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WHITE-COLLAR CRIME

Lenity, By Any Other Name

By Elkan Abramowitz and Jonathan Sack

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In June, the Supreme Court held in *Snyder v. United States*, 144 S. Ct. 1947 (2024), that a federal anti-corruption statute applied only to "bribes," not "gratuities." The majority interpreted the statute narrowly on the basis of six considerations: text, statutory history, statutory structure, statutory punishments, federalism, and fair notice. In his concurring opinion, Justice Neil Gorsuch put the matter more starkly: "Whatever the label, lenity is what's at work behind today's decision, just as it is in so many others. Rightly so."

What is lenity? It is a rule of statutory construction under which ambiguous criminal laws are interpreted in favor of defendants. For the most part, the Supreme Court has hesitated to rely explicitly on the rule of lenity in its rulings. Yet the rule has made its way into several recent Supreme Court decisions, and Gorsuch in particular has highlighted the importance of lenity to statutory interpretation.

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Courtesy photos

In this article, we describe how the rule of lenity has been applied by the Supreme Court. A key issue is the degree of ambiguity required before invocation of the rule. The importance of this issue is seen in the court's analysis in *United States v. Santos*, 553 U.S. 507 (2008), and *Muscarello v. United States*, 524 U.S. 125 (1998). After discussing these cases, we turn to the Supreme Court's recent decisions in *Snyder* and *Fischer v. United States*, 144 S. Ct. 2176 (2024), to consider how lenity may have informed interpretation of criminal statutes in these cases. We conclude with a consideration of potential implications if, in fact, the Supreme Court is moving toward a more expansive application of the rule of lenity.

Varieties of Lenity

Courts invoke lenity as "a means for upholding the Constitution's commitments to due process

and the separation of powers." *Wooden v. United States*, 595 U.S. 360, 389 (2022) (Gorsuch, J., concurring). The rule is intended to ensure that "fair warning … [is] given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed." *Bittner v. United States*, 598 U.S. 85, 102 (2023). From a "separation of powers" perspective, the rule "places the weight of inertia upon the party that can best induce Congress to speak more clearly [the executive branch] and keeps courts from making criminal law in Congress's stead." *Santos*, 553 U.S. at 514.

Despite the rule's importance, in recent years the rule has rarely been cited as a canon of statutory interpretation. A close reading of the case-law reveals that, in fact, lenity has been applied in at least two different ways, as exemplified by the court's decisions in *United States v. Santos* and *Muscarello v. United States*.

In *Santos*, in 2008, the Supreme Court considered the meaning of "proceeds" in Section 1956 of Title 18, a federal money laundering statute—specifically, whether "proceeds" refers to "receipts" or "profits." In a plurality opinion, Justice Antonin Scalia wrote that "[f]rom the face of the statute," what Congress intended by the word "proceeds" was in doubt. The statute did not define "proceeds," the term's ordinary meaning could include either "receipts" or "profits," and consideration of the broader statutory context did not shed any light on the ambiguity. Rejecting what they referred to as "the impulse to speculate regarding a dubious congressional intent," the plurality wrote that the court should "interpret ambiguous criminal statutes in favor of defendants, not prosecutors," concluding that under the rule of lenity, "the tie must go to the defendant." Accordingly, the court gave the word "proceeds" the more defendant-friendly definition of "profits."

Other Supreme Court decisions suggest a more sparing application of lenity. Ten years earlier, in *Muscarello*, the court did not apply the rule of lenity and interpreted the phrase "carries a firearm" broadly to apply to an individual who knowingly possesses and conveys firearms in the locked glove compartment or trunk of a car, not just one who carries a firearm on his person. See 18 U.S.C. Section 924(c)(1). The court considered the ordinary meaning of "carry," canvassing dictionary definitions, linguistic origins, and the use of the word in literature, journalism, and case law. The court then explored the statute's purpose and legislative history, concluding that these factors did not support limiting the term "carries" to a firearm being "on the person."

The court expressly rejected invocation of the rule of lenity by the petitioners and in Justice Ruth Bader Ginsburg's dissenting opinion: "The simple existence of some statutory ambiguity" is not enough to warrant application of the rule of lenity because "most statutes are ambiguous to some degree." The court explained that the rule of lenity may be invoked only when a "grievous ambiguity" in the statute is found, and no such ambiguity was present in Section 924(c)(1).

In short, under *Muscarello*, the rule of lenity would come into play only after a judge has canvassed every interpretive rule or evidence of congressional intent and still a "grievous ambiguity" is found. In contrast, 10 years later in *Santos,* a plurality of justices applied the rule in favor of a defendant more readily, simply when reasonable doubt remained after consulting the text and structure of the statute.

Lenity in 'Snyder'

The rule has come up in several recent Supreme Court decisions, most often in opinions authored by Gorsuch. In some cases, such as *Snyder*,

Gorsuch has identified the importance of lenity in the ultimate outcome, while in others, such as *Fischer*, the rule is not referenced expressly, but we can infer how the rule might have influenced the result.

In *Snyder*, the former mayor of Portage, Indiana, James Snyder, was convicted of accepting $13,000 from a truck dealer after the city awarded the company two contracts to purchase garbage trucks. The government did not allege a quid pro quo agreement prior to the award, but rather that Snyder was given a reward, or gratuity, for his influence over the bidding process. Snyder was charged with violating Section 666 of Title 18, which makes it a crime to "corruptly solicit[ ][,] demand[ ][,] . . . or accept[ ], . . . anything of value" with the "inten[t] to be influenced or rewarded in connection with" an organization's activities. 18 U.S.C. Section 666(a)(1)(B). The issue was whether Section 666 prohibits "gratuities," i.e., payments made after an official act, in addition to "bribes," i.e., payments made or agreed to before an official act. See Elkan Abramowitz and Jonathan Sack, "Supreme Court to Decide Scope of Key Federal Corruption Statute," N.Y.L.J. (Feb. 29, 2024).

The Supreme Court held that Section 666(a)(1)(B) did not criminalize gratuities on several bases that reinforced one another: text, statutory history, statutory structure, statutory punishments, federalism, and fair notice. Justice Brett Kavanaugh wrote that interpreting the statute to criminalize gratuities would override the "carefully calibrated policy decisions" made by state and local governments in regulating state and local officials' acceptance of gratuities. The court found that a broader interpretation of Section 666 would violate notions of fair notice by leaving state and local officials "entirely at sea to guess about what gifts they are allowed to accept under federal law, with the threat of up to 10 years in federal prison if they happen to guess wrong."

In his concurring opinion, Gorsuch stated that although the majority may have claimed to rest its decision on the structure and history of the statute, as well as "concerns of fair notice and federalism … the bottom line is that, for all those reasons, any fair reader of this statute would be left with a reasonable doubt about whether it covers the defendant's charged conduct. And when that happens, judges are bound by the ancient rule of lenity to decide the case as the court does today, not for the prosecutor but for the presumptively free individual."

This formulation of the rule of lenity, which rests on a "reasonable doubt" as to a law's reach, is very similar to Scalia's formulation in *Santos* and much broader than the "grievous ambiguity" formulation in *Muscarello*. Notably, Gorsuch emphasized that lenity is at work behind many other judicial decisions, although it may "go unnamed" or "be deployed under other guises" such as "fair notice" or judicial "restraint … in assessing the reach of a federal criminal statute."

'Fischer'

In *Fischer*, decided just two days after *Snyder*, the Supreme Court considered the scope of Section 1512(c) of Title 18, which makes it a crime to "otherwise obstruct[ ], influence[ ], or impede[ ] any official proceeding." Joseph Fischer, who was convicted of violating Section 1512(c)(2) in connection with his involvement in the attack on the U.S. Capitol on Jan. 6, 2021, argued that the statute applies only to acts that affect the integrity or availability of evidence, while the government argued that it captures all forms of obstructive conduct.

The court agreed with Fischer and held that, to prove a violation of Section 1512(c)(2), the government must establish that a defendant impaired, or attempted to impair, the availability or integrity for use in an official proceeding of records, documents, objects, or other things used in an official proceeding. The court explained that under canons of statutory interpretation, the scope of Section 1512(c)(2) is limited by the particular examples that precede it, which specifically focus on impairment of evidence. The court also considered the history of the statute and the fact that the expansive interpretation called for by the government "would criminalize a broad swath of prosaic conduct, exposing activists and lobbyists alike to decades in prison" and run counter to the court's typical approach of avoiding a reading that would create a "cover-all" obstruction statute. On this final point, the court noted that "[n]othing in the text or statutory history suggests that subsection (c)(2) is designed to impose up to 20 years' imprisonment on essentially all defendants who commit obstruction of justice in any way and who might be subject to lesser penalties under more specific obstruction statutes," and that "[i]f Congress had wanted to authorize such penalties … it would have said so."

Although the rule of lenity is not mentioned in *Fischer*, the court's narrow reading of Section 1512(c)(2) appears to be motivated by many of the same concerns expressed in *Snyder*, namely, that the court "traditionally exercised restraint in assessing the reach of a federal criminal statute" and "recognized that the power of punishment is vested in the legislative, not in the judicial department."

Conclusion

In recent years, the Supreme Court has taken several opportunities to read white-collar criminal statues closely and narrowly. In the process, the court has relied upon a range of considerations, beginning with the text and structure of the statutes in question and extending to constitutional considerations of fair notice and due process. With Gorsuch's concurring opinion in *Snyder*, we can now add to this list of considerations the rule of lenity.

The court's recent decision in *Snyder*, and perhaps in *Fischer*, may signal an inclination to apply the rule of lenity more expansively, akin to how it was articulated in *Santos*. At the same time, Gorsuch's concurring opinion in *Snyder*, including his statement that the rule of lenity often goes unnamed, may turn out to be an intriguing aside and not a foreshadowing of the rule's expanded role in judicial construction of statutes. In either event, lenity is now one more argument available to defense counsel when facing an expansive application of federal criminal law.