁴² Furthermore, most developed nations have return-free filing for low- and middle-income taxpayers, and such a system is not outside the realm of possibility in the United States.¹⁴³ If we were to resolve the compliance difficulties currently in our system for low- and middle-income taxpayers, then the case for removing willfulness becomes much stronger,¹⁴⁴ perhaps overwhelming the reasons for keeping the willfulness requirement. If the Treasury were to do all of the legwork for the taxpayer, then complying with the tax law would require no greater intellectual sophistication than following criminal law generally.

Regardless of how one would, from one's preferred moral and political valuations, balance the costs and benefits, I take it that we all agree that if the balance of reasons weighed against the willfulness requirement, Congress should be able to revise the language of I.R.C. § 7201 (and corresponding criminal tax statutes) to delete the word "willfully." An amendment by the legislature that ignorance of the law does not absolve one of criminal liability in tax law, which is a matter of

139. Though Congress has shown ready willingness to amend willfulness statutes in other areas when the courts have interpreted them to require knowledge of law, John Shepard Wiley Jr., *Not Guilty by Reason of Blamelessness: Culpability in Federal Criminal Interpretation*, 85 VA. L. REV. 1021, 1077 (1999), there has been no such amendment to I.R.C. § 7201.

140. Randall Stross, *Why Can't the I.R.S. Help Fill in the Blanks?*, N.Y. TIMES (Jan. 23, 2010), <http://www.nytimes.com/2010/01/24/business/24digi.html> [<https://perma.cc/9KSA-4U2E>]. Those with simple tax situations amount to roughly forty percent of California taxpayers. Joseph Bankman, *Simple Filing for Average Citizens: The California ReadyReturn*, 107 TAX NOTES 1431, 1431 (June 13, 2005).

141. Implementation at the federal level would require solving a few procedural issues, the main issue being "the lack of timely wage data at the federal (although not the state) level." Bankman, *supra* note 140, at 1434.

142. Stross, *supra* note 140.

143. Bankman, *supra* note 140, at 1434 (noting that such a reform would require certain changes in substantive tax law for accurate withholding at the source of income).

144. *Cf.* Cheek v. United States, 498 U.S. 192, 202 (1991) (noting that a tax return form and attached instructions could serve as evidence of knowledge of the contents of the instructions).

retributive justice, should not have enormous implications for the distribution of tax liabilities, a matter of distributive justice. Yet this is precisely the consequence of the too much lenity problem.

2. From Deference to Strict Construction

Following the question of to which statutes the rule of lenity will apply, the second question is what effect such an application will have when the rule does apply to a dual-purpose statute. Recall that the rule of lenity requires finding in favor of the defendant when the law is unclear. This interpretative stance is striking as an approach to tax law. Indeterminacy is a persistent problem for statutes, and the tax code is no exception.¹⁴⁵ Moving from an approach of uncovering the best interpretation of tax statutes to a taxpayer-wins approach in hard cases is a harsh blow to the tax law's aims. An application of the rule of lenity is particularly harmful to the IRS's enforcement efforts, as it is in the gaps of legal ambiguity where tax shelters thrive.¹⁴⁶

This issue becomes the clearest when comparing the rule of lenity to the general doctrines granting deference to the Treasury, and by extension the IRS, in interpreting the tax law. This comparison serves to analyze the counterfactual, the interpretative approach that would govern were lenity not to apply. An examination of the counterfactual brings to light just how starkly lenity contrasts in terms of both its purpose and effect.

Generally, when statutes are ambiguous, administrative agencies are granted deference (often called "*Chevron* deference") by the courts in the agencies' interpretation of the statutes they administer.¹⁴⁷ The deference given to the IRS helps it to fill in the gaps of statutes in a way that comports with the aims of the tax code, collecting revenue in a just and efficient manner.¹⁴⁸

In contrast, the Department of Justice, which prosecutes federal criminal offenses, receives no such deference in its interpretation of criminal statutes. Instead, it is well established that to afford it deference would be to run completely opposite the rule of lenity. Whereas the rule of lenity is a pro-defendant approach to interpretation, affording deference to the Justice Department would be pro-prosecution. As Justice Scalia has put

145. See Hickman, *supra* note 10, at 908.

146. *Id.* at 932.

147. The deference regime is complex, but it begins with the case law *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–44 (1984); *Nat'l Muffler Dealers Ass'n v. United States*, 440 U.S. 472, 476–77 (1979); *Skidmore v. Swift & Co.*, 323 U.S. 134, 139–40 (1944).

148. See also Hickman, *supra* note 10, at 909 (noting the role of deference in stopping abusive tax shelters).

it, to afford deference to the Justice Department would “turn the normal construction of criminal statutes upside-down” into “a doctrine of severity.”¹⁴⁹

The doctrines of deference and lenity clearly juxtapose two distinct considerations about the right approach to take with regard to gaps in the law.¹⁵⁰ On the lenity account, legal indeterminacy represents a rule of law failure and, in order to protect a path safe from punishment, citizens who fall under that penumbra cannot be punished. This account makes sense given the role of criminal law in carrying out retributive justice aims of punishment and moral condemnation. On the deference account, the gaps in the law ought to be filled by the expert, policy-driven approach of administrative agencies.¹⁵¹ This account makes sense given the role of tax law in coordinating distributive justice and revenue-raising functions. By cabining lenity to criminal law and deference to civil law, these opposing doctrines would have been kept aligned to their respective purposes, but under the *Thompson/Center* holding, lenity would apply to dual-purpose statutes that are being interpreted in the civil context. Even in cases that solely determine civil tax liability, instead of the interpretive regime that would best carry out the purposes of the tax law, the courts must employ a rule built to protect criminal defendants. The rule of lenity is incongruous with its purpose.

Without the kind of policy-driven approach permitted by *Chevron*, it is hard to imagine that there can be effective policing of tax shelters.¹⁵² In order to distinguish between abusive tax shelters and permissible tax planning, the agencies must look to the general purpose of the tax laws. This is because tax shelters follow the letter of the tax law while going against the fundamental spirit of the tax code.¹⁵³ Whereas deference allows the IRS to interpret statutes in line with the spirit of the law, lenity swings much closer to the textualist “letter of the law” interpretation. Foreign jurisdictions applying ordinary meaning textualist approaches to interpretation have struggled to strike down tax shelters,¹⁵⁴ and

149. *Crandon v. United States*, 494 U.S. 152, 178 (1990) (Scalia, J., concurring).

150. *Hickman*, *supra* note 10, at 912–17.

151. *Id.* at 932.

152. *Id.* at 932–33 (citing *Chevron*, 467 U.S. at 844–45).

153. Dean & Solan, *supra* note 60, at 882–83; Steven A. Dean, Lawrence M. Solan & Lukasz Stankiewicz, *Text, Intent and Taxation in the United States, the United Kingdom and France*, in *THE ROUTLEDGE COMPANION TO TAX AVOIDANCE RESEARCH*, 139, 146 (Nigar Hashimzade & Yuliya Epifantseva eds., 2018); *see also* Noël B. Cunningham & James R. Repetti, *Textualism and Tax Shelters*, 24 VA. TAX REV. 1, 2, 4 (2004) (noting that the rise of textualism has led tax advisors to be more aggressive in planning tax structures that go against the underlying purpose of tax law).

154. Cunningham & Repetti, *supra*, note 153 at 27.

Thompson/Center threatens the same for the US system.¹⁵⁵

As with the willfulness dam limiting the statutes to which lenity applies, the Court has partly walled off the deference due to some agency interpretations from *Thompson/Center*'s assault.¹⁵⁶ Though the tension is not yet fully resolved, the Supreme Court has laid out a middle way between the two competing doctrines for some dual-purpose statutes in *Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*, such that not all administrative interpretations will be stripped of deference.¹⁵⁷ According to the middle way, agency interpretations of dual-purpose statutes will still be granted deference if they satisfy fair notice principles. In *Sweet Home*, the Court noted that the agency interpretations satisfied fair notice because they came in the form of regulations that had been published for twenty years.¹⁵⁸

But the *Sweet Home* middle way is limited. Not all administrative interpretations come by longstanding published regulations. *Thompson/Center*, for instance, presented a case in which no regulations were present. In the spaces where the IRS has not passed longstanding, formal, law-like regulations or has passed regulations with language itself subject to competing interpretations, it appears that fair notice will not have been provided.¹⁵⁹ These gaps are significant.¹⁶⁰ Practitioners (or indeed anyone familiar with the tax system) would vouch for the importance of informal, nonbinding IRS guidance on tax matters.¹⁶¹ Abusive transactions exploiting legal ambiguities in the tax code are often noticed by the IRS only after a taxpayer has engaged in such transactions.¹⁶² For these cases, *Thompson/Center* would severely hinder the Service's efforts in effectuating the purpose of the tax laws by shifting from a deference regime to lenity.¹⁶³

Furthermore, the *Sweet Home* approach to deference has also drawn academic criticism for failing to coincide with the non-delegation principle,

155. Cf. Dean & Solan, *supra* note 60, at 903–04 (noting that the most effective interpretative approach against tax shelters would swing far towards the purposive side of the spectrum).

156. Nicholas R. Bednar & Kristin E. Hickman, *Chevron's Inevitability*, 85 GEO. WASH. L. REV. 1392, 1426 (2017) (noting also that the relationship between lenity and *Chevron* is still unresolved).

157. *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 704 n.18 (1995) (citing *United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 517–18 (1992)).

158. *Id.*

159. Hickman, *supra* note 10, at 923.

160. See also Chirelstein & Zelenak, *supra* note 12 (“As Congress closes one loophole, tax shelter designers find other glitches in the Code around which to build new shelters.”); Dean & Solan, *supra* note 60, at 904 (noting the importance of dealing with “individual shelters”).

161. See Hickman, *supra* note 10, at 942.

162. *Id.* at 932.

163. See *id.* at 942 (demonstrating the impact of lenity on IRS enforcement efforts).

which would confine the morally laden task of drafting criminal law statutes to elected officials in the legislature.¹⁶⁴ *Chevron* is essentially a delegation doctrine, recognizing the delegation of interstitial lawmaking authority from the legislature to the administrative agencies.¹⁶⁵ Since dual-purpose statutes serve criminal functions, allowing agency interpretations deference essentially puts the agencies in the role of filling in the criminal law and thereby violates the non-delegation principle. Agency deference ought to be limited to civil law just as the rule of lenity ought to be limited to the criminal law.

3. Legislative Solutions to the Too Much Lenity Problem

As I hope to demonstrate in this Article, I think that there are solutions to the too much lenity problem. Before getting to my preferred solution in Part IV, I discuss in this Section a possible legislative response and the difficulty it faces.

One possible response to the problem of too much lenity is for Congress to draft a separate criminal tax code and civil tax code. The problem of too much lenity arises when a criminal tax law refers to the language of a civil tax law. For instance, § 5871 states, “Any person who violates or fails to comply with any provision of this chapter shall, upon conviction, be fined not more than \$10,000, or be imprisoned not more than ten years, or both.”¹⁶⁶ The phrase “this chapter” refers to chapter 53 of the Internal Revenue Code, which governs the taxation of machine guns, destructive devices, and certain other firearms.¹⁶⁷ It thereby requires substantive tax laws within chapter 53 to now perform double duty, assigning civil tax liability and serving as part of the criminal actus reus for § 5871.

Separating the two contexts through drafting may seem a reasonable solution at first, but thinking through how such a solution could be carried out leads to a primary difficulty. How could the legislature be able to draft language regarding the violation of tax law without referring to such laws? The content of the crime set out in § 5871 is that someone violated the tax law. And if this violation of the tax law is what we hold to be criminal, then

164. *Id.* at 922–23.

165. *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984) (“If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. . . . Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.”)

166. I.R.C. § 5871.

167. *Id.* §§ 5801–5872.

it is hard to see how the criminal statute could be drafted without reference to the civil tax law.

The act/omission distinction partly explains the issue at hand. The distinction is ordinary and, so, should be familiar to most. To water a plant involves carrying out some willed bodily movement, an action.¹⁶⁸ Omissions can best be understood negatively as the absence of a certain act. If you have agreed to water your friend's plants while they are on vacation, then your failing to do so is an omission—an absence of the act of watering.¹⁶⁹ The law typically criminalizes acts; a major exception is in tax law, where omissions are criminalized.

Consider the language of 18 U.S.C. § 1584, which punishes “[holding another person] to involuntary servitude.”¹⁷⁰ Holding another person to involuntary servitude is an act. The statute reflects the prohibition against involuntary servitude laid out in the Thirteenth Amendment¹⁷¹ but, importantly, does not directly reference the Thirteenth Amendment.¹⁷² Since § 1584 assigns punishment to an act, it need not refer to any other provision. It can merely replicate the language of the Thirteenth Amendment and punish holding others to “involuntary servitude.” And although this is an instance of replication between the Constitution and a statute, it is not hard to see how the same could be accomplished with replication between criminal law and civil law. The civil code can set out civil penalties for the conduct of such-and-such act and the criminal code can set out criminal penalties for the conduct of such-and-such act without either needing to directly reference the other.

In contrast, I.R.C. § 5871, and tax crimes more generally, punish non-compliance with respect to some legally required conduct, an omission. Since the omission is defined by the required conduct that one is omitting to do, one cannot spell out the omission without reference to the law that sets out the required conduct in the first place; insofar as that required conduct is a matter of civil tax law, that means that the criminal tax law must refer to the civil tax law. I.R.C. § 5871 must refer to § 5821 since § 5821 sets out the required conduct, the omission of which is punishable.

168. See MICHAEL S. MOORE, *ACT AND CRIME: THE PHILOSOPHY OF ACTION AND ITS IMPLICATIONS FOR CRIMINAL LAW* 28 (paperback ed. 2010).

169. I borrow this example from Sarah McGrath, *Causation by Omission: A Dilemma*, 123 *PHIL. STUD.* 125, 125 (2005).

170. 18 U.S.C. § 1584.

171. U.S. CONST. amend. XIII, § 1.

172. Consider, by contrast, 18 U.S.C. § 241, which punishes conspiracy against any “right or privilege secured to [another] by the Constitution.” 18 U.S.C. § 241. This is a direct reference to the Constitution, which means the Constitution has criminal implications.

C. HIGHER-ORDER VAGUENESS

To make it easier to talk about the rule of lenity, let us stipulate another law and some facts about language. Suppose that there is a law prohibiting driving dangerously. The safe driving statute reads:

Whoever operates a motor vehicle or motorcycle on the public roads or highways at a dangerous speed, having regard for width, traffic, use, and the general and usual rules of such road or highway shall be fined not more than twenty-five dollars.

The half-fictive statute is based on former Oregon General Code Section 12603, which was upheld as a valid statute in *State v. Schaeffer*.¹⁷³

TABLE 1. Table of Stipulations (Stated Again *Infra*)

Statute's Meaning	Analysis of Statute's Meaning (Includes Borderline Instances)	Citizen's Mental Representation of Statute's Meaning (Only Prototypical Instances)
Dangerous Driving	60 mph or faster	70 mph or faster
Clearly Dangerous Driving	70 mph or faster	80 mph or faster
Clearly Clearly Dangerous Driving	80 mph or faster	90 mph or faster

Note: I encourage the reader to refer to this table while working through the following paragraphs. In order to state the problem, some unusual and technical locution must be used, so the graphical component of this table will aid in comprehension.

All reasonable people will admit that what counts as dangerous driving admits of borderline cases and is, thus, a vague predicate. Suppose by stipulation that 60 miles per hour (“mph”) is the cutoff for driving dangerously on Birch Avenue at 10 a.m. on Wednesday—one is dangerous if and only if one is driving at 60 mph or faster. Of course, driving at 60 mph is not prototypically dangerous, it is instead a borderline case. In fact, it is the border! Let us then stipulate that driving on Birch Avenue is *clearly* dangerous if and only if the car is going 70 mph or faster.¹⁷⁴

173. *State v. Schaeffer*, 117 N.E. 220, 226 (Ohio 1917). I borrow this example from Jeremy Waldron, *Vagueness and the Guidance of Action*, in *PHILOSOPHICAL FOUNDATIONS OF LANGUAGE IN THE LAW* 58, 59 (Andrei Marmor & Scott Soames eds., 2011).

174. For those more technically inclined, I should specify that I am here, for exposition's purpose, speaking under the assumption of truth of an epistemic theory of vagueness on which category membership is definite but sometimes unknowable. Stephen Schiffer, *Philosophical and Jurisprudential Issues of Vagueness*, in *VAGUENESS AND LAW* 23, 25, 26 n.3 (Geert Keil & Ralf

When a person reads the safe driving statute, their mental representation includes only these prototypical, clear instances of dangerous driving, or so the story of fair notice goes.¹⁷⁵ Driving at 60 mph, borderline dangerous driving, never crosses the mind of Average Joe as dangerous as he drives down Birch Avenue at 60 mph. Thus, when Joe goes on trial, the judges apply a rule of lenity. They construe the statute to mean that Average Joe can only be found guilty for dangerous driving if he has driven *clearly* dangerously, not just borderline dangerously.¹⁷⁶ To do otherwise would be unfair to his natural reading of the statute and violate fair notice as a rule of law value. So a rule of lenity, which caters to expectations, now requires judges to only find a defendant guilty of dangerous driving if the car was moving at 70 mph or faster, for it is these speeds that are *clearly* dangerous. Joe has not violated the safe driving statute, the court rules.

From here, the story unravels. The key observation is that someone who knows about the rule of lenity will now actually have a narrower realm of expectation. Recall that the rule of lenity, as a canon of statutory interpretation, assigns meaning to the statute.¹⁷⁷ After Joe's trial, the meaning of the statute changed from prohibiting dangerous driving to prohibiting clearly dangerous driving.¹⁷⁸ So suppose Steve knows that courts have applied the rule of lenity with respect to the safe driving statute because he read the opinion from Joe's verdict. Whereas Joe read the statute to mean that "dangerous" driving is prohibited, Steve rightly reads the statute to mean "*clearly* dangerous" driving is prohibited. The ultimate authorities on the meaning of statutes are the courts,¹⁷⁹ and the courts have stated that the safe driving statute means *do not drive clearly dangerously*. Steve knows from reading the opinion from Joe's case that if he drives dangerously but only barely so such that he is still a borderline rather than prototypical case of dangerous driving, he will then be outside the ambit of the statute. The rule Joe follows is *do not drive dangerously*. The rule Steve follows is *do not drive clearly dangerously*. Since Joe and Steve have different propositional contents for the rules that they are following, they will also have different mental representations. If Steve expects that he will

Poscher eds., 2016). The problem with the rule of lenity noted in this Part, however, is not dependent on any particular theory of vagueness.

175. See *supra* notes 69–72 and accompanying text.

176. Moore, *supra* note 35.

177. See *supra* note 60 and accompanying text.

178. See Solan, *supra* note 60, at 2213 ("But once the courts interpret a statute . . . the ruling becomes part of the meaning of the statute . . .").

179. H.L.A. HART, *THE CONCEPT OF LAW* 141 (3d ed. 2012); see *Marbury v. Madison*, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is:").

only be in violation of the statute for clearly dangerous driving, he will conjure the mental image of a prototypical clearly dangerous speed, not a borderline clearly dangerous speed. In other words, if mental representations of concepts are just those of prototypical instances, as discussed in Section I.B., then the mental representation that Joe has is of *clearly* dangerous driving while the mental representation that Steve has is of *clearly clearly* dangerous driving. The crux of the issue is that “clearly dangerous” is itself a vague predicate—what counts as clearly dangerous driving admits of both clear and borderline cases. This is the recursive phenomenon of *higher-order* vagueness, vagueness about the borderline cases.¹⁸⁰

Driving at 70 mph is a borderline case of clearly dangerous driving. Driving at 70 mph, however, is not *clearly* clearly dangerous driving. It is merely clearly dangerous. The mental representation of dangerous driving that Steve has upon reading the statute with the rule of lenity in mind—the propositional content of which is *do not drive clearly dangerously*—is driving at 80 mph or greater. Thus, Steve does not expect to be found guilty of dangerous driving when he drives at 70 mph. Applying exactly the same sort of reasoning that justified having the rule of lenity in the earlier case, a court system ought now to adopt a double rule of lenity to deal with the issues caused by second-order vagueness; otherwise, they will violate Steve’s expectations and the rule of law value of fair notice. Steve can be found guilty of dangerous driving only if he drove clearly clearly dangerously—at 80 mph or greater.

Such reasoning can continue *ad-infinitum*, adding the *clearly* adverb with each iteration of higher-order vagueness.¹⁸¹ In order to protect fair notice, there must be the triple rule of lenity, the quadruple rule, the quintuple But surely this is absurd.¹⁸² Since we plainly ought not adopt an infinite rule of lenity—lest we let many dangerous drivers go free—and fair notice does seem to be an important rule of law value in criminal law, something has gone quite wrong. Citizens who read a statute after the rule of lenity has been applied are failing to receive fair notice of punishment. Call this the “higher-order vagueness problem.”

180. For an account of higher-order vagueness in law, see also Moore, *supra* note 35, at 134, 134 nn.18–19; RAZ, *supra* note 37.

181. Just as there is second-order vagueness, there is third-order vagueness, fourth-order vagueness, and so forth. See also RAZ, *supra* note 37 (discussing higher-order vagueness as a requisite of any plausible theory of vagueness).

182. I note here that higher-order vagueness may be asymptotic such that, once there are enough clearly adverbs, there are no real differences in the velocity of a clearlyⁿ dangerous speed and a clearlyⁿ⁺¹ dangerous speed. If higher-order vagueness is so asymptotic, an infinite rule of lenity may be more palatable than if higher-order vagueness is not so asymptotic, but I suspect that most will find the infinite rule of lenity absurd even if higher-order vagueness were asymptotic.

Many readers, when presented with my argument above, have responded that the court ought to draw clear boundaries in order to avoid the higher-order vagueness problem. On their account, instead of changing the meaning from *dangerous* to *clearly dangerous*, the court should instead state something akin to “we hereby stipulate that any speeds at 70 mph or greater will count as dangerous driving for the purpose of the safe driving statute.” Whereas “clearly dangerous” is vague, “70 mph or greater” is a bright line rule. No problem of higher-order vagueness is presented for “70 mph or greater.” Steve, when reading this opinion, should have a clear mental representation that 70 mph driving is prohibited by law.

The problem with such a response is that it fails to notice that this discussion has thus far been using elliptical construction to hide the context dependence of the statute. The safe driving statute states that the notion of dangerous speed must be understood in the context of “width, traffic, use, and the general and usual rules of such road or highway.” Even if the court draws clear boundaries in one context, it leaves the other contexts open. 70 mph is a clearly dangerous speed for driving on Birch Avenue at 10 a.m. on Wednesday. But what counts as a dangerous speed on Grove Street at 8 p.m. on Saturday or MLK Boulevard at 4 p.m. on Tuesday? Surely, the court cannot delineate what counts as dangerous for every width, traffic, use, and the general and usual rules of every road and highway. And what of vague predicates that reject quantification altogether, such as the No Vehicles in the Park statute? How would a court draw up a bright line rule for the meaning of “vehicle”? The courts are severely limited in their ability to draw bright line rules. In most cases, they must simply apply the rule of lenity to restrict the meaning of a vague statute to only its prototypical instances, thus leading to the higher-order vagueness problem.

1. Technical Bookkeeping

For most legal scholars, the above Section should be convincing on its own. For these scholars, I recommend skipping this addendum on the more technical workings of the intuitive story set out above. Those more inclined to debate the theoretical foundations of law may disagree with how I have presented the issues above. Here, I respond to such disagreements.

In the above example of Steve and Joe, some theoretical premises were implicit in how I laid out the example. Premise one, legal realism is false. Premise two, judges assign meaning when applying the rule of lenity. Premise three, there is a fact of the matter about the borders of vague predicates, but such facts are unknowable (in other words, epistemicism). The higher-order vagueness problem is not dependent on these premises. Even if all three premises were false, I would need to revise only the

manner in which the problem is laid out, not the substance.

The first two premises get to at what point Steve can rightly have the expectation that the law only punishes clearly dangerous driving. For instance, suppose the first premise is false and legal realism is true. According to legal realism (or, more precisely, legal realism as characterized by H.L.A. Hart), the law is whatever a judge will say it is.¹⁸³ If that is the case, then Steve need not wait for the court to actually apply any rule of lenity for he knows they will. Legal realism states that the fact the court will apply the rule of lenity makes it currently the case that the statute has a narrow meaning. And if the future fact that judges will apply the rule of lenity is current law, then Steve should think, even before Joe's case is heard, that the law prohibits clearly dangerous driving. The only difference here is a matter of timing. Was the meaning of the statute made narrow by the rule of lenity or was it always narrow since the rule of lenity will be applied when the meaning of the statute is litigated? Either way, the problem of higher-order vagueness stands.

Regarding the second premise, recall the earlier argument in Part II that the rule of lenity stipulates rather than figures out what the statute means. Though canons of statutory interpretation typically seek to figure out the existing meaning of a statute, substantive canons like the rule of lenity instead assign meaning to a statute based on normative considerations.¹⁸⁴ The rule of lenity is not a rule of interpretation in substance since it is not concerned with *figuring out* what the words mean.¹⁸⁵ When the courts are applying the rule of lenity, it is often within the space of indeterminacy, where meaning has run out.¹⁸⁶ That courts change, rather than interpret, the meaning of a statute when they apply the rule of lenity (premise two above) was a key part of how I originally framed the higher-order vagueness problem.

Suppose, *arguendo*, the second premise is false and that the rule of lenity is a way of uncovering the existing meaning of the statute. That is, the safe driving statute already has a narrow meaning before it is ever

183. HART, *supra* note 179, at 65, 65 n.1, 146; Brian Leiter, *American Legal Realism*, in THE BLACKWELL GUIDE TO THE PHILOSOPHY OF LAW AND LEGAL THEORY 50, 61 (Martin P. Golding & William A. Edmundson eds., 2005).

184. ESKRIDGE ET AL., *supra* note 61, at 448–49.

185. See also Balkin, *supra* note 84 (distinguishing between construction and interpretation proper). The construction/interpretation distinction also explains why the higher-order vagueness problem does not have a parallel issue in ordinary cases of interpretation. Where the statute is being interpreted to figure out its meaning, the court's ruling about a specific case does not assign or change the meaning of the statute. Without any change in meaning, there is no new expectation to have, other than perhaps the knowledge that one or another thing is included or excluded from a general category set out in the statute.

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

litigated, and in litigation, judges are merely uncovering the existing meaning rather than changing the meaning to implement normative principles. This would make the rule of lenity a rule of statutory interpretation in substance. Even so, the higher-order vagueness problem remains. Again, the only thing that changes is that Steve, if he understands the already existing meaning of the statute, should think that only clearly dangerous driving is prohibited without needing to know about Joe's case. As with the legal realism premise, the only change here is a matter of timing.

Finally, I have been speaking as if there is a definite fact of the matter about the category membership of borderline instances of a predicate and that we do not know such facts. I find the supposition of epistemicism an easy way to talk about vagueness,¹⁸⁷ but its falsity does not solve the higher-order vagueness problem. The higher-order vagueness problem arises from the general features of vagueness that all theories of vagueness must accommodate: (1) vague predicates have borderline cases that cannot be clearly categorized either as or as not members of such predicates; (2) when reading a vague statute, the reader's mind tends to conjure up only the clear cases and not the borderline cases; and (3) the question of which items are clear or borderline cases of vague predicates is itself infected with vagueness, thus necessitating distinctions between, for example, clearly clearly dangerous driving and borderline clearly dangerous driving. Features (1) and (2) necessitate a rule of lenity to provide fair notice, and feature (3) kicks the problem one level up each time that the rule of lenity is applied such that features (1) and (2) now apply to the higher level. All three features are theory-independent phenomena.

IV. LENITY AS EXCUSE: REVISING THE DOCTRINE

I have thus far noted the discrepancy between the rule of lenity's purpose and outcome as well as three doctrinal problems that arise from the discrepancy. The rule of lenity cannot resolve cases of linguistic ambiguity. The rule of lenity extends into civil law. The rule creates higher-order issues of fair notice. Further, I have argued that such problems are foundational to the rule of lenity as it is currently applied. If my arguments are sound, then we must revise the jurisprudential approach to indeterminate criminal law at the foundation. But what should such revisions look like? This Part examines the fundamental nature of the courts' current lenity jurisprudence and how it ought to be rectified in a

187. See *supra* note 172 and accompanying text.

way that maintains rule of law values.

On my diagnosis, the issue is that the courts have understood the rule of lenity to be a canon of statutory construction. As a canon of statutory construction, it determines the meaning of the statute to which it applies.¹⁸⁸ Call such a doctrine the *semantic rule of lenity*. The meaning of statutes is not the right instrument by which to implement the demands of notice in punishment. As I have thus far argued in this Article, statutory interpretation is too blunt a tool for the fine purpose of protecting fair notice.

In some sense, it should not be surprising that the semantic rule of lenity runs into technical problems. The originators of the rule of lenity likely did not foresee the three doctrinal problems I have listed here. The rule of lenity, which traces back to sixteenth century England, predates both the advent of the Internal Revenue Code and contemporary linguistics.¹⁸⁹ Ideally, we should like to reconceptualize the rule of lenity such that we avoid the three doctrinal problems while maintaining its function carrying out rule of law values.

The semantic rule of lenity should be replaced by what I will call the *lenity excuse*. There ought to be an affirmative defense available to defendants in those instances in which the defendants' actions were within the penumbra of an indeterminate criminal statute without changing the meaning of that statute.¹⁹⁰ Because the new rule would operate as an

188. See *supra* note 60 and accompanying text.

189. Livingston Hall, *Strict or Liberal Construction of Penal Statutes*, 48 HARV. L. REV. 748, 750 (1935).

190. Likely, the most straightforward way to replace the semantic rule of lenity with the lenity excuse would require both legislative and judicial support. First, judges must abandon the use of the semantic rule of lenity. Second, there should be new legislation permitting lenity as a general excuse limited to criminal cases. It is unclear whether courts acting alone could accomplish the task. Depending on one's more foundational jurisprudential views, this is either a refashioning of the rule of lenity or the addition of a novel common law defense. For instance, one might read Justice Stevens's dissent in *Thompson/Center*, in which he states that the rule of lenity ought to be cabined to the criminal realm, as consistent with the "refashioning" view as Justice Stevens appears to want to keep the application of the rule of lenity without changing the meaning of the tax statute. See *United States v. Thompson/Ctr. Arms Co.*, 504 U.S. 505, 525–26 (1992) (Stevens, J., dissenting). Alternatively, one may view it as a new common law defense. Although federal criminal law does not allow expansion of criminal liability through common law, there is a history of contraction of criminal liability through the use of common law defenses. See Stephen S. Schwartz, Comment, *Is There a Common Law Necessity Defense in Federal Criminal Law?*, 75 U. CHI. L. REV. 1259, 1268 (2008); see also George P. Fletcher, *The Nature of Justification*, in ACTION AND VALUE IN CRIMINAL LAW 175, 180 (Stephen Shute, John Gardner & Jeremy Horder eds., 1993) ("The legislature is supreme in defining offences, but not in specifying the range of possible defences that can negate the inference of wrongdoing from the commission of an offence."). The issue is that federal courts have portrayed the introduction of such defenses as a matter of statutory construction, see, e.g., *Dixon v. United States*, 548 U.S. 1, 24–26 (2006) (Breyer, J., dissenting) (detailing the common law defenses available in federal criminal law as a matter of statutory construction); see also Jessica A. Roth, *The Anomaly of Entrapment*, 91 WASH. U. L.

excusing condition, the mere fact that the law did not unambiguously criminalize a defendant's conduct would be sufficient to negate any liability for criminal defendants in the same way that duress or insanity would negate liability. In this way, lenity would function like other excuses (such as duress or insanity) that absolve defendants of criminal liability when it would be unfair to punish them.¹⁹¹

In the remainder of this Part, I will argue that my proposed revision to lenity would not only be pragmatic, solving the three doctrinal problems that plagued the semantic rule of lenity, but also conceptually fruitful, helpfully tying together the purpose of lenity with that of other excuses.

A. THE CATEGORICAL UNITY OF LENITY AND EXCUSE

In order to understand the categorical unity between lenity and excuse, one must first understand two foundational concepts and their relation to one another: affirmative defense and excusing condition. In criminal law, the establishment of an affirmative defense will absolve the defendant of criminal liability even if the prosecution has established case that all elements of the offense are present.¹⁹² A paradigmatic example is the excuse of duress. Suppose, for instance, that a defendant has stolen cash from his friend's wallet because a thug made a credible threat to kill the defendant unless the defendant stole from his friend and gave it to the thug.¹⁹³ Even if the prosecution can establish that all elements of the larceny offense are present, the defendant may appeal to the defense of duress, which absolves a defendant of criminal liability if the defendant was threatened with "unlawful force . . . , which a person of reasonable firmness . . . would have been unable to resist."¹⁹⁴

For the second concept, that of *excusing conditions*, this Article will follow the analysis by H.L.A. Hart. Rather than defining the term, Hart

REV. 979, 993–95 (2014) (detailing the introduction of the entrapment defense in federal courts as an application of their province of statutory construction), whereas the point of my proposed revision to lenity is to avoid the semantic conclusions that come by way of statutory construction. Perhaps courts could construe the excuse of lenity as a matter of constitutional due process under the Fourteenth Amendment. Since not even the rule of lenity is understood to be a constitutional mandate, Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 332 (2000), such an argument may be a reach. Given its mere tangential relevance, I leave this matter of constitutional law unresolved.

191. See MODEL PENAL CODE §§ 2.09(1), 4.01 (AM. L. INST., Proposed Official Draft 1962).

192. KADISH ET AL., *supra* note 83, at 817.

193. Or, if one prefers an example in which the threatened harm is less harmful than the defendant's evil conduct, one can replace my example with the example of a browbeater who threatens to bust the defendant's kneecaps unless the defendant aids the browbeater in the browbeater's killing of the victim. See Moore, *supra* note 39, at 36 (noting the possibility of "justificatory readings of duress" and using a similar example). Which example we use will make no difference here so long as we focus on the nature of duress as an excuse.

194. MODEL PENAL CODE § 2.09(1) (AM. L. INST., Proposed Official Draft 1962).

provides a non-exhaustive list of its members: “Mistake, Accident, Provocation, Duress, and Insanity.”¹⁹⁵ Unlike other analyses of excuses, which tend to center their focus around the defendant’s moral responsibility,¹⁹⁶ Hart’s analysis of excusing conditions focuses on their role in protecting liberty.¹⁹⁷ Hart finds excuses to be valuable because they provide for citizens the valuable ability to predict in what instances one will be punished and to avoid such instances through one’s own will.¹⁹⁸

Return to the duress example above. If the defendant stole from the defendant’s friend because a gunman threatened to kill the defendant otherwise, the duress excuse would absolve the defendant of criminal liability.¹⁹⁹ If there was no such excuse available, then it would be very difficult for a citizen to ensure they avoid punishment. In such a system, the citizen cannot guarantee that they will avoid punishment as a result of two factors working in conjunction. Firstly, to the extent one has no control over what a violent gunman will do, one cannot guarantee that one will not be threatened by a gunman. Second, to the extent that it is near impossible to resist the orders of a gunman, one cannot guarantee that one will not commit the crime the gunman demands. Thus, without a duress excuse, whether or not one will go to jail would depend on the unpredictable whims of a gunman. In such a case, it cannot be said that the individual had a genuine choice to avoid the law’s criminal sanctions.²⁰⁰ The duress excuse eliminates this worry by ensuring that, in this unpredictable circumstance, one will be saved from punishment.

As argued in Section I.B, fair notice of the criminal laws is also an essential part of citizens’ having a genuine choice to avoid punishment. Fair notice is essential because it gives citizens an opportunity to figure out which actions are subject to punishment under the law. For instance, if the government chose not to publish the criminal laws but instead keep them private, an ordinary person would not have the ability to figure out which actions will be met with punishment. Although Hart himself did not explicitly consider the question of whether or not fair notice doctrines

195. HART, *supra* note 33, at 31.

196. *Id.* at 35. If one prefers the alternative analyses under which excuses are essentially exculpatory, they may also prefer to think of lenity as a public policy defense rather than an excuse. A public policy defense absolves a defendant of punishment for a reason of public policy, the public policy at issue for the rule of lenity being the rule of law value of fair notice. This would align the rule of lenity with doctrines like diplomatic immunity and the rule against double jeopardy. See Paul H. Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 COLUM. L. REV. 199, 230–31 (1982) (describing the public policy defense category). I take it that there is no substantive disagreement.

197. HART, *supra* note 33, at 44–50.

198. *Id.* at 45.

199. MODEL PENAL CODE § 2.09(1) (AM. L. INST., Proposed Official Draft 1962).

200. HART, *supra* note 33, at 47–48.

should be understood as excuses, his theory and its implications are clear. In order to protect the choice to avoid punishment, Hart plainly states that citizens must be given the ability to “find out, in general terms at least, the costs they have to pay if they act in certain ways.”²⁰¹

Thus, lenity’s purpose of protecting the choice to avoid punishment aligns the doctrine more closely with the domain of excuse than the domain of statutory interpretation. Given the theoretical unity between lenity and excuse, it may be instructive to look to how other excuses are applied in the criminal law and consider whether lenity should be given the same treatment.

Many excusing conditions, such as duress and insanity, are employed as affirmative defenses under the law.²⁰² In these instances, we take it as obvious that if what we want to do is free the defendant, then we should do that directly by permitting a defense, rather than indirectly through changing what a statute means. I propose here that the same treatment be given to lenity, allowing for defendants to simply avoid punishment in instances where the statute was indeterminate with respect to the defendant’s behavior without constraining the meaning of that term as the current semantic rule of lenity does.

Excuses are often understood in contrast to another category of affirmative defense: justifications. In the legal context, both serve as affirmative defenses requiring acquittal even where the prosecution has established the case that all elements of the offense are present.²⁰³ However, as a moral matter getting at the theoretical grounding of the doctrines, the two categories of defense diverge on the question of why acquittal is required. Justifications defeat what would otherwise be a prohibition against acting in a particular way. It turns what would ordinarily be prohibited into a permissible act. A standard example is self-defense. Killing another is ordinarily impermissible, but not so if done in self-defense.²⁰⁴ Someone who kills another in self-defense has done nothing wrong.²⁰⁵ This contrasts sharply with the nature of excuse, which

201. *Id.* at 44.

202. MODEL PENAL CODE §§ 2.09(1), 4.03 (AM. L. INST., Proposed Official Draft 1962).

203. KADISH ET AL., *supra* note 83, at 817. Interestingly, whether an act is justified or excused affects differently the conduct rules of those around the actor. “In sum, when the defendant’s act is justified (worthy of approval), everyone may help him, and no one may hinder him. When the defendant’s act is excused (worthy of sympathy, but not approval), no one may help him and everyone may hinder him.” LEO KATZ, *BAD ACTS AND GUILTY MINDS: CONUNDRUMS OF THE CRIMINAL LAW* 65 (1987).

204. Judith Jarvis Thomson, *Self-Defense*, 20 PHIL. & PUB. AFF. 283, 283 (1991).

205. *Id.*

presupposes the wrongfulness of the act done.²⁰⁶ To use the duress example, we would say that the defendant did something wrong by stealing, but only did so because the coercive threat left them no choice otherwise. Both excuse and justification absolve the actor of criminal liability, but justifications do so by negating the impermissibility of the actions whereas excuses affirm that the actions were impermissible but absolve the actor for a reason standing outside the wrongfulness of the act itself.²⁰⁷

By leveraging the distinction between a justification and an excuse, one can see why the lenity excuse better accords with our intuitions regarding notice as a rule of law value as opposed to the semantic rule of lenity. Like justification, the semantic rule of lenity redraws the lines of what is permissible and what is impermissible behavior. By giving the statute a narrow construction, the semantic rule shrinks what counts as impermissible behavior. But in many cases in which the rule of lenity is applied, we see that the defendants really did do some harmful act, such as disposing of an object that could serve as evidence²⁰⁸ and transporting a stolen airplane across state lines.²⁰⁹ Therefore, the semantic rule of lenity fails to accord with the reason why we acquit defendants who conduct non-prototypical criminal activities. The reason we acquit them is that it would be unfair, from a rule of law perspective, to punish an act without clear notification that such an act would be punished, not that the defendants have clean hands.²¹⁰

Under the lenity excuse, a criminal defendant would be absolved of liability for their actions if their actions were not clearly within the meaning of the criminal statute without needing to change the meaning of said statute. The underlying conduct rule, for example, the rule prohibiting dangerous driving, does not change. The law can stand both for the proposition that a citizen acted wrongfully and the proposition that punishing the individual, despite their wrongful acts, would violate our rule of law principles. Refashioning lenity from a canon of statutory interpretation to an excusing condition essentially allows us to have our cake and eat it too. The lenity excuse protects the safe path principle while still maintaining the best interpretation of the statute.

206. Fletcher, *supra* note 190, at 178.

207. See H.L.A. HART, *Prolegomenon to the Principles of Punishment*, in PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW, *supra* note 24, at 1, 13–14.

208. Yates v. United States, 574 U.S. 528, 528–30 (2015).

209. McBoyle v. United States, 283 U.S. 25, 26–27 (1931).

210. See *supra* Section I.B.

B. SOLVING THE THREE DOCTRINAL PROBLEMS

Recall the earlier discussion of the hypothetical Bank Safety Act, which criminalizes starting a fire within one hundred feet of a bank.²¹¹ We stipulated there that “bank” was ambiguous between a river bank and a financial bank and that Defendant A had set fire next to a financial bank and Defendant B had set fire next to a river bank.²¹² The semantic rule of lenity does not resolve such a situation since either reading of “bank” would absolve only one of the two defendants of guilt. However, since neither defendant received fair notice that their act would be criminalized due to the linguistic ambiguity of the Bank Safety Act, the fair notice purpose would require absolving both of guilt.

Under a lenity excuse regime, the situation is neatly resolved. The court, for all defendants, need only ask the question whether either one of their actions were unambiguously criminalized by the law. *Ex hypothesi*, due to the linguistic ambiguity inherent in the statute, neither defendants’ actions were unambiguously criminalized, so both defendants would be absolved of culpability. The same would go for any case of linguistic ambiguity in criminal statutes, *mutatis mutandis*. Thus, the outcome of the lenity excuse is consistent with what fair notice demands.

The semantic rule of lenity problematically extended past its purpose of fair notice in punishment by applying in purely civil contexts. With the lenity excuse, a statute used in both criminal and tax law contexts can be given the best interpretation rather than the narrowest construction, so tax law’s civil purposes are protected. Nevertheless, the lenity excuse can still apply in criminal contexts, which is the context in which fair notice is required due to the special status of punishment. Although the meaning of an inscription must, for linguistic reasons, stay constant across contexts,²¹³ no such principle of consistency applies to affirmative defenses at law. The law can, and does, permit defenses in criminal law that are not available in civil law.²¹⁴ Insofar as we have a principled reason, namely the special status of punishment, a company like Thompson/Center Arms Co. could leverage the excuse of lenity to avoid punishment for the manufacture of Thompson/Center kits, but it should not have such an excuse when courts are determining its civil tax liability, such as whether the firearms excise tax applies to the production of Thompson/Center kits. This solves the too much lenity problem.

211. *See supra* Section III.A.

212. *See supra* Section III.A.

213. *See supra* note 116 and accompanying text.

214. *E.g.*, 18 U.S.C. § 17 (providing an insanity defense for criminal prosecutions).

The semantic rule of lenity, by assigning meaning to a statute, led to fair notice problems caused by higher-order vagueness. With the excuse of lenity, there is no need to assign any particular narrow construction to the statute itself. Without any new assignment of meaning, studious potential criminals have no reason to have different expectations of what violates the criminal law after reading an opinion employing the lenity excuse. The court instead affirms, for instance, that borderline dangerous driving of 60 mph is still dangerous, though it absolves the defendant who drove at 60 mph of criminal liability since that would not have been the defendant's expectation from reading the statute. The sovereign command remains *don't drive dangerously* rather than changing to *do not drive clearly dangerously*, and no double rule of lenity is required. Joe, who drove at 60 mph will be able to benefit from the lenity excuse because his actions were not clearly prohibited by the vague safe driving statute; Steve, who drove at 70 mph will not be able to benefit from the excuse. Steve's driving was clearly dangerous and, since the conduct rule remains *do not drive dangerously* as opposed to *do not drive clearly dangerously*, Steve has received fair notice that his actions would be punished. The excuse of lenity thereby solves the higher-order vagueness problem.

The reader may here object that a problem parallel to the higher-order vagueness problem nevertheless remains. Can Steve not say that he thought himself to be following the law given that there is an excuse of lenity that absolves borderline dangerous driving of culpability? To put the force of the counterargument another way, what is the difference between saying, as the semantic rule of lenity does, that clearly dangerous driving is prohibited and saying, as the excuse of lenity does, that dangerous driving is prohibited but borderline dangerous driving is excused?

The key distinction is that although the semantic rule of lenity is directly construing the statutory conduct rule, an excuse is not meant to guide conduct. It would be quite odd to think that the presence of excuses in the criminal law is tantamount to the law's saying, "If you are planning to commit homicide, please make sure you are insane or under duress." Excuses are instead best understood as addressing the government on how to adjudicate questions of criminal culpability.²¹⁵ The criminal law permits excuses *sotto voce*.

This *sotto voce* feature of excuses may be analogized to the same in statutes of limitations. A five-year statute of limitations on assault, for example, is not to let citizens know that they are permitted to assault others

215. Fletcher, *supra* note 190; Robinson, *supra* note 75, at 372.

so long as they can lay low for the next five years.²¹⁶ If the government were to amend the statute of limitations to seven years, an assaulter cannot complain of unfairness.²¹⁷ It would be on its face ridiculous for the criminal to complain, “I assaulted someone yesterday thinking I would only have to hide for five years, not seven. You are treating me unfairly!” Likewise, because excuses are not conduct rules, the rule of law principle that citizens be given fair notice of which conduct is prohibited does not apply to excuses.²¹⁸ Therefore, the excuse of lenity does not require a “second-order” excuse of lenity, thereby resolving the higher-order vagueness problem.

C. OTHER JUSTIFICATIONS FOR THE SEMANTIC RULE OF LENITY

I have argued in the previous Section that an excuse of lenity best aligns the doctrine with its rule of law purpose of fair notice while the semantic rule of lenity does not. Though the value of fair notice is the most often cited justification for the rule of lenity,²¹⁹ it is certainly not the only justification for such a long-standing and august doctrine of criminal law. Ideally, the excuse of lenity would be consistent with these other justifications as well—it would be a shame to throw out any babies with the bathwater. In this Section, I consider the other justifications for the rule of lenity and demonstrate how the excuse of lenity is consistent with such aims.

The first set of reasons significantly different from fair notice for having the rule of lenity includes those that are still closely connected to restricting the scope of criminalization. The rule of lenity “constrains the discretion of law enforcement officials”;²²⁰ it is a speed bump against over-criminalization in the United States;²²¹ and it protects the (relatively) politically powerless citizens who would have a hard time organizing to change the criminal code.²²² Since the excuse of lenity likewise works to restrict the scope of criminalization by offering a functional near-equivalent of the rule of lenity in the criminal context,²²³ all of these purposes are also

216. Fletcher, *supra* note 190, at 184–85.

217. *See id.*

218. Gardner, *supra* note 24, at xlvi; Robinson, *supra* note 75, at 371–76, 379.

219. Kahan, *supra* note 20, at 349, 349 n.13.

220. *Id.* at 345.

221. *See* Stephen F. Smith, *Proportionality and Federalization*, 91 VA. L. REV. 879, 939 (2005).

222. WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, *LEGISLATION AND STATUTORY INTERPRETATION* 357 (2d ed. 2006); William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 413 (1991).

223. Although the excuse of lenity, like the semantic rule of lenity, ultimately results in absolving defendants of culpability when statutes did not unambiguously criminalize their behavior, the excuse of lenity is only “near-equivalent” because it actually provides greater protections to criminal defendants

carried out by the excuse of lenity.

Another category of reasons in favor of the rule of lenity involves the notion that criminal law is solely the province of the legislature, the non-delegation principle.²²⁴ Again, the functional near-equivalence between the semantic rule of lenity and the excuse of lenity within the criminal context will explain why the excuse of lenity can do much of the work that the semantic rule of lenity currently does. Whenever the excuse of lenity applies, because the excuse will be dispositive of the case, the courts need not resolve the indeterminacy of the criminal statute at hand. Courts will need to resolve penumbral issues in dual-purpose statutes, but this will not make a difference for criminal liability since the excuse of lenity will be available when defendants fall into the penumbra. Since defendants can leverage the excuse against vague statutes in court, it will, like the semantic rule of lenity, put the impetus on Congress to draft clearer statutes.²²⁵

There is one reason in favor of the semantic rule of lenity that does not apply to the excuse of lenity: the semantic rule of lenity has a long history.²²⁶ The rule of lenity originated in sixteenth-century England²²⁷ and has survived in application to the present day. This is indeed a value lost if we were to do away with the semantic rule of lenity, but its importance ought to be put in proper perspective. Though the semantic rule of lenity's history is long, canons of statutory interpretation are not law and do not have precedential effect.²²⁸

V. COUNTERARGUMENTS AND RESPONSES

In this Part, I consider some arguments specifically against the existence of the too much lenity problem, the higher-order vagueness problem, and the excuse of lenity. The central counterarguments are (1) the tax law is best construed narrowly in civil contexts, so the “too much lenity problem” is actually a feature, not a bug, of the semantic rule of lenity, and (2) if the legislature were to announce that there is no rule of lenity, then the higher-order vagueness problem dissipates due to the fact that

when it comes to issues of lexical ambiguity in statutes. *See supra* Section IV.B.

224. Hickman, *supra* note 10, at 912, 912 n.27.

225. This argument in favor of the rule of lenity is provided in William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 600 (1992).

226. SCALIA, *supra* note 64.

227. Livingston Hall, *Strict or Liberal Construction of Penal Statutes*, 48 HARV. L. REV. 748, 749–50 (1935).

228. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2444 (2019) (Gorsuch, J., concurring); Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as “Law” and the Erie Doctrine*, 120 YALE L.J. 1898, 1902, 1909–10 (2011) (“The U.S. Supreme Court generally does not treat its statements about statutory interpretation methodology as law.”).

individuals are now on notice that statutes will be construed according to the intent of the legislature. Both arguments are important because they go to the theoretical foundations of this Article.

A. TAX LAW WOULD BE BETTER OFF IF THE RULE OF LENITY APPLIED

The first counterargument puts forth that the problem of too much lenity is no problem at all since the tax code ought to be subject to strict construction, resolving any indeterminacy in favor of the taxpayer. On this view, it is unfair to tax a citizen without clear say-so by statute. The application of the rule of lenity to the tax law is to be celebrated, not decried. Some European nations, for instance, have strict-construction tax systems favoring taxpayers.²²⁹ Such a response, I contend, fails to comport with the differential attitude citizens should have with regard to the administration of distributive justice and retributive justice.²³⁰

First, tax law is the government's most important lever in carrying out principles of distributive justice.²³¹ Distributive justice concerns how institutions should be designed to fairly distribute the benefits and burdens of societal cooperation.²³² Our progressive income tax system carries out a democratically determined vision of distributive justice under which tax obligations directly correspond to one's income earned in the marketplace. The statutes provide the skeletal structure for this vision, the corpus of which is fleshed out by the judicial and administrative authority. To undo the interstitial authority is to partly undo the very aims of the tax code.²³³

On this picture of tax justice, to deviate from the best interpretation of a statute in favor of a narrow interpretation of a statute not only undoes what distributive justice would require, but thereby also partly undoes the provision of a valuable moral service by the government. The tax system provides valuable coordination between citizens to hire an expert to tally up

229. See Dean et al., *supra* note 153, at 139, 148–53 (detailing the more taxpayer-friendly approaches taken in the United Kingdom and France).

230. There is another, more technical argument against applying the rule of lenity to matters of determining civil tax liability. Namely, the various inclusion, exclusion, deduction, and credit rules that determine tax liability do not have a single interpretation that is uniformly good or bad for all taxpayers. Take as one example what may seem like a clear case: rules assigning taxable income. In most situations, we may think that assigning taxable income is a negative consequence to the taxpayer, so we might think it appropriate to apply the rule of lenity in a way that minimizes a taxpayer's taxable income. But this can be disadvantageous to a taxpayer who wants to meet an income floor to receive a health insurance premium assistance tax credit under I.R.C. § 36B. In such a situation, additional tax liability can be outweighed by the benefit of meeting the income floor and getting the credit. Grewal, *supra* note 22 (laying out this technical argument in further detail).

231. See Nam, *supra* note 43.

232. Jeessoo Nam, *Biomedical Enhancements as Justice*, 29 *BIOETHICS* 126, 126 (2015).

233. See also *supra* Section III.B.2 (discussing the importance of agency deference in carrying out tax policy aims).

what justice requires of them and hold each other to that tally. Since taxpayers have moral reason to pay what justice requires, following the best interpretation of the tax law helps their aims rather than impeding them.²³⁴

Second, though related to the first point, the purpose of tax law is distinct from the purpose of criminal law in that the imposition of tax does not typically aim to serve a deterrence function. After all, a tax on income is not meant to discourage the earning of income.²³⁵ There is no implicit public moral rebuke attached to civil tax liability as there is for criminal liability.²³⁶ Although there are exceptions,²³⁷ the principal purpose of the tax law is to collect (and sometimes distribute) revenue in a just and efficient manner. Notice is most critical when the statutes are intended to guide citizens' behavior since ambiguously drafted statutes cannot properly serve this guiding function.²³⁸ After all, a citizen cannot use a statute to guide their behavior if they cannot figure out what the statute means.

To bring out this point, we can think of the perspective of a hypothetical idealized taxpayer with regard to the tax law. The taxpayer understands that they have a moral obligation to contribute a certain amount to the common pool of resources by which we fund the various functions of government. However, it is quite unlikely that the taxpayer could even estimate how much they should contribute if they were to reason purely from philosophical first principles or that they would know much about the content of such first principles. Even if the taxpayer resolves the coarse-grained question regarding their obligation to pay taxes, it is unlikely that they will even be able to approximate an answer to the

234. For the purpose of this argument, that some individuals do not think that such moral reasons apply to them does not entail that those reasons do not apply to them. What reasons are provided by morality is one question, whether people rightly recognize such reasons is another.

235. Quite the contrary, an important goal of tax law design is to minimize distortions to market behavior because such distortions lead to economic inefficiency. See JONATHAN GRUBER, PUBLIC FINANCE AND PUBLIC POLICY 620–33 (5th ed. 2016).

236. *United States v. Bass*, 404 U.S. 336, 348 (1971) (noting the moral condemnation attached to criminal punishment).

237. For instance, the home mortgage interest deduction of I.R.C. § 163(h) appears to be provided principally to encourage home ownership over renting.

238. Gardner, *supra* note 24, at xlii–xliii. A critic of this premise may nevertheless contend that even if vague statutes fail to serve as suitable reference points for decision-making, a legal regime of unclear laws still affects the behavior of decision-makers. Anticipating such a response, H.L.A. Hart and John Gardner helpfully distinguish between the law serving merely as a goad and the law serving as a guide. Though unclear laws cannot serve as a guide, they may nevertheless be successful as a goad. “Isn’t it arguable that the most effective legal systems (those most successful in securing their policy objectives) have been those operated as reigns of terror, revelling in arbitrariness, exploiting human weaknesses, and triggering conditioned responses?” *Id.* at xlii. Presumably, we should prefer that our criminal law system guide rather than terrorize our community, so the premise that notice is most important when statutes intend to guide still stands.

fine-grained question of how much taxes they are morally obligated to contribute as a matter of justice.²³⁹

One way for the taxpayer to resolve the fine-grained question is to defer the calculations to appointed experts in the legislature and the Treasury. On this account, the taxpayer can carry out their ordinary business without worrying about what constitutes their fair share contribution and, at the end of the year, rely on the tax law and the aid of administrative officials to figure out what that fair share is given the activities they engaged in and their results. Instead of having to think through how the tenets of John Locke and Jean-Jacques Rousseau apply to him as a citizen, the taxpayer can just fill out an IRS Form 1040-EZ. This sort of division of labor is critical due to the difficulty of answering the fine-grained questions of political morality and the limited resources that citizens have to put towards such inquiry.²⁴⁰

For these taxpayers, notice is only relevant insofar as they need the information to pay what they owe. Since the taxpayer is not treating tax liability as a cost or benefit of such-and-such action, clarity in laws is actually more important for the administration of such laws rather than being governed by them.²⁴¹ This is also why the tax law can bear such enormous complexity. Whereas conduct rules primarily meant to dictate citizens' behavior must be drafted simply so that citizens can understand the conduct rules, tax laws can be drafted with greater complexity because they are primarily addressed to administrators and judges who have expertise in tax law.²⁴² Though idealized for purposes of exposition, this sort of narrative is consistent with both the theoretical work in political philosophy²⁴³ and the empirical research that often, though notably not always, finds that tax rates have no effects or very small effects on taxpayer behavior.²⁴⁴

None of this is to deny the proposition that there would be something good provided by having a tax law system where taxpayers can more easily figure out their tax liability. For instance, if a taxpayer does not know how much taxes they will have to pay at the end of the year because the tax laws

239. Nam, *supra* note 43.

240. *Id.*

241. See Solan, *supra* note 53, at 134–35.

242. See Robinson, *supra* note 75, at 378 (“For example, a high degree of specificity might be desirable even if it created a degree of complexity that would be unreasonable to expect the public to master. The special training of decision makers . . . means that greater complexity can be tolerated.”).

243. Nam, *supra* note 43 (detailing the work in political philosophy and the implications for how taxpayers ought to view the tax law).

244. E.g., GRUBER, *supra* note 235, at 688–90, 707; JOEL SLEMROD & JON BAKIJA, TAXING OURSELVES 112–13 (2d ed. 2000).

are too vague, it may lead to the taxpayer over- or under-saving for the forthcoming tax liability. Instead, my argument is merely that the civil tax law lacks many of the features that make fair notice far more important in criminal law. Given these differences—for civil tax law, there is no moral condemnation, no punishment, and no intended deterrence effect—we have good reason to think that tax law ought not follow the stringent fair notice requirements of criminal law.

B. STATUTORY NOTICE THAT FAIR NOTICE LAWS HAVE BEEN REPEALED

The second counterargument contends that if courts were to get rid of the rule of lenity altogether in conjunction with notice of such at the legislative level, then the problem of higher-order vagueness would not arise. Here, the central idea is that the legislation stating that the rule of lenity does not apply to the criminal code would itself stop citizens from forming any expectations about the rule of lenity.

Such an approach has a fundamental problem. A notice that there would be no lenity provided would amount to notice that there is no fair notice. This becomes plain if we recall the fictive story underlying the fair notice doctrine. The reason a citizen needs fair notice is that they may think they are following the law when they are not. To put the point another way, citizens would simply be on notice that they cannot find comfort in their natural understanding of a criminal statute. That fair notice has been abrogated still stands.

The critic might then respond that the legislature ought to impose a statutory single rule of lenity. Given my argument for the higher-order vagueness problem, having just one rule of lenity would be arbitrary—what reason do we have to stop at one rather than two?—but such violations are forgivable. The law is in the business of line drawing and, since the hair-width difference between what is inside the line and outside the line can hardly be a difference-maker,²⁴⁵ line drawing is often an arbitrary matter.

The bigger issue is that having one rule of lenity does not resolve the fair notice problem so long as the rule of lenity remains semantic in nature. The same conclusion about having no rule of lenity applies to the single rule of lenity. So long as individuals understand that the meaning of a statute has changed from an application of the rule of lenity, then to announce by statute that there will be no more higher-order rules of lenity

245. When this notion is applied to vague predicates, it is referred to as “the principle of tolerance.” Crispin Wright, *Language Mastery and the Sorites Paradox*, in TRUTH AND MEANING 223, 229 (Gareth Evans & John McDowell eds., 1976). Put more formally, for vague predicates, if there is an object *a* to which the vague predicate applies and another object *b* that is qualitatively identical to *a* but for a miniscule difference, then the vague predicate will also apply to *b*.

will only violate individuals' expectations that their actions are within the bounds of legally permissible behavior. The selection of any n -tuple rule of lenity cutoff is arbitrary and will disrupt fair notice for the $n+1$ th order reader of the statute.²⁴⁶

CONCLUSION

This Article has argued that the semantic nature of the rule of lenity leads to three problems in which the rule breaks away from its purpose of providing fair notice in criminal law. The rule of lenity cannot deal with linguistic ambiguity. Some criminal statutes also play civil functions, thereby transferring the strict construction of the rule of lenity from criminal contexts to the civil context. Once the courts construe the meaning of a statute to include just the clear cases, it then creates a fair notice burden regarding the question of what counts as the clear cases, which is itself a vague matter.

To resolve these issues, we ought to replace the semantic rule of lenity with an excuse of lenity. Excuses and fair notice share the common denominator of providing ordinary citizens the safety of choosing to avoid punishment, so having lenity provided as an excuse would more closely align the rule with its purpose. An excuse of lenity would provide the same benefits as the semantic rule of lenity, restricting the scope of criminalization and maintaining criminal law within the province of the legislature, without the drawbacks of having a semantic rule.

246. For any natural number n .