THE RULE OF LENITY AND AFFIRMATIVE DEFENSES

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ABSTRACT

The rule of lenity is undergoing a renaissance. Lenity requires courts to construct ambiguous penal statutes narrowly. In recent years, scholars have sought to reinvigorate lenity as an important tool for combatting the American crisis in overcriminalization. At the same time, the Supreme Court has issued a series of decisions debating the breadth and importance of lenity. This Article contributes a new and unexplored dimension to the growing scholarship on lenity by considering lenity's implications for affirmative defenses.

Affirmative defenses negate criminal liability, and they fall into three categories: justifications, excuses, and public policy defenses. Justifications, like self-defense, render conduct non-criminal; justified conduct is permissible conduct. Excuses, like insanity, render an actor non-punishable, despite their criminal conduct, because the actor is not an appropriate subject for blame. Excused conduct is thus impermissible yet also unpunishable. Finally, public policy defenses preclude punishment for justification-like or excuse-like reasons; they either vitiate an act's wrongfulness (justification-like) or prevent punishment even though the act was wrongful (excuse-like). Along with criminal statutes, affirmative defenses define the boundaries of what the state can punish.

This Article advances a novel claim: lenity applies to justifications and justification-like public policy defenses but not excuses or excuse-like public policy defenses. Because justificatory defenses render conduct non-criminal, they effectively narrow the scope of a penal statute—the broader the justification, the narrower the penal statute. Excusatory defenses, however, do not alter the scope of the criminal law. They preclude punishment despite an act's criminal character, so they do not affect the breadth or narrowness of penal statutes and do not implicate lenity. Lenity thus applies to justificatory defenses but not excusatory ones.

The consequences of applying lenity to justificatory defenses are profound. As a practical matter, it helps ordinary criminal defendants raise

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uncertain defenses and provides courts with an interpretative guide for recently enacted justifications like stand-your-ground laws and affirmative defenses to anti-abortion laws. This expanded role for lenity also creates new possibilities for environmental and animal activists aiming to exploit ambiguous justifications to advance their causes, thus laying the groundwork for potentially transformative legal change. Further, the Article's claims about the ambit of lenity have important implications for related scholarly debates. For example, the Article argues for the first time that some public policy defenses may be justification-like in their function, and it proposes a staunchly textualist—or "empirical"—approach to drawing the distinction between justifications and excuses. These novel arguments have implications for foundational questions regarding culpability and interpretative methodology in criminal cases.

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INTRODUCTION

Every evening, Joseph Matos built his home by arranging cardboard boxes under the awning of a New York City storefront.[1] One night, while ensconced in his den of boxes, Matos was jolted awake by a thud near his

1. Nikita Stewart & Jan Ransom, *He Says He Stabbed a Student to Defend His Home. His Home Is a Box.*, N.Y. TIMES (Jan. 15, 2020), https://www.nytimes.com/2020/01/15/nyregion/homeless-stabbing-college-students.html [https://perma.cc/YBJ7-C6U2].

head—and then another.[2] Matos grabbed his knife and jumped out of his home to find two drunk college students kicking his boxes.[3] Matos stabbed one and slashed the other.[4] For that, he was charged with assault and faces twenty-two years in prison.[5]

But Matos has advanced a novel legal defense.[6] Under New York's castle doctrine, a person may prevent another from entering their dwelling and committing a crime therein.[7] Matos's argument is that he was not engaging in assault, but in defense of his home.[8] The crucial question, then, is whether a heap of cardboard boxes is a dwelling for the purposes of New York law. But the law itself does not provide a definitive answer.[9] Faced with such hopeless ambiguity, what should Matos's judge do?

This Article offers a solution. It makes a novel contribution to the law of affirmative defenses by arguing that the rule of lenity applies to justificatory defenses. In brief, the rule of lenity requires courts to narrowly construct ambiguous penal statutes. Some affirmative defenses—particularly justifications like the defense of habitation—effectively narrow the scope of penal statutes. They render conduct non-criminal. Thus, I will argue that lenity's requirement to read penal statutes narrowly is simultaneously a requirement to read justificatory defenses broadly. For Matos, then, the judge ought to read the terms of his defense broadly, construing "dwelling" to include an arrangement of cardboard boxes.

This argument has implications well beyond Matos's case. Whenever a court faces an ambiguous justification or justification-like defense, it must construct that defense broadly. This may have especially significant consequences for the interpretation of new justifications, like stand-your-

2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. N.Y. PENAL LAW § 35.20 (McKinney 2024).
8. Stewart & Ransom, *supra* note 1.
9. Article 35 of the Penal Code does not define "dwelling." It does, however, reference New York's trespass and burglary statute, which defines "dwelling" as "a building which is usually occupied by a person lodging therein at night." N.Y. PENAL LAW § 140.00 (McKinney 2024). Matos certainly lodged in his boxes overnight, but were those boxes a "building"? "Building" is defined according to "its ordinary meaning" and "includes any structure, vehicle or watercraft used for overnight lodging of persons." *Id.* The boxes seem to be a "structure," which suggests that Matos may have a defense available. But New York case law complicates matters. Courts have found that a public place, like the hallway between two apartments, is not a dwelling. *See* Ali Kassym, Note, *My Home, My Castle: What About a Homeless Man's Cardboard Home?*, U. CIN. L. REV. BLOG (Mar. 13, 2020), https://uclawreview.org/2020/03/13/my-home-my-castle-what-about-a-homeless-mans-cardboard-home [https://perma.cc/L45Q-66N5]. And yet that is not dispositive either. Surely, a hallway differs from a home, even if the home is made of cardboard and built on the sidewalk. In short, the law is hopelessly ambiguous. Neither statutes nor cases can provide adequate guidance for the judge who must decide on Matos's proffered defense.

ground statutes, and for activists who self-consciously rely on justifications to advance movement goals.[10]

There is a robust literature on both lenity and affirmative defenses. In recent years, scholars have sought to rehabilitate and reinvigorate lenity. Scholars have identified lenity as a tool for combatting the American crisis in overcriminalization, and they have called for a more robust lenity jurisprudence.[11] At the same time, the Supreme Court seems poised to usher in a lenity renaissance.[12] Separately, there is a great deal of scholarship on affirmative defenses, in particular on how to categorize defenses and how to draw the distinction between justifications and excuses.[13] This Article is the first to connect these two domains of scholarship and to explore exactly how lenity might apply to affirmative defenses.

Applying lenity to affirmative defenses raises a host of subsidiary questions. For example, does lenity only apply to justifications or also excuses? What about public policy defenses like immunities? And does it matter what the rationale for lenity is? In advancing a simple but novel claim—lenity has implications for the construction of affirmative defenses—this Article thus necessarily wades into a number of other scholarly debates. The Article offers a comprehensive theory of lenity, arguing that the rule is grounded in the constitutional requirements of fair notice and separation of powers. Accordingly, lenity can be defined as the requirement that courts err on the side of defendants when they are unsure whether the community, through the legislature, has expressly condemned conduct. For that reason, lenity only applies to the construction of justifications and justification-like

10. *See* discussion *infra* Section IV.C.

11. *See, e.g.*, Shon Hopwood, *Restoring the Historical Rule of Lenity as a Canon*, 95 N.Y.U. L. REV. 918, 936–37 (2020) (arguing that lenity better safeguards defendants' liberty "in an era in which Congress has criminalized huge swaths of conduct"); Brandon Hasbrouck, Essay, *On Lenity: What Justice Gorsuch Didn't Say*, 108 VA. L. REV. ONLINE 1289, 1302–03 (2022) (linking the impotence of lenity to "our current carceral state and its racist results"); Maisie A. Wilson, Note, *The Law of Lenity: Enacting a Codified Federal Rule of Lenity*, 70 DUKE L.J. 1663, 1666–68 (2021) (arguing that "if courts regularly applied lenity, this rule could partially address important social problems in the criminal justice system").

12. *See* Wooden v. United States, 595 U.S. 360, 376–79, 384–97 (2022) (Kavanaugh, J., concurring; Gorsuch, J., concurring) (discussing the rule of lenity in dueling concurrences, including a strong pro-lenity concurrence authored by Justice Gorsuch and joined by Justice Sotomayor); Bittner v. United States, 598 U.S. 85, 101–03 (2023) (calling for greater use of lenity in a section authored by Justice Gorsuch and joined by Justice Jackson); Lockhart v. United States, 577 U.S. 347, 376–77 (2016) (Kagan, J., dissenting) (invoking lenity in a dissent by Justice Kagan). Thus, at least four justices have explicitly signaled an openness to lenity in recent judicial opinions.

13. *See, e.g.*, Paul H. Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 COLUM. L. REV. 199 (1982) (discussing the structure of affirmative defenses and categorizing particular defenses); Eugene R. Milhizer, *Justification and Excuse: What They Were, What They Are, and What They Ought to Be*, 78 ST. JOHN'S L. REV. 725 (2004) (providing a detailed history and analysis of affirmative defenses); H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 13–14 (2d ed. 2008) (defining justification and excuse); John Gardner, *The Gist of Excuses*, 1 BUFF. CRIM. L. REV. 575 (1998) (same); George P. Fletcher, *The Nature of Justification*, *in* ACTION AND VALUE IN CRIMINAL LAW 175–86 (Stephen Shute, John Gardner & Jeremy Horder eds., 1993) (same).

public policy defenses, not excuses. Justifications render conduct non-criminal and thus narrow criminal statutes, while excuses render actors non-punishable but do not change the criminal character of the underlying conduct. The boundary between justification and excuse is therefore crucial for determining whether lenity applies. As a result, this Article also advances a new means of drawing that line, namely an "empirical" approach that requires judges to cleave to the statutory text whenever possible.

This Article proceeds in four parts. Part I provides a holistic account of lenity. Part II then applies lenity to affirmative defenses. It demonstrates that lenity applies to justifications and justification-like public policy defenses, but not excuses or excuse-like public policy defenses. This Part includes a novel analysis of public policy defenses, arguing for the first time that some public policy defenses may function in a justification-like manner. Given the importance of this distinction between justification and excuse, Part III proposes a new, "empirical" approach to drawing this all-important line. Finally, Part IV explores the practical implications of applying lenity to some affirmative defenses.

I. THE RULE OF LENITY

The rule of lenity, sometimes also called the rule of strict construction, is a canon of statutory interpretation that requires courts to narrowly construe ambiguous penal statutes.[14] This Part will clarify the structure of lenity and then consider its purpose. It will draw primarily on the Supreme Court's lenity jurisprudence, which has proven very influential for other courts, and then consider the nature and role of lenity in state courts.[15]

A. The Structure of Lenity

Among tools of statutory interpretation, the structure of lenity is distinctive in three respects: (1) it applies only to penal statutes; (2) it applies only when those statutes are ambiguous; and (3) it is lexically inferior to other interpretative canons.

14. Adam M. Samaha, *On Law's Tiebreakers*, 77 U. CHI. L. REV. 1661, 1708–09, 1708 n.122 (2010).

15. *See infra* note 101 and accompanying text.

1. Penal Statutes

Lenity applies only to penal statutes. Generally, the Supreme Court has reflexively interpreted "penal" as "criminal."[16] Indeed, the Court has contrasted criminal statutes with civil ones, noting that lenity requires different interpretative postures for one than the other.[17] In a few cases, though, the Court has applied lenity to the construction of a civil statute, but only when the statute also had criminal ramifications.[18] For example, the Court applied lenity to the construction of civil sanctions in a tax statute[19] and an immigration statute[20] because in those cases, the statute had "criminal applications."[21]

But at least two justices have expressed an interest in expanding lenity beyond the criminal context. In a recent concurrence, Justice Gorsuch, joined by Justice Sotomayor, argued that lenity is not "a curiosity unique to criminal cases."[22] Drawing on historical applications of strict construction to civil forfeitures and fines, Justice Gorsuch argued that lenity applies to all laws "inflicting any form of punishment."[23] But even in this expanded form, it is noteworthy that lenity applies only to state-inflicted punishments. And in opinions that have carried a majority of the Court, lenity has been reserved for statutes that are criminal or have criminal ramifications.

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16. *See, e.g.*, United States v. Bass, 404 U.S. 336, 347–49 (1971) ("[A]s we have recently reaffirmed, 'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.'" (quoting Rewis v. United States, 401 U.S. 808, 812 (1971)); United States v. Giles, 300 U.S. 41, 48–49 (1937) (referring to "[t]he rule, often announced, that criminal statutes must be strictly construed"); United States v. Bramblett, 348 U.S. 503, 509 (1955) ("That criminal statutes are to be construed strictly is a proposition which calls for the citation of no authority."), *overruled on other grounds by* Hubbard v. United States, 514 U.S. 695 (1995).

17. *See, e.g.*, Liparota v. United States, 471 U.S. 419, 427–28 (1985) (noting that lenity applies specifically to criminal statutes); United States v. Thompson/Ctr. Arms Co., 504 U.S. 505, 517–18, 518 n.10 (1992) (holding that lenity can only apply in civil cases if the civil statute has criminal applications, thereby highlighting the importance of criminal law in the application of lenity); *see also* Sessions v. Dimaya, 584 U.S. 148, 208–09 (2018) (Thomas, J., dissenting) (noting a preference for the rule of lenity over the void for vagueness doctrine because the latter also applies to civil statutes while the former does not).

18. Some statutes have both criminal and noncriminal applications. For example, the definition of "crime of violence" in 18 U.S.C. § 16 has implications for both criminal and noncriminal cases. In criminal cases, a "crime of violence" can result in additional charges or sentencing enhancements. *See* 18 U.S.C. § 924. In some noncriminal cases, like immigration cases, a "crime of violence" can have civil consequences, like deportation. *See* 8 U.S.C. § 1227(a)(2)(A)(iii); Leocal v. Ashcroft, 543 U.S. 1, 4 (2004). Even when courts interpret "crime of violence" in the immigration context—i.e., a context in which lenity does not traditionally apply—they must use lenity because whatever meaning they give the term in the civil context will also apply in the criminal context. *Leocal*, 543 U.S. at 11 n.8; *see also* Crandon v. United States, 494 U.S. 152, 168 (1990) (applying lenity in interpreting a criminal statute invoked in a civil action).

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

20. *Leocal*, 543 U.S. at 11 n.8; Clark v. Martinez, 543 U.S. 371, 380–81 (2005).

21. *Clark*, 543 U.S. at 380 (citation omitted).

22. Wooden v. United States, 595 U.S. 360, 396 (2022) (Gorsuch, J., concurring).

23. *Id.* at 396 n.5.

2. Ambiguity

The "touchstone" of lenity is "statutory ambiguity."[24] But how ambiguous is ambiguous enough?[25] More than perhaps any other element of lenity, the threshold for ambiguity has been the subject of heated disagreement among judges and scholars.[26]

The Court has invoked at least three different standards of ambiguity in its lenity cases.[27] The oldest standard, the "reasonable doubt" standard, has its origins in a defendant-friendly decision from 1850.[28] In that case, the Court held that "[i]n the construction of a penal statute, it is well settled . . . that all reasonable doubts concerning its meaning ought to operate in favor of the [defendant]."[29] In 1958, the Court introduced a new standard, which required leniency whenever a court could "no more than . . . guess as to what Congress intended."[30] Though originally a defendant-friendly standard that was "almost always" invoked in favor of lenity, the standard eventually took a "decidedly pro-prosecution direction."[31] Finally, in 1974, the Court invoked its most stringent standard, requiring "grievous

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

25. Lenity has frequently been called a "tiebreaker"—that is, when the meaning of a penal statute is uncertain, lenity requires that the tie goes to the defendant. *See, e.g.*, Samaha, *supra* note 14, at 1708–09, 1708 n.122. But as this Section makes clear, the tiebreaker framing may obscure more than it clarifies. For starters, what constitutes a "tie" sufficient to trigger the "tiebreaker" of lenity is perhaps the most debated aspect of lenity. In addition, the "tiebreaker" framing can be misleading. Strictly speaking, lenity requires courts to narrowly construe ambiguous penal statutes; it does *not* require courts to construe them in favor of defendants. Most of the time, a narrow construction and a defendant-friendly one are one and the same, hence the popular tiebreaker moniker. But in a small set of cases, namely overbreadth challenges, a narrow construction of a penal statute can actually hurt a defendant because the penal statute must sweep broadly to be struck down entirely. *See* United States v. Williams, 553 U.S. 285, 292 (2008) (discussing overbreadth doctrine).

26. *See* Daniel Ortner, Note, *The Merciful Corpus: The Rule of Lenity, Ambiguity and Corpus Linguistics*, 25 B.U. PUB. INT. L.J. 101, 106–20 (2016) (summarizing judicial disagreements on the threshold for ambiguity); Lane Shadgett, Note, *A Unified Approach to Lenity: Reconnecting Strict Construction with Its Underlying Values*, 110 GEO. L.J. 685, 699–701 (2022) (discussing the "ambiguity of ambiguity").

27. In *The Merciful Corpus: The Rule of Lenity, Ambiguity and Corpus Linguistics*, Daniel Ortner claims that the Court has invoked at least four standards—the three discussed above and a maximally defendant-friendly standard that requires the government's position to be "unambiguously correct." Ortner, *supra* note 26, at 106–20. Ortner draws this "unambiguously correct" standard from the Court's opinion in *Granderson*. *Id.* at 106–07. But in context, the *Granderson* Court's claim that the government's position fails because it is not "unambiguously correct" is merely a finding of ambiguity—not a threshold for ambiguity. *See* United States v. Granderson, 511 U.S. 39, 54 (1994). Indeed, in his concurrence in *Wooden*, Justice Gorsuch cites the *Granderson* standard as an instance of the "reasonable doubt" standard "in slightly different words." *Wooden*, 595 U.S. at 393 & n.3 (Gorsuch, J., concurring).

28. Harrison v. Vose, 50 U.S. (9 How.) 372, 378 (1850).

29. *Id.*

30. Ladner v. United States, 358 U.S. 169, 178 (1958).

31. Ortner, *supra* note 26, at 112–13.

ambiguity" to trigger lenity.[32] To date, the Court has never decided a case in the defendant's favor when invoking the "grievous ambiguity" standard.[33]

Despite establishing different thresholds for ambiguity, these three standards—reasonable doubt, no more than a guess, and grievous ambiguity—have coexisted rather harmoniously. The Court rarely acknowledges its shift in standards from one opinion to the next.[34] Sometimes the majority will adopt one standard and the dissent another.[35] Justices seem to select whichever standard suits their argument, and as a result, the Court's ambiguity-threshold jurisprudence is predictably messy.

But recently, these inconsistencies in the Court's lenity jurisprudence have come to a head. In *Wooden v. United States*, Justices Kavanaugh and Gorsuch issued dueling concurrences regarding the appropriate threshold for triggering lenity. Justice Kavanaugh relied solely on the Court's grievous ambiguity cases to argue that lenity "should essentially come in never."[36] In his concurrence, Justice Gorsuch emphatically rejected this approach, noting that "[t]his 'grievous' business does not derive from any well-considered theory about lenity or the mainstream of this Court's opinions."[37] Citing early treatises and case law, Justice Gorsuch made the case for the reasonable doubt standard and argued for readier recourse to lenity.[38] But so far, the Court has not settled the ambiguity threshold in a majority opinion and all three standards remain good law.

3. Lexical Inferiority

A third distinctive feature of lenity is its ranking relative to other canons of construction: lenity comes last. As Justice Frankfurter famously put it: "The rule [of lenity] comes into operation *at the end of the process* of construing what Congress has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers."[39] Canons of

32. Huddleston v. United States, 415 U.S. 814, 831 (1974).

33. Ortner, *supra* note 26, at 117.

34. *See, e.g.*, Prince v. United States, 352 U.S. 322, 329 (1957) (using the reasonable doubt standard); *Ladner*, 358 U.S. at 178 (adopting the "no more than a guess" standard only one year after *Prince*, without acknowledging departure from the reasonable doubt standard); *Huddleston*, 415 U.S. at 831 (adopting the "grievous ambiguity" standard without acknowledging departure from the reasonable doubt or no more than a guess standards).

35. *See, e.g.*, Abramski v. United States, 573 U.S. 169, 204 (2014) (Scalia, J, dissenting) (invoking the reasonable doubt standard in dissent and criticizing the majority's approach to lenity as "miserly"); *id.* at 188 n.10 (majority opinion) (responding to the dissent's invocation of the reasonable doubt standard by citing cases invoking the grievous ambiguity standard).

36. Wooden v. United States, 595 U.S. 360, 377–78 (2022) (Kavanaugh, J., concurring) (citing Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345, 386).

37. *Id.* at 392 (Gorsuch, J., concurring).

38. *Id.*

39. Callanan v. United States, 364 U.S. 587, 596 (1961) (emphasis added).

construction are interpretative rules that help resolve statutory uncertainty,[40] so it makes sense that lenity—a tiebreaker triggered where there is irresolvable ambiguity—only applies once every other canon has been exhausted. As the Court put it, "[t]he rule of lenity applies only if, 'after seizing everything from which aid can be derived,'" ambiguity remains.[41] But as many scholars have pointed out, this approach renders lenity a dead letter.[42] The purpose of interpretative canons is to resolve ambiguity; once every canon has been applied, there is rarely any ambiguity left for lenity.

While there is a consensus that lenity is lexically inferior to all other interpretative strategies, there is not a similar consensus on what strategies are legitimate. Lenity may be last, but what comes before it is up for debate. In particular, justices have disagreed about whether legislative history and congressional intent are legitimate considerations. *Moskal v. United States* is perhaps the best example of this particular debate. In *Moskal*, the defendant participated in a "title-washing" scheme in which he received car titles with fraudulently altered odometer readings, exchanged those for genuine titles bearing the altered odometer readings, and then transported those genuine titles over state lines.[43] At issue was whether the state could prosecute the defendant for transporting "falsely made, forged, altered, or counterfeited securities" in interstate commerce.[44] The Court acknowledged that the titles were not, strictly speaking, "falsely made"; they were, after all, genuine titles made by state authorities.[45] But it ultimately concluded that Congress's intent, as revealed in the criminal statute's legislative history, was that "falsely made" included "genuine documents containing false information."[46]

Justice Scalia dissented, arguing that lenity ought to prevent the Court from looking to legislative history to clarify an ambiguous statute: "If the rule of lenity means anything, it means that the Court ought not do what it does today: use an ill-defined general purpose to override an unquestionably clear term of art."[47] As Justice Scalia saw it, Congress enacted only the *text* of the statute—not its committee reports—and the Court asks too much when

40. Brian G. Slocum & Kevin Tobia, *The Linguistic* and *Substantive Canons*, 137 HARV. L. REV. F. 70, 70–71 (2023).

41. Muscarello v. United States, 524 U.S. 125, 138 (1998) (quoting United States v. Wells, 519 U.S. 482, 499 (1997)).

42. *See, e.g.*, Hopwood, *supra* note 11, at 931 ("[I]f judges possess every interpretive tool at their disposal to construe away ambiguity, they will, inevitably, never reach the rule of lenity."); Kahan, *supra* note 36, at 386 ("[I]f lenity invariably comes in "last," it should essentially come in never.").

43. Moskal v. United States, 498 U.S. 103, 105–06 (1990).

44. *Id.* at 106.

45. *Id.* at 114–15.

46. *Id.* at 110.

47. *Id.* at 132 (Scalia, J., dissenting).

it demands that defendants familiarize themselves not only with the text of a statute but also with its history.[48]

Moskal reveals lenity as a site of conflict between purposivism and textualism.[49] Justice Thurgood Marshall's majority opinion sought to vindicate "Congress' 'general intent' and 'broad purpose,'" so he turned to legislative history to clarify an ambiguous term rather than resorting to the tiebreaker of lenity.[50] Justice Scalia, on the other hand, claimed that the text alone mattered, and if the text was ambiguous, then lenity was the answer.[51]

Today, Justice Scalia's textualist approach has become firmly entrenched in the judiciary,[52] and judges are increasingly reticent to turn to legislative history and purpose to interpret a penal statute.[53] In fact, consistent with the Court's textualism, a recent survey of the Supreme Court's construction of penal statutes over the last ten terms has found that the Court "adopted a narrow construction nearly twice as often as it adopted a broad construction."[54] Though lenity is still last in the canonical line, the line itself has become shorter.

48. *See* United States v. R.L.C., 503 U.S. 291, 308–10 (1992) (Scalia, J., concurring).

49. *See* Jonathan R. Siegel, *The Legacy of Justice Scalia and His Textualist Ideal*, 85 GEO. WASH. L. REV. 857, 879–82 (2017) (discussing *Yates v. United States*, 574 U.S. 528 (2015), as an example in which the plurality's purposivist approach clashed with the dissent's textualist approach in a case construing the meaning of an ambiguous penal statute).

50. *Moskal*, 498 U.S. at 108–10.

51. *Id.* at 131–32 (Scalia, J., dissenting).

52. *See* Chase Wathen, Note, *Textualism Today: Scalia's Legacy and His Lasting Philosophy*, 76 U. MIA. L. REV. 864, 898 (2022) (demonstrating that the federal judiciary is increasingly textualist because it is becoming rarer for federal judges to cite to legislative history).

53. For another example of lenity as a site of conflict between purposivism and textualism, see *Yates*, 574 U.S. at 547–48, 566 (plurality opinion; Kagan, J., dissenting). The issue in *Yates* was whether the Sarbanes-Oxley Act, which forbids destroying or concealing any "tangible object," covered the actions of a fisherman who threw undersized fish back into the ocean against the wishes of a government inspector. *Id.* at 532–34 (plurality opinion). In other words, are fish "tangible objects" for the purposes of the Sarbanes-Oxley Act? The plurality opinion, written by Justice Ginsburg, consulted legislative history and said no, *id.* at 542; the dissent, written by Justice Kagan, considered only the language of the statutory text—"tangible object"—and said yes, *id.* at 554–55 (Kagan, J., dissenting). Interestingly, *Yates* shows that textualism does not always lead to a narrower construction of an ambiguous term. Though textualism leads more swiftly to lenity—if only the text can be considered, then there are fewer means of dispelling ambiguity—it does not necessarily lead to strict constructions. In *Yates*, Justice Ginsburg's purposivist approach limited the meaning of "tangible object," while Justice Kagan's textualist approach took the capacious term at face value.

54. Joel S. Johnson, Ad Hoc Constructions of Penal Statutes, 100 NOTRE DAME L. REV. (forthcoming 2024) (manuscript at 19), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4739013 [https://perma.cc/3FRY-SLGH]. Notably, the same paper found that a majority of the Court rarely invoked lenity explicitly—perhaps due to textualist discomfort with substantive canons—and instead opted for ad hoc narrowing interpretations that produced the same result. *Id.* at 33–37.

B. The Purpose of Lenity

Lenity is a substantive canon.[55] Like all substantive canons, lenity's purpose is not to decipher or implement the will of the legislature[56] but to "advance values external to a statute."[57] Lenity thus permits a court to depart from its usual role as the faithful agent of the legislature.[58] Scholars have defended this departure by arguing that substantive canons like lenity are "Constitution-implementing."[59] In effect, they "overenforc[e] constitutional norms" by forcing the legislature to act decisively when constitutional values are at stake.[60] In particular, lenity implements two constitutional values: due process and separation of powers.[61] The Supreme Court has treated these two rationales as coequal justifications, sometimes emphasizing due process,[62] sometimes separation of powers,[63] and sometimes both.[64]

1. Due Process

Lenity promotes due process by ensuring that the legislature gives the public a "fair warning" of what it has condemned as criminal.[65] Lenity accomplishes this fair notice function by requiring courts to cleave narrowly to the text of penal laws.[66] If courts could engage in liberal gap-filling or consult inaccessible sources of statutory meaning, then the public would not

55. *See* Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 121–24 (2010); Biden v. Nebraska, 600 U.S. 477, 508 (2023) (Barrett, J., concurring).

56. *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION 27–28 (new ed. 2018).

57. *Biden*, 600 U.S. at 508 (Barrett, J., concurring).

58. *See* Barrett, *supra* note 55, at 121–24.

59. Abbe R. Gluck, *The Federal Common Law of Statutory Interpretation:* Erie *for the Age of Statutes*, 54 WM. & MARY L. REV. 753, 766–67 (2013).

60. Barrett, *supra* note 55, at 174–75.

61. Wooden v. United States, 595 U.S. 360, 389 (2022) (Gorsuch, J., concurring) ("[L]enity . . . serve[s] . . . [as] a means for upholding the Constitution's commitments to due process and the separation of powers.").

62. *See, e.g.*, United States v. Standard Oil Co., 384 U.S. 224, 234–37 (1966) (Harlan, J., dissenting) ("A more important contemporary purpose of the notion of strict construction is to give notice of what the law is, in order to guide people in their everyday activities."); Dunn v. United States, 442 U.S. 100, 112–13 (1979) ("[Lenity] is rooted in fundamental principles of due process which mandate that no individual be forced to speculate, at peril of indictment, whether his conduct is prohibited."); McNally v. United States, 483 U.S. 350, 374–75 (1987) (Stevens, J., dissenting) ("The doctrine of lenity is, of course, sound, for the citizen is entitled to fair notice of what sort of conduct may give rise to punishment.").

63. *See, e.g.*, *McNally*, 483 U.S. at 359–60 (majority opinion) (holding that Congress must speak "in clear and definite language" to avoid lenity); United States v. Kozminski, 487 U.S. 931, 949 (1988) (holding that a broad interpretation of a penal statute would improperly "delegate to prosecutors and juries the inherently legislative task of determining what . . . should be punished as crimes").

64. *See, e.g.*, United States v. Bass, 404 U.S. 336, 347–49 (1971) (leaning equally on notice and separation of powers to justify lenity); Huddleston v. United States, 415 U.S. 814, 830–31 (1974) (same).

65. Hopwood, *supra* note 11, at 934–35.

66. *Id.*

be "on notice" about the content of criminal law, and criminal defendants could be caught off guard by prosecution.[67]

The due process rationale received its canonical formulation in Justice Holmes's opinion in *McBoyle v. United States*, which considered whether the phrase "motor vehicles" includes aircrafts.[68] Justice Holmes held that lenity required a narrow reading of the term "motor vehicles"—a reading that excluded airplanes.[69] He grounded this application of lenity in a requirement of fair notice:

> Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear.[70]

Since *McBoyle*, notice has become a standard justification for lenity,[71] with at least one justice even referring to it as "more important" than competing rationales.[72] Though some scholars have argued that notice is an inadequate rationale,[73]

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67. *Id.*; *see also* Screws v. United States, 325 U.S. 91, 96 (1945) (noting that failing to provide fair notice of the content of the criminal law "would be like sanctioning the practice of Caligula who 'published the law, but it was written in a very small hand, and posted up in a corner, so that no one could make a copy of it'").

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

69. *Id.* at 27.

70. *Id.*

71. *See* David S. Romantz, *Reconstructing the Rule of Lenity*, 40 CARDOZO L. REV. 523, 524, 531–534 (2018); Bittner v. United States, 598 U.S. 85, 101–03 (2023) (relying solely on notice as a rationale for lenity).

72. United States v. Standard Oil Co., 384 U.S. 224, 234–37 (1966) (Harlan, J., dissenting) ("A more important contemporary purpose of the notion of strict construction is to give notice of what the law is, in order to guide people in their everyday activities.").

73. Kahan, *supra* note 36, at 364 (dismissing notice as "a rank fiction"). Indeed, notice has some severe shortcomings as a rationale for lenity. Criminals do not consult statutes before committing crimes. And in most lenity cases, the defendant is already effectively on notice that their conduct is wrongful. For example, the defendant in *McBoyle* surely knew that stealing an aircraft was wrong. He just got lucky. Even if would-be criminals did read statutes, we would hardly want to reward their ability to find loopholes. *See* Am. Fur Co. v. United States, 27 U.S. (2 Pet.) 358, 366–67 (1829) ("A construction which would sanction so glaring an evasion of the whole policy of the law, ought in no case to be adopted, unless the natural meaning of the words of the act require it."); United States v. Giles, 300 U.S. 41, 48–49 (1937) (holding that reading the statute artificially narrowly "would emasculate the statute [and] defeat the very end in view"). Such a policy would punish the ordinary swindler while granting leniency to the sophisticated fraudster. As one scholar put it, where a criminal consults a statute and identifies and exploits a loophole, he would not "have established the kind of reliance interest that society would be obliged to respect." John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 231 (1985). Perhaps most problematic of all for the notice rationale is that it could be defeated by a rule of prospective application. If a court confronted a poorly drafted statute—one in which the act's text did not cover the prosecuted conduct but the act's policy surely did—then the court

the Court[74] and most scholars[75] treat notice alone as a sufficient justification for lenity.

2. Separation of Powers

Lenity's other rationale is the separation of powers.[76] This rationale has its origins in the Supreme Court's very first lenity opinion: *United States v. Wiltberger*.[77] In that case, Chief Justice Marshall declared: "The rule that penal laws are to be construed strictly . . . is founded on . . . the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment."[78] In *Wiltberger*, the Court held that the crime of manslaughter did not apply to a foreign river because the Crimes Act of 1790, the first federal criminal statute, only criminalized manslaughter "on the high seas."[79] Though Chief Justice Marshall could "conceive no reason why" manslaughter on a foreign river should go unpunished, he felt bound by the separation of powers: "Congress has not made [it] punishable, and this Court cannot enlarge the statute."[80]

Because of this unwavering commitment to the separation of powers, *Wiltberger* is often considered a "companion case" to *United States v. Hudson & Goodwin*, which abrogated the federal judiciary's power to create common-law crimes.[81] In that case, the Court held that for a federal court to exercise criminal jurisdiction, "[t]he legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that

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could fill the gap but make this broad construction only prospectively applicable. Because the Supreme Court's decisions have the force of law, the decision would provide legal notice just as a statute would. And yet the Court has not done that. Even though lenity is a "rank fiction," the Court has clung to that fiction. A full explanation is beyond the scope of this Article. One possible answer is that interrogating notice too closely would prove destabilizing for *all* of law, since the fiction of notice undergirds more than just lenity. *See, e.g.*, Nathan S. Chapman, *Fair Notice, the Rule of Law, and Reforming Qualified Immunity*, 75 FLA. L. REV. 1, 16 (2023) (discussing notice rationale in context of qualified immunity). The bottom line for the purposes of lenity is that notice, though a legal fiction, is a fiction with the force of law.

74. *See Bittner*, 598 U.S. at 101–03.

75. *See* Hopwood, *supra* note 11, at 942; Jeffrey A. Love, Comment, *Fair Notice About Fair Notice*, 121 YALE L.J. 2395, 2401 (2012); Barrett, *supra* note 55, at 130; Sarah Newland, Note, *The Mercy of Scalia: Statutory Construction and the Rule of Lenity*, 29 HARV. C.R.-CIV. LIBERTIES L. REV. 197, 210 (1994).

76. Wooden v. United States, 595 U.S. 360, 389 (2022) (Gorsuch, J., concurring).

77. United States v. Wiltberger, 18 U.S. (5 Wheat.) 76 (1820).

78. *Id.* at 95.

79. *Id.* at 93–99.

80. *Id.* at 105.

81. *See, e.g.*, Shadgett, *supra* note 26, at 690 ("*Wiltberger* is a companion case to *United States v. Hudson & Goodwin*, in which the Court had, eight years earlier, forsworn the power of federal courts to craft criminal common law."); Kahan, *supra* note 36, at 359 ("Chief Justice Marshall's formulation in *Wiltberger* unmistakably alluded to a parallel passage in *United States v. Hudson & Goodwin* . . . .").

shall have jurisdiction of the offence."[82] This passage echoes in *Wiltberger*, where the Court similarly foreswore its ability to exercise criminal jurisdiction when Congress had not expressly granted that power.[83]

Notably, lenity's enforcement of the separation of powers is not about implementing the will of the legislature. As Chief Justice Marshall acknowledged in *Wiltberger*, the legislature almost certainly meant to criminalize manslaughter on foreign rivers; they simply forgot to write that into the statute.[84] Lenity thus stands for the proposition that legislative intent alone, filtered through the judiciary, is insufficient to criminalize something. For conduct to be criminal, the legislature must explicitly condemn it, and courts are powerless to fill in the gaps.

Lenity enforces the separation of powers by requiring a clear statement of criminal prohibition from the legislature.[85] Lenity only applies to criminal statutes or civil statutes that have criminal consequences.[86] Unlike other law, criminal law uniquely reflects "the moral condemnation of the community."[87] Civil statutes may deter or inflict hardship, but they do not give voice to the moral opprobrium of the community in the way that criminal statutes do.[88] And because only the legislature represents the will of the community, only the legislature can create criminal law.[89] Lenity is thus a formalistic rule that the mouthpiece of the people—the legislature—must explicitly condemn conduct before it becomes criminal. Put differently, lenity creates a presumption that conduct is non-criminal unless the legislature has explicitly criminalized it.[90]

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82. United States v. Hudson & Goodwin, 11 U.S. (7 Cranch.) 32, 34 (1812).

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

84. *Id.* at 97.

85. Shon Hopwood, *Clarity in Criminal Law*, 54 AM. CRIM. L. REV. 695, 731 (2017). Lenity's clear statement requirement shows the overlap between the due process and separation of powers rationales. The courts' demand for a clear statement enforces the separation of powers by preventing the legislature from delegating criminal lawmaking to the courts. The clear statement rule also facilitates fair notice by providing defendants with an unambiguous declaration of the criminal prohibition.

86. *See supra* Section I.A.

87. United States v. Bass, 404 U.S. 336, 348 (1971).

88. *See* Paul H. Robinson, *The Criminal-Civil Distinction and the Utility of Desert*, 76 B.U. L. REV. 201, 206–07 (1996); Joel Feinberg, *The Expressive Function of Punishment*, 49 THE MONIST 397, 402–04 (1965) (noting that unlike civil law, criminal law engages in expressive condemnation of the wrongdoer).

89. *See, e.g.*, *Bass*, 404 U.S. at 348 ("[B]ecause criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity."); United States v. Hudson & Goodwin, 11 U.S. (7 Cranch.) 32, 34 (1812) (abolishing common-law crimes because only the legislature has the authority to declare conduct condemnable and thus criminal).

90. As a formal rule of criminal law, lenity mirrors the presumption of innocence. Both rules are fundamentally about allocating risk of error. While the presumption of innocence "governs how uncertainties regarding the *facts* of a defendant's conduct ought to be resolved," lenity governs how uncertainties regarding the *law* ought to be resolved. Peter Westen, *Two Rules of Legality in Criminal Law*, 26 LAW & PHIL. 229, 281 (2007). This bedrock presumption of legality is also why a "rule of

Lenity accomplishes this nondelegation function—essentially preventing courts from exercising criminal lawmaking power in the legislature's stead—in a few ways.[91] First, as one scholar has noted, it enforces "democratic accountability."[92] Legislators, who are electorally accountable to the people, must define crimes in specific terms, "exposing themselves to whatever resistance or ridicule their choices entail; they cannot use vague or general language to obscure the law's reach."[93] Democratic accountability is the traditional justification for nondelegation,[94] and it rings especially true in the criminal context.[95] Second, lenity places the burden of "fixing" the law on the party most able to bear the cost.[96] The Court itself has recognized this, arguing that lenity "places the weight of inertia upon the party that can best induce Congress to speak more clearly."[97] Empirical research has also largely substantiated this claim. When dissatisfied with a narrow construction, the Department of Justice has proven remarkably successful at lobbying Congress to broaden criminal statutes.[98] If courts interpreted a statute unduly broadly, it is unlikely that criminal defendants would be able to exercise similar influence.[99] Third, as Jeremy Bentham argued long ago, "[t]he minimum of punishment is more clearly marked than its maximum. What is too little is more clearly observed than what is too much."[100] In other words, if punishment has measurable social effects, then under-punishing will be more visible—and thus more easily corrected—than over-punishing, and courts ought to choose more lenient constructions as a result.

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severity" (instead of a rule of lenity) would be inappropriate. A rule of severity would fulfill the fiction of notice—everyone knows that ambiguities in the law will be construed against them—but it would violate the presumption of legality. In this way, the separation of powers rationale also goes hand-in-hand with the due process rationale: the presumption of legality is a presumption that fair notice is required before conduct can be punished.

91. Kahan, *supra* note 36, at 348 (describing lenity as a "nondelegation doctrine" in criminal law).

92. Zachary Price, *The Rule of Lenity as a Rule of Structure*, 72 FORDHAM L. REV. 885, 925 (2004).

93. *Id.* at 911.

94. *See, e.g.*, Gundy v. United States, 588 U.S. 128, 152–57 (2019) (Gorsuch, J., dissenting) (arguing that nondelegation serves democratic accountability).

95. *See generally* F. Andrew Hessick & Carissa Byrne Hessick, *Constraining Criminal Laws*, 106 MINN. L. REV. 2299, 2351–56 (2022) (arguing for nondelegation in criminal law to further democratic accountability).

96. *See* Shadgett, *supra* note 26, at 697.

97. United States v. Santos, 553 U.S. 507, 514 (2008).

98. *See* Matthew R. Christiansen & William N. Eskridge, Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967–2011*, 92 TEX. L. REV. 1317, 1321 (2014).

99. *See* William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 413–14 (1991).

100. JEREMY BENTHAM, *Principles of Penal Law*, *in* 1 THE WORKS OF JEREMY BENTHAM 365, 401 (John Bowring ed., Russell & Russell Inc. 1962).

C. Lenity in the State Courts

So far, this account has focused solely on the Supreme Court's lenity jurisprudence. And admittedly, state courts have often taken their cues from the Supreme Court's lenity cases.[101] But lenity in some state courts differs from lenity in the federal courts in at least one crucial way: many states have codified anti-lenity interpretative rules.[102]

Thirteen states have codified explicit anti-lenity provisions.[103] New York's anti-lenity statute is the prototypical example.[104] It provides: "The general rule that a penal statute is to be strictly construed does not apply to this chapter, but the provisions herein must be construed according to the fair import of their terms to promote justice and effect the objects of the law."[105] Sixteen states have codified "ordinary meaning" rules, which imply that lenient, narrowing constructions are disfavored.[106] Five states direct courts to construe criminal statutes "in light of specified 'general purposes' of the criminal code, which do not include strict construction."[107] Two states—Florida and Ohio—have actually codified the rule of lenity.[108] And the

101. *See, e.g.*, State v. Thonesavanh, 904 N.W.2d 432, 440 (Minn. 2017) (citing the Supreme Court's lenity cases in *Wiltberger*, *Santos*, and *Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1 (2011)); State v. Hearn, 797 N.W.2d 577, 586 (Iowa 2011) (citing the Supreme Court's lenity cases in *Moskal*, *Chapman*, and *R.L.C.*); State v. Pratt, 479 P.3d 680, 686 (Wash. 2021) (McCloud, J., dissenting) (citing the Supreme Court's lenity cases in *Bass* and *Wiltberger*); State v. Kizer, 976 N.W.2d 356, 367–71 (Wis. 2022) (Bradley, J., concurring) (citing the Supreme Court's lenity cases in *Wooden*, *Ratzlaf v. United States*, 510 U.S. 135 (1994), *McBoyle*, *R.L.C.*, *Crandon*, and *Wiltberger*); People v. Hartfield, 202 N.E.3d 890, 907 (Ill. 2022) ("This court has followed the lead of the United States Supreme Court in applying the doctrine of lenity where the unit of prosecution is unclear."); State v. Pribble, 145 N.E.3d 259, 266 (Ohio 2019) (citing the Supreme Court's lenity cases in *Moskal*, *Abramski*, *Gozlon-Peretz v. United States*, 498 U.S. 395 (1991), and *Callanan*); State v. Demello, 361 P.3d 420, 441 (Haw. 2015) (Pollack, J., dissenting) (citing the Supreme Court's lenity case in *Wiltberger*); State v. Lowden, 87 A.3d 694, 697 (Me. 2014) (citing the Supreme Court's lenity case in *Wiltberger*); Brown v. State, 102 So. 3d 1087, 1095 (Miss. 2012) (Randolph, J., dissenting) (citing the Supreme Court's lenity cases in *Wiltberger*, *Callanan*, *Moskal*, and *Johnson v. United States*, 529 U.S. 694 (2000)); People v. Peals, 720 N.W.2d 196, 217 (Mich. 2006) (Kelly, J. dissenting) (citing the Supreme Court's lenity cases in *Huddleston*, *Wiltberger*, and *United States v. Lanier*, 520 U.S. 259 (1997)); State v. Lutters, 853 A.2d 434, 446 (Conn. 2004) (discussing what "the United States Supreme Court has explained" with regard to lenity); Riley v. United States, 647 A.2d 1165, 1175 (D.C. 1994) (Schwelb, J., concurring) (citing the Supreme Court's lenity cases in *Wiltberger* and *Bass*).

102. Price, *supra* note 92, at 902–05.

103. *Id.*

104. Samuel A. Thumma, *State Anti-Lenity Statutes and Judicial Resistance: "What A Long Strange Trip It's Been*," 28 GEO. MASON L. REV. 49, 74 (2020).

105. N.Y. PENAL LAW § 5.00 (McKinney 2024).

106. Price, *supra* note 92, at 903.

107. *Id.*

108. FLA. STAT. ANN. § 775.021 (West 2024); OHIO REV. CODE ANN. § 2901.04 (West 2024). Texas has also codified the rule of lenity for a very narrow subset of crimes, namely criminal offenses outside of its Penal Code. *See* Wilson, *supra* note 11, at 1698–1700.

remaining fourteen states, plus the District of Columbia, have not codified any relevant rules of construction.[109]

But curiously, these anti-lenity rules have had little effect on state courts' lenity jurisprudences. A handful of state supreme courts have accepted the abrogation of lenity, but most have ignored it or limited its impact.[110] California is a representative example of the futility of anti-lenity legislation. Section 4 of California's Penal Code declares that the rule of lenity "has no application to this Code" and commands courts to construe penal provisions "according to the fair import of their terms, with a view to effect [the Penal Code's] objects and to promote justice."[111] And yet in *Keeler v. Superior Court*, the California Supreme Court invoked notice and separation of powers considerations to narrowly construct a penal statute.[112] In effect, the court found that the Constitution required lenity. The California Supreme Court has continued to apply lenity and claimed that it is fully consistent with Section 4 because lenity only applies when two reasonable interpretations "stand in relative equipoise."[113] Likewise, supreme courts in several other states have ignored anti-lenity legislation entirely or attempted to reconcile such legislation with a continued commitment to strict construction in criminal cases.[114] Thus, despite attempts to sideline lenity, it remains an important canon at both the federal and state levels.[115]

D. Lenity Summarized

In summary, the rule of lenity requires courts to strictly construct ambiguous penal statutes. This obligation of strict construction only kicks in if ambiguity remains after the court has exhausted all other interpretative strategies. Which strategies are valid and the threshold for ambiguity remain fraught questions. But virtually all courts—including many state courts in states that have attempted to abolish strict constructionism—treat lenity as a judicial obligation.

This obligation derives from both due process and separation of powers concerns. Lenity recognizes that criminalizing conduct is the unique province of the legislature. In effect, lenity creates a presumption of permissibility in criminal law. Unless the legislature has issued a clear statement of prohibition, conduct is not criminal and courts are powerless to criminalize it.

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109. Price, *supra* note 92, at 903.
110. *Id.* at 903–04.
111. CAL. PENAL CODE § 4 (West 2024).
112. Keeler v. Superior Ct., 470 P.2d 617, 624–26 (Cal. 1970).
113. People v. Jones, 758 P.2d 1165, 1173 (Cal. 1988).
114. Price, *supra* note 92, at 904–05.
115. *Id.* at 903–05.

II. THE RULE OF LENITY AND AFFIRMATIVE DEFENSES

Affirmative defenses, sometimes also called "general defenses," can be raised by a defendant to negate liability for a crime.[116] Such defenses are "affirmative" because they must be raised by the defendant,[117] and they are "general" because they theoretically apply to all offenses, even if the elements of those offenses have been proven.[118] Unlike failure of proof defenses, which negate an element of the offense charged and must be disproven by the prosecution,[119] the burden of proof for affirmative defenses may rest on the defendant.[120] This is because the government always bears the burden of proving the elements of a crime beyond a reasonable doubt, but affirmative defenses do not directly negate those elements.[121] Rather, they prevent punishment even when the elements of an offense have been met.[122]

Criminal law scholarship typically sorts affirmative defenses into three broad categories: justifications, excuses, and public policy defenses.[123] All three types of affirmative defenses negate criminal liability, but they do so in different ways. This Part describes the function of justifications, excuses, and public policy defenses and considers whether and how the rule of lenity applies to each of them.

A. Justifications and Lenity

As their name suggests, justification defenses *justify*.[124] They render conduct noncriminal: "[J]ustified conduct is conduct that under ordinary circumstances is criminal, but which under the special circumstances encompassed by the justification defense is not wrongful and is even,

116. Robinson, *supra* note 13, at 203.

117. Charlene Sabini, *Affirmative Defenses*, NAT'L ASSOC. LEGAL SUPPORT PROS. (June 21, 2017), https://www.nals.org/blogpost/1359892/279125/Affirmative-Defenses [https://perma.cc/5MZQ-KDMK].

118. Robinson, *supra* note 13, at 203.

119. *Id.* at 204.

120. Patterson v. New York, 432 U.S. 197, 207–08 (1977). Though *Patterson* is still good law, it may be worth revisiting its holding in light of *Apprendi v. New Jersey*. *See* Apprendi v. New Jersey, 530 U.S. 466, 544 (2000) (O'Connor, J., dissenting) (noting that the majority's opinion "is inconsistent with our precedent and would require the Court to overrule, at a minimum, decisions like *Patterson*"); Leslie Yalof Garfield, *Back to the Future: Does Apprendi Bar a Legislature's Power to Shift the Burden of Proof Away from the Prosecution by Labeling an Element of a Traditional Crime as an Affirmative Defense?*, 35 CONN. L. REV. 1351, 1381 (2003) (noting that *Apprendi* "provides the Court with an opportunity to overrule *Patterson*," though the author ultimately rejects such a change of course as inappropriate).

121. *See Patterson*, 432 U.S. at 215.

122. Robinson, *supra* note 13, at 203.

123. *See* Mitchell N. Berman, *Justification and Excuse, Law and Morality*, 53 DUKE L.J. 1, 6 (2003).

124. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 198 (8th ed. 2018).

perhaps, affirmatively desirable."[125] Homicide, for example, is ordinarily wrongful and criminal. But homicide to save one's own life—that is, self-defense—is not wrongful and not criminal; it is justified. Though what counts as a justification defense varies by jurisdiction, the standard list includes self-defense, defense of others, defense of habitation, defense of property, necessity (or "choice of evils"), and public authority defenses.[126] Notably, justifications render conduct merely *permissible*—that is, non-criminal—but not necessarily encouraged or obligatory.[127]

Courts should apply the rule of lenity to ambiguous justifications. Because justifications render conduct non-criminal—that is, beyond the bounds of the penal statute—reading a justification broadly narrows the penal statute (and vice versa: reading a justification narrowly effectively broadens the penal statute). The flip side of the court's obligation to read ambiguous penal statutes narrowly, then, is that it must read ambiguous justifications broadly.[128]

Consider the case of Joseph Matos, with which this Article began.[129] Matos asserted a justification defense—defense of habitation—for attacking two students who vandalized his dwelling.[130] The ambiguity is whether his home of cardboard boxes constitutes a "dwelling" under New York law.[131] If the cardboard boxes *are* a dwelling, then Matos has a defense available and the relevant penal statute is effectively narrowed. Assault would be a crime *unless done to protect one's home, including a home of cardboard boxes*. But if the cardboard boxes are *not* a dwelling, then Matos does not have a defense available, and the penal statute is comparatively broader, covering ordinary violence and violence done to protect one's cardboard home. Lenity therefore provides a rule of decision for Matos's case: "dwelling" is ambiguous and thus ought to be read broadly to narrow the assault statute with which Matos was charged.

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125. *Id.*

126. *See* Robinson, *supra* note 13, at 214, 242.

127. Peter Westen, *An Attitudinal Theory of Excuse*, 25 LAW & PHIL. 289, 372 (2006).

128. Put in separation of powers terms: if conduct is justified according to the legislature, then the legislature has not explicitly condemned it. If a justification is ambiguous, then it is uncertain whether or not the legislature has condemned the conduct covered by the ambiguous justification. And if it is uncertain whether or not the legislature has condemned particular conduct, lenity prevents courts from criminalizing that conduct. Alternatively, even if fair notice were the true rationale for lenity, as some have intimated, *see, e.g.*, United States v. Standard Oil Co., 384 U.S. 224, 234–37 (1966) (Harlan, J., dissenting) (noting that a "more important contemporary purpose" of the rule of lenity is "to give notice of what the law is, in order to guide people in their everyday activities"), courts would still be required to read justifications broadly. If an ambiguous justification is read narrowly, then a would-be defendant may not be on notice that their conduct was unjustified—that is, that their conduct was criminal.

129. *See supra* Introduction.

130. Stewart & Ransom, *supra* note 1.

131. *Id.*

Or to provide a more general illustration, consider a hypothetical penal statute that declares that X-ing is a crime. Justification Y is an exception to this penal statute. It states that X-ing under condition Y is justified. A full description of the penal statute is thus: X-ing is a crime unless condition Y obtains. The broader a court interprets condition Y, the narrower the penal statute is. Because courts are required to construe ambiguous penal statutes narrowly, they are therefore required to construe ambiguous justifications broadly. As this hypothetical statute illustrates, interpreting the scope of a justification is essentially the same as interpreting the scope of a criminal statute.[132] No matter how one frames the interpretative project, the effect is the same: the court draws the boundary between what is legal and illegal.

Lenity applies to the construction of justifications for the same reason that it applies to the construction of offense elements, even though the defendant may bear the burden of proving a justification but may never bear the burden of disproving an element.[133] Despite this difference in burden allocation, justifications still function as exceptions to criminal statutes.[134] Thus, in a

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132. One potentially vexing consequence of lenity's application to justifications is that some terms may take on different meanings in criminal and civil contexts. For example, consider a defendant charged with theft who claims they had a lien on the property at issue. Moving property on which one has a lien is non-criminal, so the lien-defense would be a justification. *See* People v. Person, 658 N.Y.S.2d 372, 373 (App. Div. 1997); People v. Brown, 711 N.Y.S.2d 707, 711 (Crim. Ct. 2000) (holding that a defendant's ownership interest in property means "she cannot be convicted of larceny" (quoting People v. Kheyfets, 665 N.Y.S.2d 802 (Sup. Ct. 1997))). Now assume that a term of the lien-defense is ambiguous. The defense is a justification, so the ambiguous term must be read broadly, thereby negating larceny. But recognizing a lien for the defendant would also have unanticipated civil consequences, since the defendant would suddenly have a claim against the victim-debtor. This seems to create a problem: by broadly construing the lien in the criminal context, the court creates unanticipated issues in the civil context, namely granting a lien where ordinarily there would not be one. The solution is that the ambiguous term will have a different meaning in the civil and criminal contexts. It is possible for the court to hold that the defendant has a lien sufficient to negate theft in the criminal context, while also holding that the defendant may lack a lien sufficient to foreclose on the property in the civil context. Though inelegant, this solution is not unusual. Lenity is triggered when there is a reasonable doubt about the meaning of a term, and lenity requires the term to be read broadly when it falls into this fairly capacious zone of ambiguity. Civil law lacks a similar canon. As a result, a court may have to construct the same term differently in criminal and civil contexts because there may be reasonable doubt about its meaning (criminal) but not proof beyond a preponderance of the evidence (civil). When a term falls between those two standards, it will be constructed differently in the criminal and civil contexts.

133. *See* Patterson v. New York, 432 U.S. 197, 215 (1977).

134. Admittedly, it would be more parsimonious if the government bore the burden of proof for justifications and defendants bore the burden of proof for excuses. This would reflect the fact that justifications render conduct non-criminal, while excuses render criminal conduct non-punishable. A defendant who acted justifiably did nothing wrong, and they should not be required to prove their innocence for the same reason that they are not required to disprove the elements of a crime. But a defendant who acted subject to an excusing condition *did* do something wrong, and it should be acceptable to place on them the burden of proving that they should be spared punishment despite their wrongful conduct. For this reason, many scholars bemoan *Patterson* for muddying the logic of criminal law. *See, e.g.*, Robinson, *supra* note 13, at 257 ("The choice of the failure of proof/offense modification distinction as constitutionally controlling on the allocation of burden of persuasion seems unfortunate."); Jonathan Levy, *A Principled Approach to the Standard of Proof for Affirmative Defenses in Criminal Trials*, Note,

jurisdiction in which a defendant bears the burden of proving a justification, we can rewrite the above example as follows: X-ing is a crime unless *the defendant proves that* condition Y obtains. The justification is still functionally an exception to the criminal statute, even if the defendant bears the burden of showing that the exception applies. Because the burden shifting does not change the function of the justification, it does not change the logic that compels the application of lenity.

B. Excuses and Lenity

While justifications render conduct non-criminal, excuses render criminal conduct non-punishable.[135] "Excuses admit that the deed may be wrong, but excuse the actor because conditions suggest that the actor is not responsible for his deed."[136] The difference between justification and excuse thus relies on two distinctions: the distinction between the act and actor and the distinction between crime and punishment. An act is criminal if and only if the community has explicitly condemned it.[137] But sometimes, even if the community has explicitly condemned an act, the community may have other reasons for sparing the actor from hard treatment.[138] Thus, the *act* is still criminal, but the *actor* is excused from punishment because some characteristic of the actor makes them an inappropriate subject for punishment.[139] Or, as one scholar pithily put it, "[t]he difference between justification and excuse is as basic and simple as the difference between, 'I did nothing wrong,' and 'Even if I did, it was not my fault.'"[140] Standard

40 AM. J. CRIM. L. 281, 288 (2013) ("[*Patterson*] is not based on a principled approach to the standard of proof."). Indeed, despite the Supreme Court permitting states to place the burden of proof on defendants for justifications, many states have chosen to allocate the burden in a more rigorous and principled manner, placing the burden of proof on the prosecution for justifications and on the defendant for excuses. *See, e.g.*, ALA. CODE § 13A-3-23 (2024) (placing burden of proof on the state to disprove self-defense); ARIZ. REV. STAT. ANN. § 13-205 (2024) (placing the burden of proof on the state to disprove justifications and on the defendant to prove all other affirmative defenses); CONN. GEN. STAT. ANN. §§ 53a-12, 53a-16, 53a-19 (West 2024) (placing the burden of proof on the state to disprove self-defense and justification defenses); Commonwealth v. Magadini, 52 N.E.3d 1041, 1047 (Mass. 2016) (placing the burden on the state to disprove the necessity defense); Commonwealth v. Glacken, 883 N.E.2d 1228, 1232 (Mass. 2008) (placing the burden of proof on the state to disprove self-defense); OHIO REV. CODE ANN. § 2901.05 (West 2024) (placing the burden of proof on the state to disprove self-defense); NEB. REV. STAT. § 29-2203 (2024) (placing the burden of proof on the defendant to prove insanity); S.D. CODIFIED LAWS § 22-5-10 (2024) (same); VT. STAT. ANN. tit. 13, § 4801 (West 2024) (same).

135. *See* DRESSLER, *supra* note 124, at 201.

136. Robinson, *supra* note 13, at 221.

137. *See supra* notes 89–90 and accompanying text.

138. For example, the community may find it unjust to subject the insane, immature, or coerced to hard treatment.

139. *See* Robinson, *supra* note 13, at 229.

140. Westen, *supra* note 127, at 373.

excuses include insanity, intoxication, immaturity, mistake of law or fact, and duress.[141]

The rule of lenity does not apply to excuses. The ambit of lenity is the breadth or narrowness of penal statutes.[142] But excuses do not affect the breadth or narrowness of penal statutes, so lenity is never implicated.[143] If X is a crime and someone commits X while suffering from a fit of insanity, then they still engaged in criminal wrongdoing. Society simply declines to punish them, despite their wrongdoing, because of doubts about the insane individual's blameworthiness.[144] Lenity requires courts to narrowly construe what conduct is criminal. But excuses do not affect what conduct is criminal, only what criminal conduct can be punished. Unlike justifications, which effectively shift the boundary between criminal and noncriminal conduct, excuses do not alter the scope of a penal statute, so they do not trigger lenity.

However, lenity can still apply informally, as one factor among many in determining how a court should construe an ambiguous excuse. In deciding between ambiguous interpretations of an excuse, courts essentially allocate risk of error. A narrow construction of the excuse allocates that risk against the defendant, while a broad construction allocates it in the defendant's favor. The separation of powers recommends allocating that risk in favor of the defendant because it reduces the risk of future error. Excused defendants will often be unpopular and lack the power to induce the legislature to correct a mistaken interpretation.[145] In contrast, prosecutors tend to be sophisticated and powerful political actors, and they are more likely to succeed in lobbying

141. *See* Robinson, *supra* note 13, at 242–43. *But see infra* note 205 and accompanying text (noting that some jurisdictions treat duress as a justification rather than an excuse).

142. United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 105 (1820) (noting that the "Court cannot enlarge the statute").

143. Even if fair notice were the true rationale for lenity, lenity still would not apply to excuses. Notice is tied to reliance: an actor is made aware of a rule and can then plan their conduct around it. But the nature of an excuse is that an *unforeseen* disabling condition renders an actor unblameworthy despite their wrongful conduct. One cannot plan to act involuntarily, make a mistake about law or justification, be insane, or be subjected to duress. In effect, the excused actor "gets lucky" that they acted wrongfully while suffering from a condition that makes punishment inappropriate. Thus, lenity would not apply to excuses, even if notice were its rationale. Moreover, even if reliance on an excuse were possible, it would not be the kind of reliance society would be obliged to respect. The excused actor would be identifying a loophole that allows them to escape punishment despite acting wrongfully.

144. For this reason, many jurisdictions permit a jury to spare a defendant from punishment via the verdict of "not guilty by reason of insanity." Such a verdict has an important expressive function: it communicates that the defendant is being spared from punishment *not* because their conduct was permissible but because they lacked the requisite mental capacity to be held fully accountable. *See* Elaine M. Chiu, *Culture As Justification, Not Excuse*, 43 AM. CRIM. L. REV. 1317, 1337 (2006); People v. Blakely, 178 Cal. Rptr. 3d 876, 878 (Ct. App. 2014) ("A plea of not guilty by reason of insanity 'is a statutory defense that does not implicate guilt or innocence but, instead, determines whether the accused shall be punished for the guilt which has already been established.'" (emphasis omitted) (quoting People v. Hernandez, 994 P.2d 354 (Cal. 2000))).

145. *See supra* notes 96–99 and accompanying text.

the legislature.[146] Put otherwise, if a court mistakenly construes an excuse *broadly* (i.e., in favor of the defendant), then the legislature is more likely to be responsive and clarify the meaning of its excuse statute.[147] But if a court mistakenly construes an excuse *narrowly* (i.e., in favor of the government), then the legislature is not as likely to be responsive and the incorrect judicial interpretation will stay on the books. Enforcing the separation of powers is thus democracy-reinforcing and ensures more "accurate" statutes in the long run.[148]

This informal application of lenity applies with special force to statutory excuses. A legislature will likely feel greater responsibility to intervene to fix a mistaken construction of one of its statutes than to fix an undesirable construction of a common law rule. Lenity's democracy-reinforcing effect is thus particularly salient for statutory excuses. But the informal application of lenity can also play a role in the interpretation of common law excuses. After all, if the legislature disagrees with a judicial ruling, it can always override it legislatively.

In sum, to the degree that lenity is just an especially robust enforcement of the separation of powers in the criminal context,[149] it can still aid judicial interpretation by counseling leniency. But lenity applies only informally to excuses because—unlike in the case of justifications—it does not *require* leniency; it only *suggests* it.

C. Public Policy Defenses and Lenity

Public policy defenses advance public interests that are unrelated to an actor's blameworthiness or an act's wrongfulness.[150] Generally, a defendant who presents a public policy defense "admits the harm or evil [of his act] and his culpability but relies upon an important public policy interest, apart from blamelessness, that is furthered by foregoing the defendant's conviction."[151] Common public policy defenses include defenses predicated on a statute of limitations, double jeopardy, diplomatic or sovereign immunity, plea-bargained immunity, incompetency, amnesia, dismissals

146. *Id.*

147. Consider John Hinckley's acquittal by reason of insanity for the attempted assassination of President Reagan. The public outrage over the acquittal spurred almost immediate legislative reforms of the excuse of insanity. *See* MICHAEL L. PERLIN & HEATHER ELLIS CUCOLO, 3 MENTAL DISABILITY LAW: CIVIL AND CRIMINAL § 14-3 (3d ed. 2024). Though the acquittal did not exactly rest on an ambiguity in the insanity defense doctrine, it shows how quickly the legislature can respond to a perceived incorrect acquittal.

148. In this case "accurate" means that the statute is interpreted by the courts in the manner that the legislature meant for it to be interpreted—that is, the statute sweeps exactly as broadly as the legislature intended.

149. *See supra* notes 86–90 and accompanying text.

150. *See* Milhizer, *supra* note 13, at 810.

151. Robinson, *supra* note 13, at 203.

based upon the exclusionary rule or prosecutorial misconduct, and entrapment.[152] These defenses vindicate a variety of important interests, from international comity (diplomatic immunity) to constraining an overreaching state (entrapment, double jeopardy, dismissals for prosecutorial, or police misconduct).[153]

For our purposes, the crucial question for public policy defenses is a *functional* one. Why do public policy defenses prevent criminal punishment? Because they justify the defendant's conduct? Or because they excuse a defendant despite that defendant's criminal conduct? If the former, then lenity applies;[154] if the latter, then lenity does not apply.[155]

Criminal law scholars treat public policy defenses as functional excuses.[156] Like excuses, the conduct at issue is still condemnable and criminal, but the actor is spared punishment.[157] But unlike excuses, the refusal to punish does not stem from the actor's lack of blameworthiness.[158] Instead, it stems from other, unrelated public policy aims.[159] As one scholar put it, a public policy defense is "a bright-line rule that permits an acquittal even when the defendant is demonstrably blameworthy and dangerous."[160] This analysis seems right for most public policy defenses. For example, if D successfully raises a statute of limitations or double jeopardy defense to a burglary charge, that does not render burglary permissible or D blameless. D's burglarous conduct was still criminal, and D is still an appropriate subject for blame and condemnation. But nevertheless, the statute of limitations or double jeopardy provides a complete defense to the burglary charge. And this defense functions in an excuse-like manner: it spares D from punishment without justifying D's actions.

As an intuitive matter, most public policy defenses seem to function like a statute of limitations or double jeopardy defense—that is, they function in an excuse-like manner. Immunities, for example, seem to prevent punishment without justifying conduct. A diplomat who commits murder seems to escape punishment not because diplomatic murder is permissible but because public policy interests prevent punishment even for such wrongful conduct. Incompetency and amnesia also do not change the wrongful character of the conduct at issue. And governmental misconduct

152. *See id.* at 243.
153. *See id.* at 230–31.
154. *See supra* Section II.A.
155. *See supra* Section II.B.
156. *See, e.g.*, Robinson, *supra* note 13, at 232 (arguing that conduct covered by a public policy defense is still harmful); Milhizer, *supra* note 13, at 811 (distinguishing public policy defenses from justifications and arguing that conduct covered by a public policy defense can be "net harm[ful]").
157. *See* Robinson, *supra* note 13, at 232.
158. *See* Milhizer, *supra* note 13, at 811.
159. *Id.*
160. *Id.*

defenses, like entrapment or dismissals based upon the exclusionary rule, spare a defendant as a means of disciplining the government.[161] Notably, all of these public policy defenses are only excuse-*like*; they differ from true excuses in that they do not render the defendant unblameworthy.[162] But in a crucial sense, they are *excuse*-like because they bar punishment despite the wrongfulness of the conduct. This similarity with true excuses is probably why scholars have only ever treated public policy defenses as excusatory in function.

But for some defenses the categorization is not as straightforward. Certain bargained-for immunities, for example, may plausibly be justification-like instead of excuse-like. Consider *Herrera v. Wyoming* and its progeny.[163] In 1868, the United States and the Crow Tribe signed a treaty in which the Tribe ceded part of its reservation lands to the United States but reserved the right to hunt on those lands even though they were no longer part of the reservation.[164] In 2014, Herrera and other citizens of the Crow Tribe went hunting on the Crow Reservation.[165] They followed a herd of elk from the reservation into the Bighorn National Forest, where they shot and killed several elk.[166] The state of Wyoming charged Herrera for illegally taking an elk.[167] Though Herrera attempted to offer the 1868 treaty as a defense, the courts of Wyoming rejected the argument and Herrera was convicted.[168] On appeal, the case eventually wound its way to the Supreme Court of the United States, which sided with Herrera and held that the Crow Tribe's treaty-based hunting rights remained in effect.[169] As a result, on remand, the Wyoming trial court held that Herrera, as a member of the Crow Tribe, could assert his treaty-based hunting rights as a defense to prosecution.[170] For our purposes, *Herrera v. Wyoming* raises the following question: Does Herrera's treaty-

161. *See* Robinson, *supra* note 13, at 237.

162. This is only one difference between true excuses and excuse-like public policy defenses, though it is the most important difference for our purposes. Another difference is structural. Excuses share a common structure: a "disability" causes "an excusing condition." *Id.* at 221 (emphasis omitted). The excusing condition renders the actor nonliable, even though their act remains unjustified and criminal. *See id.* at 246. Public policy defenses, however, vary widely in their structure. Some require a triggering condition (e.g., statute of limitations defenses require the passage of a certain amount of time). Others are entirely status-based (e.g., immunities derive from the special status of the immunity-holder). And some public policy defenses even preclude prosecution altogether. Double jeopardy and sovereign immunity, for example, prevent prosecution in the first place. *See* Flanagan v. United States, 465 U.S. 259, 266 (1984); Funk v. Belneftekhim, 861 F.3d 354, 363 (2d Cir. 2017). They thus differ from excuses, which are often brought at trial or some prior hearing.

163. Herrera v. Wyoming, 587 U.S. 329 (2019).

164. *Id.* at 333–35.

165. *Id.* at 335–36.

166. *Id.* at 336.

167. *Id.*

168. *Id.* at 336–37.

169. *Id.* at 337.

170. Herrera v. State, No. CV 2020-273 (Wyo. Dist. Ct. Dec. 3, 2021).

based public policy defense function in a justification-like or excuse-like manner? Put differently, does Herrera have a defense because his conduct was not wrongful (justification-like) or because it was wrongful but not punishable for public policy reasons (excuse-like)?

Though the case law does not provide a definitive answer, on balance it seems likely that Herrera's treaty-based defense functioned in a justification-like manner. By maintaining the Crow Tribe's hunting rights, the 1868 treaty effectively operated as a grandfathered-in exception to subsequent hunting laws. And that is exactly how justifications operate: they are exceptions to a criminal statute. On this reading, then, the 1868 treaty provides a justification-like defense to Herrera and other members of the Crow Tribe because Wyoming never had the power to criminalize hunting in formerly-Crow lands to begin with. Indeed, even as a matter of intuition, it seems incorrect to say that members of the Crow Tribe acted *wrongfully* when they exercised their treaty rights.[171] But notably, the treaty-based defense is only justification-*like* because it is limited to specific actors. True justifications are available to anyone who acts in the justified manner,[172] but this treaty-based defense is available only to actors who have a special status, namely membership in the Crow Nation.

Even though *Herrera* does not provide a definitive answer on the nature of the treaty-based public policy defense, it still usefully complicates our understanding of public policy defenses. Criminal law scholars, all of whom have asserted that public policy defenses function in an excuse-like manner,[173] may still be right, but they need a more nuanced account than the one that has typically been offered.[174] Bargained-for immunities, especially when made pursuant to an agreement that predates criminalization, offer a persuasive case for thinking that some public policy defenses may be justification-like, not excuse-like.

One helpful heuristic for these problem cases is whether the defense at issue negates accomplice liability. Because justifications vitiate the wrongfulness of an act, they provide complete defenses for both the principal

171. I am not endorsing the underlying conduct, but rather making a point about legal architecture: if someone has a treaty-based right to X, then surely they do not act *illegally* in exercising that right. It seems implicit in having a legal right that its exercise is at least legally permissible.

172. *See* Robinson, *supra* note 13, at 203.

173. *See supra* notes 156–60 and accompanying text.

174. One explanation for why some public policy defenses are excuse-like and others are justification-like is that what matters is not the *defense* so much as the *conduct* the defense covers. Intuitions about the continued wrongfulness of conduct, even when covered by a public policy defense, seem strongest for conduct that is *malum in se*. For *malum in se* conduct like murder, the public policy defense seems like a technicality that spares the wrongdoer. The intuition may be different for *malum prohibidum* conduct, like hunting by members of the Crow Nation. Perhaps the all-important line between public policy defenses that are justificatory rather than excusatory in function is not determined by the defense itself but by the conduct sought to be punished.

and the accomplice. Thus, "if *X* provides *D* with a gun used to kill *V* in justifiable self-defense, *X* should be guilty of no crime."[175] Excuses, though, are specific to the actor and thus only provide a defense to the actor suffering from the excusing condition. So, if "*D* kills *V* due to an insane delusion" and "*X*, who is sane, assists *D* by providing the gun used in the killing," then "[a]lthough *D* may be acquitted on the basis of insanity, no logical reason precludes the conviction of *X* for the murder in which she sanely assisted."[176] The killing of *V* is still a wrongful act, so as long as *X* does not suffer from an excusing condition, she has no defense to accomplice liability for the killing of *V*.

Courts can use the accomplice liability heuristic to decide whether an ambiguous public policy defense functions in a justification-like or excuse-like manner.[177] Consider entrapment.[178] If a principal has a valid entrapment defense, does their accomplice also benefit from that defense, or are they still liable? Courts have held that entrapment is only a defense for the principal, not the accomplice.[179] The Ninth Circuit, for example, upheld a conviction for aiding and abetting the bribery of a public official, even though the principal had been found not guilty by reason of entrapment.[180] The court reasoned that entrapment "does not so much establish innocence as grant immunity from prosecution for criminal acts concededly committed."[181] The accomplice liability heuristic thus reveals that entrapment is excuse-like.

But the heuristic also suffers from some significant shortcomings. Not every ambiguous defense has been litigated in an accomplice liability case. For example, the treaty-based defense at issue in *Herrera* was dispositive for Herrera himself, but would it protect an accomplice? Suppose members of the Crow Tribe went hunting with a non-Crow companion and killed an elk in the National Bighorn Forest. Could the companion be prosecuted for aiding and abetting the taking of an elk, even though the Crow hunters have a complete defense? The case law does not provide an answer. Nevertheless, the heuristic can still be a helpful judicial tool for categorizing ambiguous

175. DRESSLER, *supra* note 124, at 208.

176. *Id.*

177. In fact, my claim that some public policy defenses are "*justification*-like" and some "*excuse*-like" is in part a claim that those public policy defenses have the same implications for accomplice liability as their respective namesakes. Justification-like public policy defenses render conduct non-criminal and thus negate accomplice liability. Excuse-like public policy defenses do not alter the wrongfulness of the conduct and thus do not negate accomplice liability. The effect on accomplice liability is therefore one of the ways in which public policy defenses can be *like* justifications or excuses.

178. *See* Robinson, *supra* note 13, at 237 (explaining why entrapment is a public policy defense).

179. *See, e.g.*, People v. Tewksbury, 544 P.2d 1335, 1343 (Cal. 1976) (noting that entrapment is a public policy defense that "insulate[s] the accused notwithstanding the question of his guilt"); State v. Rockholt, 476 A.2d 1236, 1242 (N.J. 1984) ("[E]ntrapment represents a nonexculpatory public policy defense that does not involve the critical mental element of the crime.").

180. *See* United States v. Azadian, 436 F.2d 81 (9th Cir. 1971).

181. *Id.* at 83 (quoting Carbajal-Portillo v. United States, 396 F.2d 944, 948 (9th Cir. 1968)).

defenses—and not just ambiguous public policy defenses. For defenses that seem to straddle the divide between justification and excuse, the question of accomplice liability can be one way to discern how a particular jurisdiction actually employs that defense.[182]

In summary, public policy defenses are not as easily compartmentalized as justifications and excuses.[183] They vindicate diverse public interests by precluding criminal liability, yet the manner in which they preclude liability has not been definitively settled. Scholars treat public policy defenses as excuse-like, but they have not offered an adequate explanation for why *all* public policy defenses are excuse-like rather than justification-like. Some defenses, like bargained-for immunities, may function in a justification-like manner. Nevertheless, as a general matter, public policy defenses are probably excuse-like more often than justification-like. Intuitively, a defendant who benefits from a statute of limitations, double jeopardy, or governmental misconduct defense has still acted wrongfully, even if they are no longer punishable. Given these possible ambiguities, courts should not make abstract, categorical decisions about the functional nature of a public policy defense but should instead inquire into the nature and facts of the particular defense.

If a public policy defense is justification-like, then lenity requires interpreting that defense broadly. And if a public policy defense is excuse-like, then lenity is not formally implicated. The logic is the same as in the standard justification/excuse cases. If the defense renders the act non-wrongful (i.e., the defense is justification-like), then the construction of the defense affects the breadth of the penal statute and lenity necessarily applies.[184] If the defense does not change the wrongfulness of the act (i.e., the defense is excuse-like), then lenity is not implicated.[185] For this reason, it is imperative that courts inquire into the nature of a particular public policy defense before deciding how to construe any ambiguities.

182. *See, e.g.*, United States v. Lopez, 662 F. Supp. 1083, 1086 (N.D. Cal. 1987) (holding that because necessity is a justification, not an excuse, a third party cannot be held liable for assisting in the necessary conduct), *aff'd*, 885 F.2d 1428 (9th Cir. 1989).

183. *Contra* Milhizer, *supra* note 13, at 810 ("The most easily compartmentalized of the general defenses are the nonexculpatory [public policy] defenses" because "[t]hese defenses are unrelated to the blameworthiness or dangerousness of the defendant, or to the wrongfulness of his conduct.").

184. *See supra* Section II.A.

185. *See supra* Section II.B. But like in standard excuse cases, lenity—that is, a formalist insistence on the separation of powers in the criminal context—may be an informal factor weighing in favor of an expansive reading of the excusatory defense. *See supra* notes 145–49 and accompanying text.

III. THE DIFFERENCE BETWEEN JUSTIFICATIONS, EXCUSES, AND PUBLIC POLICY DEFENSES

As the preceding Part demonstrates, the rule of lenity applies to justifications and justification-like public policy defenses, and it does not apply to excuses and excuse-like public policy defenses. The crucial question, then, is how to draw the line between these two groups of defenses. In other words, how should we categorize the multiplicity of existing defenses? This Part offers a theory of how to draw this line, especially the crucial line between justification and excuse.

A. Public Policy Defenses

Determining which defenses are public policy defenses and which are not does not matter for lenity. Public policy defenses may function in an excuse-like manner (e.g., statute of limitations) or a justification-like manner (e.g., perhaps certain bargained-for immunities, like the Crow Nation's treaty in *Herrera*).[186] Knowing that a particular defense is a public policy defense does not reveal whether it functions in a justification-like or excuse-like manner, so it does not reveal whether lenity applies. Rather, the crucial inquiry is whether a particular public policy defense is excuse-like or justification-like in the first place. Section II.C modeled how to approach this inquiry for bargained-for immunities and entrapment, but a full account of every possible public policy defense is beyond the scope of this Article.[187]

B. Justifications and Excuses

Whether a particular defense is a justification or excuse determines whether lenity applies or not.[188] Thus, drawing the line between justification and excuse is essential for applying lenity to affirmative defenses. This Section proposes a new theory for drawing this all-important line and demonstrates how this theory would work in practice.

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186. *See supra* Section II.C.

187. The following Section on the empirical approach applies with equal force to the categorization of public policy defenses as justification-like or excuse-like. *See infra* Section III.B.1. For statutory public policy defenses, courts should be mindful of the statutory text. The problem is that many public policy defenses are hybrid creatures of the common law, constitutional law, treaties, and/or international law. For example, diplomatic immunity has its roots in treaties, international law, and the common law. *See* Jennifer Hoover Kappus, Note, *Does Immunity Mean Impunity? The Legal and Political Battle of Household Workers Against Trafficking and Exploitation by Their Foreign Diplomat Employers*, 61 CASE W. RSRV. L. REV. 269, 272–73 (2010).

188. *See supra* Sections II.A–B.

1. Drawing the Line Between Justification and Excuse: The Empirical Approach

An adequate theory of distinguishing between justification and excuse should do at least two things. First, it should be easy to use for judges. Judges—not legislators or law professors—must decide in each case whether a particular defense justifies or excuses. A line-drawing theory that relies on the competencies of judges is thus preferable to one that requires them to do something outside their area of expertise. Second, an adequate theory of the justification/excuse distinction should account for the great diversity of American law. If two states have different legal regimes, then the theory should provide two different answers on where the line between justification and excuse falls. The theory must work for states that have codified their defenses inconsistently with one another and for states that have not codified their defenses at all. Perhaps most importantly, a workable theory must account for statutory codification in the first place. Given the special role of the legislature in criminal lawmaking,[189] the fact that a legislature has passed a statute declaring one defense to be a justification and another to be an excuse must figure prominently in how judges draw that line.

With these two goals in mind, I propose that judges should engage in an "empirical" approach—that is, an approach that cleaves to statutory text whenever possible—to draw the line between justification and excuse.[190] An empirical approach treats judges as judges. Their job is to take the legislature at its word and employ the ordinary tools of judging, such as canons of statutory interpretation and precedential reasoning, to decide vexed interpretative questions.[191] If the line between justification and excuse is codified, then that codification ought to be conclusive in classifying a given defense. Thus, if a codified defense describes particular conduct as "justified," then the courts ought to treat that defense as a justification. And

189. *See* United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32, 34 (1812) (holding that criminal lawmaking is the unique province of the legislature).

190. I borrow the term "empirical" from Mitchell Berman (who uses it derisively) to contrast my approach with the approaches taken by other scholars, sometimes termed "conceptual" or "sociological." *See* Berman, *supra* note 123, at 30–31 (rejecting a "wholly empirical" inquiry in favor of a "sociological" and "conceptual" inquiry). Conceptual or sociological approaches treat judges as quasi-philosophers who must determine the true meaning of justification and excuse and how those terms fit into the broader architecture of criminal law. *Id.* In essence, the empirical approach is dogmatically textualist with respect to statutory interpretation. I use the more capacious "empirical" rather than "textualist" because not every line-drawing question can be answered by reference to statutory text. Some jurisdictions, like the federal system, have not codified their defenses. The empirical approach accounts for these jurisdictions just as well as for those in which defenses have been codified. *See infra* Section III.B.2.b.

191. Inattention to judicial competencies is one problem with most scholarly accounts of the justification/excuse distinction. Those accounts tend to treat judges as quasi-philosophers who must determine the true meaning of justification and excuse and how those terms fit into the broader architecture of criminal law. *See, e.g.*, Westen, *supra* note 127, at 310; Berman, *supra* note 123, at 30–31.

if a statute describes a particular condition as "excusing," then courts ought to treat it as an excuse. The overriding interpretative presumption should be that the legislature means what it says, and courts are bound by its enactments. If a statute is ambiguous, then courts ought to resort to the ordinary tools of statutory interpretation to decide its meaning. Even if a state has not codified a defense at all, courts are not without tools to reach reliable decisions. They can engage in standard common-law reasoning and decision-making.

Beyond accounting for the diversity of American law and relying on the traditional competencies of judges, the empirical approach has the virtue of appropriately constraining judges in the criminal sphere. As textualists have recognized, permitting judges to discern a statute's "true purpose" invites judges to exercise discretion that may substitute the judgment of the judiciary for that of the legislature.[192] This risk of judicial usurpation is especially concerning in criminal law, where the separation of powers applies with the greatest force.[193] In deciding whether a defense is a justification or excuse, a court draws the line between the permissible and the criminal.[194] As a result, to avoid accidentally engaging in criminal lawmaking, courts should err on the side of literalist adherence to the text.

Notably, the empirical approach differs markedly from the approaches proposed by other criminal law scholars. Scholars have "obsessed over" the line between justification and excuse,[195] but in offering approaches to drawing that line, they have proposed grand theories that attempt to offer the best normative account of the distinction.[196] These grand theories effectively

192. *See* William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 674 (1990).

193. *See supra* Section I.B.

194. *See* DRESSLER, *supra* note 124, at 198–201.

195. Berman, *supra* note 123, at 1.

196. *See, e.g.*, JOHN GARDNER, *Justifications and Reasons*, *in* OFFENCES AND DEFENCES: SELECTED ESSAYS IN THE PHILOSOPHY OF CRIMINAL LAW 91, 105 (2007); Westen, *supra* note 127, at 310. Indeed, it would be a remarkable coincidence if the distinction between justification and excuse neatly corresponded to a single, coherent moral theory—let alone the best normative theory. The distinction has distant, murky origins, dating back to early English legal history. DRESSLER, *supra* note 124, at 211. For felonies, a justified actor was acquitted of the offense, while an excused actor was punished just as if they had been convicted, usually via the death penalty and forfeiture of property. *Id.* at 197. The dichotomy "blurred over time, as excused actors were pardoned by the Crown on an increasingly *pro forma* basis; and they were allowed to regain their property by means of a writ of restitution." *Id.* Nevertheless, the excused actor was still subject to the moral opprobrium of the community—and incarceration while petitioning for a pardon—while the justified actor was generally free of any moral or legal impediments. *Id.* American law inherited the distinction between justification and excuse from the English common law, and many states ultimately wrote the distinction into statutes during the codification movement of the twentieth century. Milhizer, *supra* note 13, at 795–99. Unsurprisingly, this long and winding history has produced "a body of contemporary American criminal law jurisprudence that is at once generally similar in the broad strokes and quite diverse in the details, which rests upon a variety of often-contradictory philosophical first principles." *Id.* at 799. To make matters worse, legislation is almost always the fruit of messy compromises and inconsistent principles. *See* Jonathan T. Molot, *The Rise and*

take the point of view of the legislator charged with designing the criminal law from the bottom up.[197] In contrast, the empirical approach takes the point of view of a judge who is already embedded within a legal system. Faced with the question of whether lenity applies to a particular defense, this hypothetical judge must operate within their inherited legal framework to categorize the defense at issue.

2. The Empirical Approach in Action

This Section will demonstrate how the empirical approach works in practice. First, I will consider "easy cases," in which the empirical approach yields a straightforward answer. Then I will consider "hard cases," in which the statutory text is not dispositive or the defense has not been codified.

a. Easy Cases

Mistaken self-defense and duress are commonly considered among the most difficult defenses to categorize as either a justification or excuse.[198] Scholars have split on the question,[199] and states vary in how they frame self-

Fall of Textualism, 106 COLUM. L. REV. 1, 28 (2006). Legislators may disagree about why a particular defense is a justification or excuse, ultimately enacting defenses with incompatible rationales. *See* Berman, *supra* note 123, at 68. Given the messiness of history and the legislative process, it would be a miracle if the contemporary distinction between justification and excuse were grounded in a single normatively coherent theory.

197. *See, e.g.*, Westen, *supra* note 127, at 328–29 (speculating about legislative intentions for drawing the line in particular ways). For example, in articulating the difference between justification and excuse, Peter Westen offers a comprehensive theory of criminal punishment. *Id.* at 356–61. He argues that criminals, by their conduct, exhibit "a certain disparaging attitude toward what the criminal statute" prohibits, and this disparaging attitude merits an indignant response by the state, namely punishment. *Id.* at 354–55. But someone who suffers from an excusing condition does not exhibit a disparaging attitude and thus ought not be punished, even though their conduct was wrongful. *Id.* at 360–61. In addition, by attempting to offer a comprehensive, bottom-up account of the distinction between justification and excuse, Westen improperly collapses the distinction between law and morality. In Westen's theory, conduct is *legally* justified when it is not regrettable and *legally* unjustified when it is regrettable. As Mitchell Berman has usefully pointed out, "justification and excuse are generic concepts in normative reasoning, serving the same logical function in law and in morals." Berman, *supra* note 123, at 18. But the contents of law and morality are different, so the normative outcomes—what is justified and what is excused—are inevitably different in law and morality. *Id.* at 18–20. Some conduct, like famous cases of civil disobedience, may be morally justified but legally unjustified. *Id.* at 11–13. Likewise, some conduct, like using deadly force when safe retreat is easy, may be morally unjustified but legally justified. *Id.* at 13–17. By trying to harmonize law and morality, Westen ignores this crucial discrepancy.

198. *See* Westen, *supra* note 127, at 304; DRESSLER, *supra* note 124, at 285–86 (discussing the fraught debate over whether duress justifies or excuses); Berman, *supra* note 123, at 39–40, 69–76 (discussing the literature on mistaken justification and then the literature on how to categorize duress).

199. DRESSLER, *supra* note 124, at 285–86 (discussing the fraught debate over whether duress justifies or excuses); Berman, *supra* note 123, at 39–40, 69–76 (discussing the literature on mistaken justification and then the literature on how to categorize duress).

defense.[200] But fortunately, these prototypical hard cases are easy cases for the empirical approach, which offers a straightforward solution: read the statutory text.

Consider self-defense in Utah and North Dakota. Utah Code § 76-2-402 defines self-defense: "An individual is *justified* in threatening or using force against another individual when and to the extent that the individual *reasonably believes* that force or a threat of force is necessary to defend the individual or another individual against the imminent use of unlawful force."[201] The text of the statute is clear: reasonable belief is sufficient to claim self-defense, and self-defense is a justification.[202] In contrast to Utah, North Dakota provides: "A person is justified in using force upon another person to defend himself against danger of imminent unlawful bodily injury, sexual assault, or detention by such other person . . . ."[203] Nothing in this statute accommodates reasonable but incorrect belief. North Dakota

200. In forty-one states and the federal system, mistaken self-defense is justified as long as it was reasonable. *See, e.g.*, ALA. CODE § 13A-3-23 (2024); ALASKA STAT. ANN. § 11.81.335 (West 2024); ARIZ. REV. STAT. ANN. § 13-404 (2024); ARK. CODE ANN. § 5-2-607 (West 2024); CAL. PENAL CODE § 197 (West 2024); COLO. REV. STAT. ANN. § 18-1-704.5 (West 2024); CONN. GEN. STAT. ANN. § 53a-19 (West 2024); DEL. CODE ANN. tit. 11, § 464 (West 2024); FLA. STAT. ANN. § 776.012 (West 2024); GA. CODE ANN. § 16-3-21 (West 2024); HAW. REV. STAT. ANN. § 703-304 (West 2024); IDAHO CODE ANN. § 18-4009 (West 2024); 720 ILL. COMP. STAT. ANN. 5/7-1 (West 2024); IND. CODE ANN. § 35-41-3-2 (West 2024); IOWA CODE ANN. § 704.3 (West 2024); KAN. STAT. ANN. § 21-5222 (West 2024); KY. REV. STAT. ANN. § 503.050 (West 2024); LA. STAT. ANN. § 14:20 (2024); ME. REV. STAT. tit. 17-A, § 108 (2024); Commonwealth v. Haddock, 704 N.E.2d 537, 540 (Mass. App. Ct. 1999); MISS. CODE. ANN. § 97-3-15 (2024); MO. ANN. STAT. § 563.031 (West 2024); MONT. CODE ANN. § 45-3-102 (West 2023); NEB. REV. STAT. ANN. § 28-1409 (West 2024); NEV. REV. STAT. ANN. § 200.120 (West 2023); Culverson v. State, 797 P.2d 238, 239–40 (Nev. 1990); N.H. REV. STAT. ANN. § 627:4 (2024); N.J. STAT. ANN. § 2C:3-4 (West 2024); N.M. STAT. ANN. § 30-2-7 (West 2024); N.Y. PENAL LAW § 35.15 (McKinney 2024); N.C. GEN. STAT. ANN. §§ 14-51.2 to -51.4 (West 2023); OHIO REV. CODE ANN. § 2901.05 (West 2024); *In re* Morton, No. 01-BA-29, 2002 WL 32832637, at *4 (Ohio Ct. App. May 21, 2002); OKLA. STAT. ANN. tit. 21, § 733 (West 2024); OR. REV. STAT. ANN. § 161.209 (West 2024); 18 PA. STAT. AND CONS. STAT. § 505 (West 2024); S.D. CODIFIED LAWS §§ 22-18-4 to 22-18-4.1 (2024); TENN. CODE ANN. § 39-11-611 (West 2024); TEX. PENAL CODE ANN. § 9.32 (West 2023); UTAH CODE ANN. § 76-2-402 (West 2024); VT. STAT. ANN. tit. 13, § 2305 (West 2024); Bailey v. Commonwealth, 104 S.E.2d 28, 31 (Va. 1958); WASH. REV. CODE ANN. § 9A.16.050 (West 2024); W. VA. CODE ANN. § 55-7-22 (West 2024); State v. Hoard, 889 S.E.2d 1, 9 n.8 (W. Va. 2023); New Orleans & Ne. R.R. Co. v. Jopes, 142 U.S. 18, 23 (1891). In eight states, the law is ambiguous on whether mistaken self-defense is a justification or excuse. *See* MICH. COMP. LAWS ANN. § 780.972 (West 2024); MINN. STAT. ANN. § 609.065 (West 2024); 11 R.I. GEN. LAWS ANN. § 11-8-8 (West 2024); Dykes v. State, 571 A.2d 1251, 1254 (Md. 1990); S.C. CODE ANN. § 16-11-440 (2024); State v. Davis, 317 S.E.2d 452, 453 (S.C. 1984); WIS. STAT. ANN. § 939.48 (West 2024); Moes v. State, 284 N.W.2d 66, 70 (Wis. 1979); WYO. STAT. ANN. § 6-2-602 (West 2024). Only one state, North Dakota, considers mistaken but reasonable self-defense an excuse. N.D. CENT. CODE ANN. § 12.1-05-03 (West 2023). This means that the line-drawing theories of prominent scholars, like Peter Westen, advocate approaches that override the plain language of at least *forty-one of fifty* states' laws. Westen, *supra* note 127, at 310. This is yet another reason to prefer the empirical approach to the approaches advocated by other scholars.

201. UTAH CODE ANN. § 76-2-402(2)(a) (West 2024) (emphasis added).

202. *See also id.* § 76-2-401 ("The defense of justification may be claimed . . . when the actor's conduct is in defense of persons or property under the circumstances described in Section[] 76-2-402 . . . .").

203. N.D. CENT. CODE ANN. § 12.1-05-03 (West 2023).

confirms this reading in its codification of excuse: "A person's conduct is excused if he believes that the facts are such that his conduct is necessary and appropriate for any of the purposes which would establish a justification . . . , even though his belief is mistaken."[204] Taking the statutory text seriously—as the empirical approach does—thus straightforwardly establishes the justification/excuse boundary in different places in Utah and North Dakota. In Utah, reasonable but mistaken self-defense is justified, while in North Dakota it is merely excused. Whatever the merits of either approach to self-defense, the empiricist judge is bound by the specific language of their jurisdiction.

Similarly, different jurisdictions treat duress differently. For example, Arizona's duress statute provides:

> Conduct which would otherwise constitute an offense is *justified* if a reasonable person would believe that he was compelled to engage in the proscribed conduct by the threat or use of immediate physical force against his person or the person of another which resulted or could result in serious physical injury which a reasonable person in the situation would not have resisted.[205]

Meanwhile, Minnesota's statute provides that when a crime is committed "under compulsion" from someone who creates a reasonable threat of death, "such threats and apprehension constitute duress which will *excuse* such participator from criminal liability."[206] Like in the above self-defense example, the statutes here unequivocally categorize this defense differently.

In many jurisdictions, though, the duress statute simply states that duress is a "defense" and does not specify whether it is a justification or an excuse.[207] But context indicates that in these jurisdictions, duress is generally an excuse. The same jurisdictions typically use explicitly justificatory language for paradigmatic justifications, like self-defense,[208] so the absence

204. *Id.* § 12.1-05-08.

205. ARIZ. REV. STAT. ANN. § 13-412 (2024) (emphasis added).

206. MINN. STAT. ANN. § 609.08 (West 2024) (emphasis added).

207. *See, e.g.*, ALASKA STAT. ANN. § 11.81.440 (West 2024); CONN. GEN. STAT. ANN. § 53a-14 (West 2024); HAW. REV. STAT. ANN. § 702-231 (West 2024); KY. REV. STAT. ANN. § 501.090 (West 2024); MO. ANN. STAT. § 562.071 (West 2024); N.J. STAT. ANN. § 2C:2-9 (West 2024); N.Y. PENAL LAW § 40.00 (McKinney 2024); N.D. CENT. CODE ANN. § 12.1-05-10 (West 2023); OKLA. STAT. ANN. tit. 21, § 156 (West 2024); OR. REV. STAT. ANN. § 161.270 (West 2024); 18 PA. STAT. AND CONS. STAT. § 309 (West 2024); S.D. CODIFIED LAWS § 22-5-1 (2024); TENN. CODE ANN. § 39-11-504 (West 2024); TEX. PENAL CODE ANN. § 8.05 (West 2023); WASH. REV. CODE ANN. § 9A.16.060 (West 2024).

208. *See, e.g.*, ALASKA STAT. ANN. § 11.81.330 (West 2024) ("A person is justified in using nondeadly force upon another . . . ."); CONN. GEN. STAT. ANN. § 53a-18 (West 2024) ("The use of physical force upon another person which would otherwise constitute an offense is justifiable and not criminal . . . ."); HAW. REV. STAT. ANN. § 703-304 (West 2024) ("[T]he use of force upon or toward another person is justifiable . . . ."); KY. REV. STAT. ANN. § 503.050 (West 2024) ("The use of physical

of such language in the duress statute is notable. And they often refer to paradigmatic excuses, like insanity,[209] with the same vague language. For example, New Jersey provides that "[i]nsanity is an affirmative defense," without further specifying the kind of defense.[210] In fact, a survey of all fifty states' codifications of defenses reveals that justifications typically use explicitly justificatory language (e.g., "X is justified when . . ."),[211] while excuses typically use vague language (e.g., "X is a defense when . . .").[212]

But what if a statute is written in a straightforward, easily interpretable manner but seems to produce unreasonable results? Mitchell Berman offers such a challenge:

> Suppose a provision of the penal code says: "For purposes of the criminal law, it is permissible for a child under the age of seven to engage in an act that would be a criminal offense were the child over the age of 18." Does the fact that the defense assumes the form of a permission necessarily determine that it's a justification rather than an excuse?[213]

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force by a defendant upon another person is justifiable . . . ."); N.J. STAT. ANN. § 2C:3-4 (West 2024) ("[T]he use of force upon or toward another person is justifiable . . . ."); N.D. CENT. CODE ANN. § 12.1-05-03 (West 2023) ("A person is justified in using force upon another person to defend himself . . . ."); OKLA. STAT. ANN. tit. 21, § 733 (West 2024) ("Homicide is also justifiable when committed by any person in any of the following cases . . . ."); OR. REV. STAT. ANN. § 161.209 (West 2024) ("[A] person is justified in using physical force upon another person for self-defense . . . ."); 18 PA. STAT. AND CONS. STAT. § 505 (West 2024) ("The use of force upon or toward another person is justifiable . . . ."); S.D. CODIFIED LAWS § 22-18-4 (2024) ("A person is justified in using or threatening to use force . . . ."); TEX. PENAL CODE ANN. § 9.32 (West 2023) ("A person is justified in using deadly force against another . . . ."); WASH. REV. CODE ANN. § 9A.16.050 (West 2024) ("Homicide is also justifiable when committed either: (1) In the lawful defense of the slayer . . . .").

209. *See, e.g.*, Russell D. Covey, *Temporary Insanity: The Strange Life and Times of the Perfect Defense*, 91 B.U. L. REV. 1597, 1598 (2011) ("[T]he insanity defense is considered paradigmatic of excuse defenses."); Mitchell N. Berman & Ian P. Farrell, *Provocation Manslaughter as Partial Justification and Partial Excuse*, 52 WM. & MARY L. REV. 1027, 1031 (2011) ("[I]nsanity [is] a paradigmatic excuse defense.").

210. N.J. STAT. ANN. § 2C:4-1 (West 2024).

211. *See, e.g.*, ALA. CODE § 13A-3-23 (2024) (using "justified" for self-defense); ALASKA STAT. ANN. § 11.81.330 (West 2024) (same); ARIZ. REV. STAT. ANN. § 13-404 (2024) (same); ARK. CODE ANN. § 5-2-607 (West 2024) (same); CONN. GEN. STAT. ANN. § 53a-19 (West 2024) (same); FLA. STAT. ANN. § 776.012 (West 2024) (same); GA. CODE ANN. § 16-3-21 (2024) (same); 720 ILL. COMP. STAT. ANN. 5/7-1 (West 2024) (same); IND. CODE ANN. § 35-41-3-2 (West 2024) (same); IOWA CODE ANN. § 704.3 (West 2024) (same); KAN. STAT. ANN. § 21-5222 (West 2024) (same); ME. REV. STAT. tit. 17-A, § 108 (West 2024) (same); MONT. CODE ANN. § 45-3-102 (West 2023) (same); N.H. REV. STAT. ANN. § 627:4 (2024) (same); N.C. GEN. STAT. ANN. § 14-51.3 (West 2023) (same); N.D. CENT. CODE ANN. § 12.1-05-03 (West 2024) (same); OR. REV. STAT. ANN. § 161.209 (West 2024) (same); S.D. CODIFIED LAWS § 22-18-4 (2024) (same); TEX. PENAL CODE ANN. § 9.32 (West 2023) (same); UTAH CODE ANN. § 76-2-402 (West 2024) (same); W. VA. CODE ANN. § 55-7-22 (West 2024) (same).

212. *See, e.g.*, KY. REV. STAT. ANN. § 501.090 (West 2024) (duress "is a defense"); ME. REV. STAT. ANN. tit. 17-A, § 103-B (West 2024) (involuntariness "is a defense"); 18 PA. STAT. AND CONS. STAT. § 309 (West 2024) (duress "is a defense"); TENN. CODE ANN. § 39-11-504 (West 2024) (duress "is a defense"); WASH. REV. CODE ANN. § 9A.16.060 (West 2024) (duress "is a defense").

213. Berman, *supra* note 123, at 30–31 (footnote omitted).

Berman's hypothetical presents a challenge to the empirical approach. But it is not a unique challenge—it is the same challenge that every vexed question of statutory interpretation presents. Courts frequently contend with statutes in which the plain meaning leads to unusual results.[214] For Berman's particular example, the court should probably begin by consulting the language used for other defenses. If other defenses were written in stronger, more clearly justificatory language—like the self-defense statutes above, which explicitly state that self-defense is "justified"—then perhaps there is sufficient ambiguity to permit the court to read "permissible" in an excusatory manner. But assuming that the statute is written in language that is as clearly justificatory as the language used in that jurisdiction's paradigmatic justifications, then the court should stick to the statutory text, mindful of its role as the faithful agent of the legislature in the criminal context. The court should interpret the provision as a justification. But notably, if a statute seems to indicate a result that is sufficiently unlikely and outrageous—so outrageous as to be impossible to plausibly defend[215]—then the empirical judge is not without tools.[216] For example, the court could deploy the doctrine of absurdity to depart from the literal meaning of the text.[217] Though such a departure would be extremely disfavored for an empiricist judge, it need not be inconsistent with a strong commitment to textualism.[218]

b. Hard Cases

Two cases that are especially hard for the empirical approach are worth considering in greater depth: jurisdictions in which the codified defenses are truly—and sometimes intentionally—ambiguous and jurisdictions that have not codified their defenses at all. Wisconsin is a prime example of the former and the federal system of the latter.

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214. Laura R. Dove, *Absurdity in Disguise: How Courts Create Statutory Ambiguity to Conceal Their Application of the Absurdity Doctrine*, 19 NEV. L.J. 741, 744 (2019).

215. Notably, Berman acknowledges that a plausible rationale can be given for interpreting the hypothetical infancy provision as a justification. *See* Berman, *supra* note 123, at 30–31 (noting that a proponent of the justificatory view of infancy could "believe it advantageous for the full flowering of human individuality that young children experiment with conduct that the law prohibits of them later in life").

216. *See* John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2455–56 (2003) (discussing textualist means of avoiding absurd results, like enforcing legislative boundaries through constitutional lawmaking).

217. *See* Veronica M. Dougherty, *Absurdity and the Limits of Literalism: Defining the Absurd Result Principle in Statutory Interpretation*, 44 AM. U. L. REV. 127, 127–28 (1994).

218. *See, e.g.*, Glen Staszewski, *Avoiding Absurdity*, 81 IND. L.J. 1001, 1043–46 (2006) (arguing that absurdity is compatible with textualism because it "promote[s] judicially underenforced constitutional norms").

Wisconsin abolished the formal distinction between justification and excuse.[219] Wisconsin Statute § 939.45 declares that duress, necessity, defense of self or others, defense of property, and various law enforcement defenses are "privileged."[220] In interpreting this provision, the Wisconsin Supreme Court noted that it "end[s] the distinction between 'justification' and 'excuse.'"[221] But where does that leave the empirical judge tasked with determining whether lenity applies to a particular defense or not?

As usual, the empirical approach requires the judge to use the ordinary tools of statutory interpretation to determine whether lenity applies to these "privileges"—that is, whether they are justification-like or excuse-like. Context suggests that the defenses codified in Wisconsin Statute § 939.45 are justification-like. Paradigmatic justifications, like self-defense and necessity, are codified as privileges, while paradigmatic excuses, like insanity, are not.[222] The privileges also generally concern conduct rather than culpability, and mental-state defenses like mistake of law or fact, infancy, intoxication, and insanity are conspicuously absent from the statute.[223] Moreover, the contrast with statutory non-privilege defenses like insanity is pronounced. Wisconsin tellingly codifies the insanity defense *not* as a privilege but by stating that "[a] person *is not responsible for criminal conduct* if at the time of such conduct" they acted pursuant to a "mental disease or defect."[224] The language here is straightforwardly excusatory: the actor is *not responsible* for an avowedly *criminal* act.[225] Likewise, the Wisconsin Supreme Court seemed to recognize that traditional excuses were different from privileges when it held that accident is not an "affirmative defense" because, unlike the privileges in § 939.45, it negates liability by negating the mental state of the actor.[226]

Crucially though, in making this inquiry, the empirical judge must remain attuned to the fact that the legislature abolished the terms "justification" and "excuse" and codified these disparate defenses under a single umbrella: "privilege." If a judge reads one of § 939.45's privileges as justification-like then they should read all of them that way. And to the degree possible, judges should use the language prescribed by the legislature. The Wisconsin legislature may have abolished "justification" and "excuse" in favor of

219. Moes v. State, 284 N.W.2d 66, 70 (Wis. 1979).

220. WIS. STAT. ANN. § 939.45 (West 2024).

221. *Moes*, 284 N.W.2d at 70.

222. WIS. STAT. ANN. § 939.45 (West 2024).

223. *See also* State v. Amundson, 230 N.W.2d 775, 783 (Wis. 1975) (distinguishing between entrapment and coercion, in part because coercion is codified as a "privilege" and is a more demanding and plenary defense), *overruled on other grounds by* State v. Wayerski, 922 N.W.2d 468 (Wis. 2019).

224. WIS. STAT. ANN. § 971.15(1) (West 2024) (emphasis added).

225. *See* Robinson, *supra* note 13, at 221 (drawing justification/excuse distinction along precisely these lines).

226. *See* State v. Watkins, 647 N.W.2d 244, 252–54 (Wis. 2002).

"privilege" for expressive reasons. To say that conduct is "justified" may imply that it is encouraged or even desired, and perhaps the legislature wanted to avoid such connotations in favor of the more staid "privileged," which implies permissibility and nothing more. Regardless, the key lesson for the empirical judge is not to resurrect the old terms of justification and excuse, even though for certain inquiries like complicity or lenity, the judge may have to inquire into the functional effect of privileges.[227]

Unlike Wisconsin, which simply codified its defenses in an unusual way, the federal system has not codified its defenses,[228] except for insanity.[229] Given the empirical judge's commitment to being the faithful agent of the legislature, how should they approach common-law defenses? Though the execution is difficult, the answer is simple: the empirical judge should engage in the kind of precedential reasoning typical in common law judging. As discussed above, complicity can be a useful heuristic for categorizing ambiguous defenses.[230] If there are gaps in the law, then the empirical judge may engage in a limited sociological or conceptual inquiry to fill the gap.[231] For example, in response to an unusual fact pattern, the Third Circuit drew on existing case law and the laws of other jurisdictions to recognize a "justification defense" that was implied in previous law but not explicit.[232] In this landmark case, the defendant was charged with being a felon in possession of a firearm, but he argued that he had only possessed the firearm because another man had threatened him with it and he had wrested control away from this would-be attacker.[233] Though the defendant undoubtedly "possessed" the firearm when police caught him, the Third Circuit reversed the conviction because the trial court should have instructed the jury on a "justification defense," even though such an instruction had never previously been given.[234] This judicial innovation is consistent with the empirical approach. In the absence of clear legislative direction, judges should do what they have always done: reason analogically from prior cases to answer new

227. The inquiry here is not dissimilar to the inquiry into the functional effect of public policy defenses. *See supra* Section II.C.

228. *See* Cynthia K.Y. Lee, *The Act-Belief Distinction in Self-Defense Doctrine: A New Dual Requirement Theory of Justification*, 2 BUFF. CRIM. L. REV. 191, 191–92 (1998).

229. *See* 18 U.S.C.A. § 17.

230. *See supra* notes 175–182 and accompanying text.

231. *See, e.g.*, Kathryn Maza, Note, *Necessity Defense to Felon-in-Possession Charges: The Third Circuit Justifies a Federal Justification Defense in* Virgin Islands v. Lewis, 56 VILL. L. REV. 725, 737–52 (2012) (discussing various circuits' attempts to fill a notable gap in Supreme Court jurisprudence on criminal defenses, namely the absence of a federal necessity defense).

232. United States v. Paolello, 951 F.2d 537 (3d Cir. 1991), *holding modified by* Gov't of Virgin Islands v. Lewis, 620 F.3d 359 (3d Cir. 2010).

233. *Id.* at 539.

234. *Id.* at 544.

questions. In this way, the empirical approach permits a limited sociological inquiry for the purposes of legal gap-filling.[235]

Notably, lenity applies to the construction of justifications—but not excuses—regardless of whether they are codified. Whether a particular justification is rooted in a statute or the common law is irrelevant for the purposes of lenity: it is the narrow construction of the penal statute that warrants the broad construction of the justification.

* * *

In summary, determining how to draw the line between justifications and excuses is essential for determining when lenity applies. The empirical approach embraces the judicial role by requiring judges to adhere to the statutory codifications of defenses or, in the absence of a statute, to engage in traditional common law judging. But importantly, no matter how or where one draws the line between justification and excuse, the lesson for lenity is the same: lenity applies to justifications but not excuses, however these categories may be construed.

IV. WHY THIS MATTERS

The rule of lenity requires courts to broadly construe ambiguous justifications and justification-like public policy defenses. But that only applies if some justifications are in in fact ambiguous—something which no court has explicitly found so far.[236] What, then, are the stakes of this Article, given the seeming absence of ambiguous justifications?

Ambiguity surely exists in affirmative defenses, just as it exists nearly everywhere in the law.[237] The case of Joseph Matos, with which this Article began, is just one notable example of how a justification can be ambiguous.[238] Is a collection of cardboard boxes a habitation for the purposes of New York's defense of habitation justification?[239] And just as courts have not found fatal ambiguity in any affirmative defenses, they have not found ambiguity in civil statutes, which surely can also be ambiguous.[240] Put

235. *See* Berman, *supra* note 123, at 31 (discussing the "sociological" approach, which is effectively a Dworkinian approach to justifications and excuses).

236. I conducted a WestLaw search using combinations of the terms "lenity," "rule of strict construction," "justification," "affirmative defense," "self defense," and "ambiguity," and I did not find a single relevant result.

237. H.L.A. HART, THE CONCEPT OF LAW 128–36 (2d ed. 1994) (discussing the ways in which law is "irreducibly open-textured").

238. *See supra* Introduction.

239. Stewart & Ransom, *supra* note 1.

240. *See* Kahan, *supra* note 36, at 386 (noting that "in civil statutory fields that do not include the rule of lenity, no interpretive games end in a tie").

differently, ambiguity is a luxury that courts can only afford if they have some means of resolving it; courts cannot adjudicate a tie without a tiebreaker.[241] Perhaps the greatest contribution of this Article, then, is to give courts permission to find ambiguity in justifications—and then to resort to lenity. Lenity makes ties possible by providing a tiebreaker.[242]

This Section considers the practical implications of applying lenity to justifications. First, this expanded role for lenity establishes a new use for lenity just as lenity is resurgent. Second, it rehabilitates the justification/excuse distinction because that distinction is crucial for determining when lenity applies. And third, it will help courts resolve ambiguities in justifications of both an ordinary and extraordinary character—including ambiguities deliberately seized upon by activists seeking to advance legal change.

A. The Rise of Lenity

Long a disfavored canon,[243] lenity is suddenly resurgent.[244] Several Supreme Court justices have called for a more robust lenity jurisprudence.[245] In part, this is due to lenity's compatibility with textualism: a dogmatic commitment to text creates more room for ambiguity, and ambiguity triggers lenity.[246] In addition, recent years have seen a spike in lenity-related

241. *Id.*

242. See *supra* note 25 for a discussion of lenity as a "tiebreaker." Despite the complexities noted in that footnote, I am using the term "tiebreaker" here as a shorthand for lenity's ability to resolve uncertainty in the meaning of criminal statutes.

243. Why lenity fell out of fashion is a difficult historical and jurisprudential question, and one that is more difficult to answer then why lenity is now in fashion (the answer to the latter is a new commitment to textualism and separation of powers). *See supra* notes 49–54 and accompanying text. In his argument for abolishing lenity, Dan Kahan may have unwittingly provided the germ of an explanation for why lenity fell out of favor. Kahan argues that the "pro-lenity" position stems from a formalistic conception of legislative supremacy, while the "anti-lenity" position "stems from a 'practical' conception of legislative supremacy." Kahan, *supra* note 36, at 398–99. The goal of this "practical" conception of legislative supremacy is to "maximize the policymaking authority of actual legislators" by permitting courts to "propound operative rules of law at Congress's explicit or implicit direction." *Id.* at 399. In other words, the anti-lenity position prizes governmental effectiveness, even at the expense of formal legal rules. It is no wonder, then, that lenity has been disfavored since the collapse of legal formalism and is now coming back into vogue with the rise of new formalisms, namely textualism and originalism. *See generally* Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1, 39 (1983) (describing the collapse of "classical" formalism during the Progressive and New Deal eras); Cass R. Sunstein, *What Judge Bork Should Have Said*, 23 CONN. L. REV. 205, 215 (1991) (arguing, among other things, that "originalism is merely the latest version of formalism in the law"); Jonathan T. Molot, *Ambivalence About Formalism*, 93 VA. L. REV. 1, 5 (2007) (arguing that textualism is a modern formalism).

244. *See* Wooden v. United States, 595 U.S. 360, 378 (2022) ("[T]his Court rarely relies on the rule of lenity, at least as a decisive factor.") (Kavanaugh, J., concurring).

245. *See id.* at 376–79, 384–97 (Kavanaugh, J., concurring; Gorsuch, J., concurring) (discussing the rule of lenity in dueling concurrences).

246. Romantz, *supra* note 71, at 561–65 (discussing the relationship between lenity and textualism).

scholarship, likely as a response to the American crisis in over-punishment and over-incarceration.[247] Leniency is in vogue.

One of the clearest indications of the rise of lenity occurred in *Wooden v. United States*, a recent Supreme Court case interpreting a tricky provision of the Armed Career Criminal Act.[248] Though the Court ultimately did not resort to lenity, Justice Gorsuch, joined by Justice Sotomayor, wrote separately to urge lower courts to turn to lenity more readily.[249] Justice Gorsuch argued that the threshold for triggering lenity should be lower and its application broader—not just to criminal laws but to any laws that inflict punishment.[250] Since joining the Court, Justice Jackson has also joined a strongly pro-lenity opinion by Justice Gorsuch.[251] Remarkably, this opinion called for applying lenity to a civil statute because the provision at issue could have criminal as well as civil ramifications.[252] There are thus at least three justices—and possibly more[253]—who have indicated a willingness to depart from the Court's previously torpid lenity jurisprudence.[254] Perhaps just as notably, Justice Kavanaugh has twice written separately to express concern over the possibility of reinvigorating the rule of lenity.[255] Lenity is in the air at the Supreme Court.

Most recently, these debates about the scope of lenity almost came to a head in the Court's decision in *Pulsifer v. United States*, a case about the meaning of a remedial sentencing statute.[256] In its brief, the government argued that lenity applies *only* to penal laws, which are "laws that define a crime" and "laws that 'inflict[] a penalty,'" *not* "ameliorative" laws like the one at issue in the case.[257] At oral argument, the government pressed its case, going so far as to analogize the provision to "a statute that sets forth an affirmative defense."[258] Plainly, the government argued, lenity would not

247. *See, e.g.*, Hopwood, *supra* note 11, at 936–37; Hasbrouck, *supra* note 11, at 1302–03; Wilson, *supra* note 11, at 1666–68.

248. *Wooden*, 595 U.S. 360.

249. *Id.* at 394–97 (Gorsuch, J., concurring).

250. *Id.* at 392–96.

251. *See* Bittner v. United States, 598 U.S. 85, 101–03 (2023).

252. *Id.* at 103.

253. *See, e.g.*, Lockhart v. United States, 577 U.S. 347, 376–77 (2016) (Kagan, J., dissenting) (invoking lenity); Barrett, *supra* note 55, at 128–34 (2010) (arguing, as a law professor, that the rule of lenity is a substantive canon consistent with a strong commitment to textualism).

254. Notably, in *Wooden*, Justice Sotomayor also joined Justice Gorsuch in a concurrence arguing that lenity is not "a curiosity unique to criminal cases" and should be extended to all laws "inflicting any form of punishment." *Wooden*, 595 U.S. at 396 & n.5.

255. *See Wooden*, 595 U.S. at 376–79 (Kavanaugh, J., concurring); Shular v. United States, 589 U.S. 154, 166–68 (2020) (Kavanaugh, J., concurring).

256. Pulsifer v. United States, 601 U.S. 124 (2024).

257. Brief for the United States at 45–46, *Pulsifer*, 601 U.S. 124 (No. 22-340), 2023 WL 4824957, at *45–46.

258. Transcript of Oral Argument at 105, *Pulsifer*, 601 U.S. 124 (No. 22-340).

apply to a statutory affirmative defense.[259] In other words, the government invited the Court to hold that lenity does not apply beyond a narrow conception of "penal statutes." But the Court declined to do so. The majority reserved the question of lenity's scope,[260] and the dissent (written by Justice Gorsuch and joined by Justices Sotomayor and Jackson) explicitly invoked lenity.[261] The Court—or at least some of its members—certainly seems open to taking lenity to its logical conclusion.

The rise of lenity on the Court has coincided with a renewed interest from scholars. While it was once in vogue to question the very existence of lenity, scholars now take its utility for granted.[262] Some have identified lenity as one tool for combatting the American crisis in overcriminalization and overincarceration.[263] To that end, scholars have proposed reinvigorating lenity by granting it lexical priority,[264] lowering the threshold for ambiguity,[265] or even statutorily codifying it to ensure robust and uniform application.[266] But their precise proposals matter less than the sum of their parts: in the academy as at the Court, lenity is experiencing something of a renaissance.

Separately, the prosecution of former President Trump by Manhattan District Attorney Alvin Bragg relies on a novel interpretation of New York's false records law.[267] Several popular commentators have highlighted the likely role of lenity in the case should it reach appeal.[268] There is certainly potential for a very public and significant invocation of lenity.

This Article establishes a new use for lenity, just as courts, scholars, and the public at large are becoming more receptive to it. The coming years will likely see a greater reliance on lenity and perhaps a greater willingness to

259. *Id.*

260. *Pulsifer*, 601 U.S. at 152 n.8.

261. *Id.* at 184–86 (Gorsuch, J., dissenting).

262. *See, e.g.*, Kahan, *supra* note 36, at 396–97 (making the case for abolishing lenity—a proposal that has been roundly rejected since).

263. *See, e.g.*, Hopwood, *supra* note 11, at 936–37 (arguing that lenity better safeguards defendants' liberty "in an era in which Congress has criminalized huge swaths of conduct"); Hasbrouck, *supra* note 11, at 1302–03 (linking the impotence of lenity to "our current carceral state and its racist results"); Wilson, *supra* note 11, at 1666–68 (arguing that "if courts regularly applied lenity, this rule could partially address important social problems in the criminal justice system").

264. *See* Shadgett, *supra* note 26, 712–14.

265. *See* Hopwood, *supra* note 11, at 931–38 (2020); Price, *supra* note 92, at 924.

266. Wilson, *supra* note 11, at 1688–93.

267. *See* Jed Handelsman Shugerman, Opinion, *I Thought the Bragg Case Against Trump Was a Legal Embarrassment. Now I Think It's a Historic Mistake.*, N.Y. TIMES (Apr. 23, 2024), https://www.nytimes.com/2024/04/23/opinion/bragg-trump-trial.html [https://perma.cc/7L6L-VVX6].

268. *See, e.g.*, David French, Opinion, *The Law Is Closing in on Trump*, N.Y. TIMES (Feb. 15, 2023), https://www.nytimes.com/2023/02/15/opinion/prosecuting-trump.html [https://perma.cc/PNR9-FT24]; Ian Millhiser, *The Dubious Legal Theory at the Heart of the Trump Indictment, Explained*, VOX (Apr. 4, 2023, 4:15 PM), https://www.vox.com/politics/2023/4/4/23648390/trump-indictment-supreme-court-stormy-daniels-manhattan-alvin-bragg [https://perma.cc/A7QD-KHXL].

apply it in new contexts—especially contexts where it plainly ought to apply, like the construction of ambiguous justifications.

B. The Return of the Justification/Excuse Distinction

The justification/excuse distinction has fallen out of fashion. Though much scholarly ink has been spilled over the distinction, some scholars have dismissed the entire enterprise as scholastic.[269] One influential article,[270] for example, argued that "[t]he justification/excuse distinction plays no significant role in contemporary criminal doctrine."[271] The distinction is simply too fraught, the scholar argued, and thus of limited use for courts.[272] Likewise, another scholar argued that the distinction cannot be maintained in any "fully systematic way"—the line simply becomes too fuzzy in marginal defenses.[273] This ambivalence over the utility of the justification/excuse distinction has infected courts too, with one judge noting that the distinction is "arguably superfluous"[274] and another dismissing it as "often fuzzy, and more often fudged."[275]

But because lenity applies to justifications and not excuses, the justification/excuse distinction actually matters a great deal. Whether a particular affirmative defense is a justification or excuse ought to inform a judge's interpretative approach. Applying lenity to affirmative defenses thus effectively resurrects the once-significant division between justifications and excuses—and not just for criminal law scholars, but for judges and practitioners too.

C. New Frontiers in Justification Law

1. Ordinary Cases of Ambiguity

Law is rife with ambiguity.[276] What may seem plain today becomes unsettled by an unexpected fact pattern tomorrow. The case of Joseph Matos, which seizes on the ambiguity of "dwelling," is just one such example.[277] Other ambiguities, both realized and unrealized, abound.

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269. *See* Berman, *supra* note 123, at 1 (noting that scholars have "obsessed over" the distinction).

270. This article was cited in *People v. Nguyen*, No. D078477, 2022 WL 897006, at *8–9 (Cal. Ct. App. Mar. 28, 2022).

271. Gabriel J. Chin, *Unjustified: The Practical Irrelevance of the Justification/Excuse Distinction*, 43 U. MICH. J.L. REFORM 79, 80 (2009).

272. *Id.* at 81.

273. Kent Greenawalt, *The Perplexing Borders of Justification and Excuse*, 84 COLUM. L. REV. 1897, 1898 (1984).

274. State v. Leidholm, 334 N.W.2d 811, 815 (N.D. 1983).

275. People v. Young, 210 N.Y.S.2d 358, 361 (App. Div. 1961), *rev'd*, 183 N.E.2d 319 (N.Y. 1962).

276. *See* HART, *supra* note 237.

277. *See supra* notes 1–9 and accompanying text.

Consider the defense of property, a justification that permits property owners to use reasonable, non-deadly force to protect their property.[278] But "property," just like "dwelling," can be ambiguous. For example, a New York court had to consider when wild animals became "property" for the purposes of a hunting dispute in which one hunter pursued a fox and another killed the fox.[279] Meanwhile, a Washington court had to decide whether "property of another," which was undefined by statute, included marital community property.[280] Though neither case interpreted the defense of property justification directly, both are exemplars of how the terms of that defense can be uncertain. What constitutes one's "property" such that one can exercise force in its defense?

Similarly, consider the necessity defense, also called the "choice of evils" defense, which justifies violating the letter of the law if done to prevent a greater imminent harm for which no legal alternative was available.[281] The open-ended nature of the defense creates nearly limitless opportunity for ambiguity.[282] One prominent example of necessity's ambiguity is whether it justifies "looting" in the wake of a natural disaster.[283] At what point is the situation sufficiently dire to permit someone to break into a store and remove food and clothes?[284]

278. Note, *Justification for the Use of Force in the Criminal Law*, 13 STAN. L. REV. 566, 568 (1961).

279. Pierson v. Post, 3 Cai. 175 (N.Y. Sup. Ct. 1805).

280. State v. Coria, 48 P.3d 980, 982 (Wash. 2002).

281. Stephen S. Schwartz, *Is There a Common Law Necessity Defense in Federal Criminal Law?*, 75 U. CHI. L. REV. 1259, 1260–61 (2008).

282. *See, e.g.*, *infra* Section IV.C.3 (discussing ambiguity in the necessity defense as generated by animal and environmental activists).

283. Stephanie J. Hamrick, Note, *Is Looting Ever Justified?: An Analysis of Looting Laws and the Applicability of the Necessity Defense During Natural Disasters and States of Emergency*, 7 NEV. L.J. 182, 184 (2006).

284. *Id.* at 201–02.

Other justifications, like self-defense,[285] defense of others,[286] defense of habitation,[287] and public authority defenses, also have latent ambiguities that may only come to light with the right fact pattern. Rather than requiring judges to interpret justifications when competing views are in equipoise, the rule of lenity is a ready tiebreaker.

2. New Justification Statutes

In recent years, many state legislatures have passed new justification statutes. With scant case law narrowing their meanings, the breadth of these statutes will inevitably be the subject of reasonable disagreement. For example, from 2005 to 2021, twenty-six states adopted stand-your-ground statutes that remove the duty to retreat, even outside one's home.[288] These laws significantly expand the rights of private citizens to resort to deadly force.[289] They have also given rise to confusion within courts about the meaning of "reasonable fear," which is at the heart of these statutes.[290] As the

285. *See generally* Whitley R.P. Kaufman, *Self-Defense, Imminence, and the Battered Woman*, 10 NEW CRIM. L. REV. 342, 360–68 (2007) (discussing the ambiguity of "imminence" in the context of battered woman cases); Uwe Steinhoff, Self-Defense and Imminence (May 15, 2014) (unpublished manuscript), https://ssrn.com/abstract=2653669 [https://perma.cc/7G69-Z29U] (discussing a wide range of hypothetical scenarios that generate ambiguity in self-defense due to questions about imminence). For example, Steinhoff contrasts two hypotheticals: "Attack with probabilities" and "Murder Plan with probabilities." *Id.* at 27–28. In Attack, a villain advances with a gun, and you can stop him with 100% certainty by shooting him or 90% certainty by tasering him. *Id.* In Murder Plan, a villain plans to kill you in two weeks, and you can stop him with 100% certainty by killing him in his sleep tonight or 90% certainty by imprisoning him. *Id.* The author's intuition—and the law's—is that immediate deadly force is permitted in Attack but not in Murder Plan, despite the obvious similarities in the two cases. *Id.* at 34–35. As these and other hypotheticals reveal, "imminence" is a highly fraught element.

286. *See, e.g.*, Bill Lueders, *A Crime of Compassion?*, ISTHMUS (Mar. 7, 2024, 9:00 AM), https://isthmus.com/news/cover-story/a-crime-of-compassion [https://perma.cc/7Z77-98GZ] (linking defendant's motion in limine arguing that dogs are "someone" for the purposes of Wisconsin's defense of others statute).

287. *See, e.g.*, Sarah A. Pohlman, Comment, *Shooting from the Hip: Missouri's New Approach to Defense of Habitation*, 56 ST. LOUIS U. L.J. 857, 880 (2012) (discussing ambiguities in Missouri's new defense of habitation statute); Stuart P. Green, *Castles and Carjackers: Proportionality and the Use of Deadly Force in Defense of Dwellings and Vehicles*, 1999 U. ILL. L. REV. 1, 16 n.66 (discussing ambiguity in Alabama's defense of habitation statute).

288. Alexa R. Yakubovich, Michelle Degli Esposti, Brittany C.L. Lange, G.J. Melendez-Torres & Alpa Parmar et al., *Effects of Laws Expanding Civilian Rights to Use Deadly Force in Self-Defense on Violence and Crime: A Systematic Review*, 111 AM. J. PUB. HEALTH e1, e2 (2021).

289. *Id.*

290. *See, e.g.*, Justin Wingerter, *Ambiguity in 'Stand-Your-Ground' Law Leads Kansas Court to Send Two to Trial*, TOPEKA CAP.-J. (Oct. 22, 2016, 4:26 PM), https://www.cjonline.com/story/news/politics/state/2016/10/22/ambiguity-stand-your-ground-law-leads-kansas-court-send-two-trial/16570017007/ [https://perma.cc/MD3G-ZFM2] (discussing ambiguity in Kansas's stand-your-ground law); John Romano, *Romano: Ambiguous Words Muddy 'Stand Your Ground' Law*, TAMPA BAY TIMES (Feb. 25, 2014), https://www.tampabay.com/news/politics/ambiguous-words-muddy-stand-your-ground-law/2167156 [https://perma.cc/K8WC-WMK3] (discussing ambiguity in Florida's stand-your-ground law); Larry Hannan, *Stand Your Ground Law Not Working as Intended Despite Changing Self Defense in*

site of cultural conflict, these statutes are the subject of significant debate.[291] That debate—and the sweeping language of these statutes—has produced a great deal of uncertainty for which lenity can be a helpful means of resolution.

Another site of cultural conflict and statutory ambiguity is new legislation criminalizing abortion. In the wake of *Dobbs v. Jackson Women's Health Organization*, many states passed criminal abortion bans[292] while also enacting affirmative defenses to those bans.[293] As a representative example, consider Missouri's "Right to Life of the Unborn Child Act," which makes "knowingly perform[ing] or induc[ing] an abortion" a felony but also makes it an "affirmative defense . . . [to] perform[] or induce[] an abortion because of a medical emergency."[294] The legal meaning of "medical emergency"—a

Florida, FLA. TIMES-UNION (Nov. 21, 2015, 7:25 PM), https://www.jacksonville.com/story/news/crime/2015/11/22/stand-your-ground-law-not-working-intended-despite-changing-self-defense/15689407007/ [https://perma.cc/Q45X-UV63] (discussing ambiguities in Florida's stand-your-ground law, which is a model for many stand-your-ground laws across the country).

291. *See, e.g.*, Addie C. Rolnick, *Defending White Space*, 40 CARDOZO L. REV. 1639, 1702–19 (2019) (critiquing expansive self-defense laws for legitimizing violence against people of color and defending "white space"). It is worth noting that lenity's application to stand-your-ground laws may turn some of the racial justice motivations for the expansion of lenity on their head. Many scholars have called for a reinvigoration of lenity as a means of combatting mass incarceration and racial injustice. *See supra* note 11 (citing scholars who have endorsed lenity as part of the anti-mass incarceration toolbox). But lenity also requires broadly construing stand-your-ground laws that can be weaponized against people of color. And as discussed *supra* note 73, lenity is a poor tool for winnowing overbroad penal statutes because it tends to favor unusual edge cases—including ones that may be patently wrongful and unsympathetic—rather than providing broad-based relief.

292. Elizabeth Nash & Isabel Guarnieri, *Six Months Post-Roe, 24 US States Have Banned Abortion or Are Likely to Do So: A Roundup*, GUTTMACHER INST. (Sept. 1, 2023), https://www.guttmacher.org/2023/01/six-months-post-roe-24-us-states-have-banned-abortion-or-are-likely-do-so-roundup#:~:text=As%20of%20September%201%2C%202023,in%20Iowa%2C%20Utah%20and%20Wyoming [https://perma.cc/YJ28-NZR5].

293. Mabel Felix, Laurie Sobel & Alina Salganicoff, *A Review of Exceptions in State Abortion Bans: Implications for the Provision of Abortion Services*, KFF (June 6, 2024), https://www.kff.org/womens-health-policy/issue-brief/a-review-of-exceptions-in-state-abortions-bans-implications-for-the-provision-of-abortion-services/#:~:text=An%20affirmative%20defense%20does%20not,demonstrate%20that%20they%20provided%20care [https://perma.cc/W57G-35XK]. It is worth noting two uncertainties regarding these new affirmative defenses. First, it is uncertain whether some of the affirmative defenses are justifications or excuses, which has obvious implications for lenity. *See supra* Sections II.A–B. The analogy to self-defense and necessity suggests that the affirmative defenses for medical emergencies are justifications, but the staid language of some of the defenses, *see, e.g.*, MO. ANN. STAT. § 188.017 (West 2024) (stating that an abortion in the case of a medical emergency is "an affirmative defense" rather than "justified"), suggests that they are excuses. This is a crucial question for the application of lenity, but its resolution is beyond the scope of this Article. Second, it is uncertain whether some of these defenses to abortion bans are affirmative defenses or exceptions. *See* Felix et al., *supra* note 293. Fortunately for our purposes, whether a defense is an affirmative defense or an exception does not matter for lenity. The rule of lenity applies with equal force to ambiguous justifications and ambiguous exceptions, because both justifications and exceptions narrow penal statutes.

294. MO. ANN. STAT. § 188.017 (West 2024).

fraught term, to be sure[295]—has yet to be determined.[296] Indeed, several states' abortion bans and their concomitant affirmative defenses are already embroiled in litigation about the meaning of those defenses.[297] The abortion context thus presents another opportunity for lenity to define the scope of penal statutes—in this case, by defining the scope of new affirmative defenses to new criminal prohibitions on abortion.

3. Activist Cases

Lenity may also prove especially significant in activist cases, especially ones that rely on the necessity defense. The necessity defense is a paradigmatic justification[298] that has historically been used by activists to justify acts of civil disobedience.[299] For example, protesters who blocked the entrance to a nuclear power plant in Oregon were acquitted due to necessity in 1970.[300] And in 1987, Abby Hoffman and other anti-imperialist activists were acquitted for their conduct in occupying a university building to protest the CIA's actions in Central America.[301] But as the necessity defense became a vehicle for social change, courts began restricting its use. Wary that necessity would become nullification by other means, courts developed doctrines that severely limited its application in activist cases, like only permitting it for certain, narrow forms of direct action and denying it whenever the legislature had weighed in on the policy at issue.[302]

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295. *See* Lauren Mascarenhas, *Texas Abortion Law's Wording Is Causing Dangerous Confusion Over Emergency Medical Exceptions, Critics Say*, CNN (Dec. 15, 2023, 7:06 AM), https://www.cnn.com/2023/12/15/us/texas-abortion-ban-emergency-medical-exception/index.html [https://perma.cc/BF9U-W6VR] (discussing the uncertainty of the term "medical emergency" in Texas's abortion ban, which lacks a definition of the term).

296. Missouri law defines "medical emergency" but in doing so simply shifts the uncertainty to new terms. *See* MO. ANN. STAT. § 188.039 (West 2024).

297. *See, e.g.*, *In re* State, 682 S.W.3d 890 (Tex. 2023) (per curiam) (discussing Texas's affirmative defense/exception to its abortion ban); Wrigley v. Romanick, 988 N.W.2d 231 (N.D. 2023) (discussing North Dakota's affirmative defense to its abortion ban).

298. *See* Luis E. Chiesa, *When an Offense Is Not an Offense: Rethinking the Supreme Court's Reasonable Doubt Jurisprudence*, 44 CREIGHTON L. REV. 647, 669 (2011) ("The paradigmatic justification is the choice of the lesser evils or necessity defense.").

299. *See* Lance N. Long & Ted Hamilton, *The Climate Necessity Defense: Proof and Judicial Error in Climate Protest Cases*, 38 STAN. ENV'T L.J. 57, 74–78 (2018).

300. *Id.* at 74–75.

301. *Id.* at 75.

302. *See, e.g.*, People v. Weber, 208 Cal. Rptr. 719, 721 (App. Dep't Super. Ct. 1984) ("To accept the defense of necessity under the facts at bench would mean that markets may be pillaged because there are hungry people; hospitals may be plundered for drugs because there are those in pain; homes may be broken into because there are unfortunately some without shelter; department stores may be burglarized for guns because there is fear of crime; banks may be robbed because of unemployment."); *see also* William P. Quigley, *The Necessity Defense in Civil Disobedience Cases: Bring in the Jury*, 38 NEW ENG. L. REV. 3, 41–49 (2003); John Alan Cohan, *Civil Disobedience and the Necessity Defense*, 6 PIERCE L. REV. 111, 120–23 (2007).

But in recent years, the necessity defense has experienced something of a renaissance in activist cases. For example, the Climate Defense Project is a legal organization devoted to defending frontline climate activists and using their trials as a way to further the aims of the environmental movement.[303] Unlike earlier activists, who used the necessity defense as a legal defense of last resort, some climate activists, in conjunction with the Climate Defense Project, have been deliberate in crafting their activism to permit the use of the necessity defense.[304] The Climate Defense Project even compiled a necessity defense guide for activists and attorneys.[305] The guide introduces activists to the elements of the necessity defense and discusses every major climate activist case that has raised the defense.[306] Most notably, the Project won a landmark victory at the Washington Supreme Court, which held that a lower court erred in denying a necessity instruction to a climate activist who engaged in civil disobedience against a railway company.[307] At issue was whether the activist had exhausted all reasonable alternatives before breaking the law—a determination loaded with ambiguity—and the Court held that the activist had offered enough evidence to send this difficult question to the jury.[308]

Similarly, animal rights activists have attempted to raise the necessity defense at trial, and they have even coordinated their direct actions to set the stage for necessity at trial.[309] For example, in 2018, hundreds of activists walked onto the premises of a factory farm, and several entered barns, documented their conditions, and removed animals in need of veterinary care.[310] Before the action, activists had obtained video footage of inhumane

303. CLIMATE DEFENSE PROJECT, https://climatedefenseproject.org [https://perma.cc/4U96-JAMG] (noting that the organization seeks to defend climate activists "with movement-aligned legal representation"). *See generally* TED HAMILTON, BEYOND FOSSIL LAW: CLIMATE, COURTS, AND THE FIGHT FOR A SUSTAINABLE FUTURE (2022) (arguing, among other things, that the necessity defense should be recognized for climate activists as a means of overturning "fossil law").

304. Jack McCordick, *Q&A with Ted Hamilton on Climate Change and the Courts*, YALE L. SCH. (Apr. 14, 2021), https://law.yale.edu/yls-today/news/qa-ted-hamilton-climate-change-and-courts [https://perma.cc/UY4H-WMK8]; *see also* Long & Hamilton, *supra* note 299, at 78–115.

305. *Climate Necessity Defense Case Guide: A Guide for Activists and Attorneys*, CLIMATE DEFENSE PROJECT (Dec. 29, 2020), https://climatedefenseproject.org/wp-content/uploads/2021/05/CDP-Climate-Necessity-Defense-Case-Guide.pdf [https://perma.cc/KF9M-QVLS].

306. *Id.*

307. State v. Spokane Cnty. Dist. Ct., 491 P.3d 119, 127–28 (Wash. 2021).

308. *Id.* at 126–27.

309. *See* Marina Bolotnikova, *The Fight Against Factory Farming Is Winning Criminal Trials*, VOX (Mar. 21, 2023, 6:30 AM), https://www.vox.com/future-perfect/23647682/factory-farming-dxe-criminal-trial-rescue [https://perma.cc/L9JU-6T2L]; *see also* Justin Marceau, Wayne Hsiung & Steffen Seitz, *Voluntary Prosecution and the Case of Animal Rescue*, 137 HARV. L. REV. F. 213, 228–37 (2024).

310. Marina Bolotnikova, *You're More Likely to Go to Prison for Exposing Animal Cruelty than for Committing It*, VOX (Nov 9, 2023, 7:00 AM), https://www.vox.com/future-perfect/23952627/wayne-hsiung-conviction-direct-action-everywhere-dxe-rescue-sonoma-county-chickens [https://perma.cc/2SGC-8LN6].

conditions at the farm and shared them with a law professor.[311] The law professor wrote a memo setting out the elements of the necessity defense in California and applying the defense to a possible "open rescue" at the farm.[312] The law professor stated: "[I]t is my opinion that an open rescuer who removes sick animals from this facility should be able to successfully argue for a necessity defense against any charges of trespass or misappropriation."[313] On the day of the action, activists carried a copy of the law professor's memo with them, and one activist later attempted to raise the defense at trial.[314] Though the court did not allow the defense, the activists' actions show a desire to carefully construct direct actions to raise a justification at trial.[315] Just as importantly, the denial of necessity will be appealed, setting the stage for a court to consider the contours of the justification in California—a determination for which lenity may prove invaluable as the court wrestles with the ambiguities of the defense.[316]

Lenity may even have important implications for litigation concerning animal personhood, which has become an important issue within the nascent field of animal law.[317] This litigation has been led by the Nonhuman Rights Project (NhRP), an animal civil rights organization that has filed a series of habeas petitions on behalf of confined elephants, great apes, and cetaceans.[318] NhRP's most prominent case involved a habeas corpus petition on behalf of an elephant named Happy, which made it all the way to the New York Court of Appeals, the state's highest court.[319] Though the court denied the habeas petition in a 5-2 vote, the fact that animal personhood garnered

311. *Id.*

312. Memorandum from Hadar Aviram, Harry & Lillian Hastings Rsch. Chair, Univ. of Cal. Hastings Coll. of the L. (May 17, 2018), https://drive.google.com/file/d/1MgJjLJenCAkFGGtp77XZXEQkIg9W-gi9/view [https://perma.cc/HPH9-JDBE].

313. *Id.*

314. Bolotnikova, *supra* note 310.

315. *Id.*

316. *Id.* In the spirit of disclosure, it is worth noting that I am on the team appealing the conviction in this case.

317. *See* Lawrence Wright, *The Elephant in the Courtroom*, NEW YORKER (Feb. 28, 2022), https://www.newyorker.com/magazine/2022/03/07/the-elephant-in-the-courtroom [https://perma.cc/V2JE-RAXE].

318. *About Us*, NONHUMAN RTS. PROJECT, https://www.nonhumanrights.org/about-us [https://perma.cc/L4DF-XACR] (listing "our initial clients").

319. Joel Shannon, *Case Asking Courts to Free Elephant 'Imprisoned' in Bronx Zoo Heads to New York's Highest Court*, USA TODAY (May 5, 2021, 1:34 PM), https://www.usatoday.com/story/news/nation/2021/05/04/happy-elephant-imprisoned-bronx-zoo-argues-advancing-case/4946963001 [https://perma.cc/AH27-8VRE] (quoting the NhRP that "[t]his marks the first time in history that the highest court of any English-speaking jurisdiction will hear a habeas corpus case brought on behalf of someone other than a human being"); Nonhuman Rts. Project, Inc. v. Breheny, 197 N.E.3d 921, 924–26 (N.Y. 2022), *reargument denied*, 200 N.E.3d 121 (N.Y. 2022).

the votes of two justices suggests that the theory is at least plausible, even if it may be too radical for most courts.[320]

The intersection of lenity and justifications may suggest an alternate path toward animal personhood. Several states' necessity defenses require the beneficiary of the necessitous conduct to be a "person."[321] The problem with habeas as a means of securing animal personhood is that it requires judges to decide the question without a favorable interpretative posture in one direction or the other.[322] In contrast, a necessity defense that implies animal personhood may be more favorable ground for animal litigators because it requires the judge to adopt a defendant-friendly posture.[323] Given the argument of this Article, any ambiguities in the necessity defense—including the content of "person"—must be read broadly.[324]

By deliberately crafting their actions to meet the requirements of the necessity defense, climate and animal activists are putting pressure on the seams of necessity law. What counts as a reasonable alternative? When is climate change a sufficiently imminent harm to justify lawbreaking? Are the interests of a dying animal cognizable for necessity purposes? Or even, are animals legal persons? These are ambiguities that are already arising and require judicial resolution. Judges will be forced to decide: should the justification of necessity be read broadly or narrowly? Fortunately, lenity supplies an answer.

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320. *See* Press Release, Lauren Choplin, Commc'ns Dir., Nonhuman Rts. Project, Statement on New York Court of Appeals Decision in Historic Elephant Rights Case (June 14, 2022), https://www.nonhumanrights.org/blog/statement-court-of-appeals-decision [https://perma.cc/3L5P-8SY7].

321. Jenni James, *When Is Rescue Necessary? Applying the Necessity Defense to the Rescue of Animals*, 7 STAN. J. ANIMAL L. & POL'Y 1, 36–38 (2014).

322. By "interpretative posture" I mean something different from the burden of proof. It is not about who must prove unlawful detention but about the meaning of unlawful detention itself.

323. For a notable example in which a criminal defendant argued for animal personhood in a criminal case, see Megan Easton, *The Trial of Anita Krajnc*, U. TORONTO MAG. (May 26, 2017), https://magazine.utoronto.ca/people/alumni-donors/the-trial-of-anita-krajnc-animal-rights-activist-toronto-pig-save [https://perma.cc/N8JC-RK6X]. Anita Krajnc was prosecuted for providing water to pigs on their way to slaughter. *Id.* As part of her defense, her lawyers argued that pigs are "persons" under the law, not mere property. *Id.* Though Krajnc's animal personhood arguments were not adopted by the court, she was acquitted. *Id.*

324. In addition to furnishing a more favorable legal posture, the necessity avenue to personhood may also furnish a more favorable political posture. NhRP has received backlash for relying on old habeas cases that considered the personhood of enslaved persons. *See* Recent Case, Nonhuman Rights Project Inc. *ex rel.* Happy v. Breheny, *No. 52, 2022 WL 2122141 (N.Y. June 14, 2022)*, 136 HARV. L. REV. 1292, 1299 (2023). As one commentator argued, faced with a case "in which a Black person's subpersonhood is material to the legal conclusion," the only acceptable option is to "*throw it all out*." *Id.* The necessity approach to personhood does not rely on such fraught cases, and the defensive posture of a criminal case—one in which an activist is prosecuted for giving aid to a dying animal—may provide a more sympathetic ground for recognizing personhood. *See* ANIMAL L. PROGRAM, UNIV. OF DENVER STURM COLL. OF L., SMITHFIELD TRIAL JUROR INTERVIEWS, https://www.law.du.edu/sites/default/files/2023-03/SCOL_ALP_Smithfield%20Trial%20Juror%20Interview%20Transcripts_March%202023.pdf [https://perma.cc/3EXX-6BBX] (compiling juror transcripts in which jurors from rural, southern Utah express sympathy for animal rights activist-defendants).

CONCLUSION

This Article has argued that lenity, by its own logic, applies to some affirmative defenses, namely justifications and justification-like public policy defenses. Unlike excuses and excuse-like public policy defenses, which prevent punishment but do not alter the scope of a penal statute, justificatory defenses effectively narrow the boundaries of the criminal law. Because lenity requires courts to interpret ambiguous penal statutes narrowly, courts must interpret ambiguous justifications expansively. Put simply, lenity's call to strictly construct penal statutes is also a call to broadly construct justificatory defenses.

While this Article has explored the implications of a more capacious rule of lenity, the full consequences of this argument remain to be seen. At a minimum, this new frontier for lenity should help defendants like Joseph Matos, who are caught in the law's liminal spaces.[325] But activists and lawyers alike may advance this argument even further, using lenity to expand justificatory defenses and prune penal statutes. Hopefully, this Article will serve as a foundation for such experimentation and a reassurance for those seeking refuge not only in the shadow of the law, but also in the sanctuary of a cardboard dwelling.

325. *See supra* notes 1–9 and accompanying text.