THE MERCIFUL CORPUS: THE RULE OF LENITY, AMBIGUITY AND CORPUS LINGUISTICS

DANIEL ORTNER*

I. INTRODUCTION

The rule of lenity, or the rule of statutory interpretation that "penal statutes must be strictly construed against the state,"[1] has been described as a "venerable"[2] rule "perhaps not much less old than construction itself."[3] Countless commentators, however, have noted the decline of the rule,[4] and many have

* Daniel Ortner, J.D. Brigham Young University Law School 2015, Law Clerk for Justice Thomas R. Lee—Utah Supreme Court.

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

[2] United States v. R.L.C., 503 U.S. 291, 305 (1992).

[3] United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95 (1820). *See R.L.C.*, 503 U.S. at 305; *The New Rule of Lenity*, 119 HARV. L. REV. 2420 (2006). Lenity has been strongly supported as a concrete application of the principle of legality or the requirement that crimes be expressly proscribed. Jeffries, *supra* note 1, at 198. Yet, Justice Scalia, though a strong proponent of the rule of lenity, argues that as an original matter there is little justification for the adoption of the rule of lenity. *See* Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE W. RES. L. REV. 581, 583 (1990).

[4] For instance, Professor Hill has suggested that the rule of lenity be renamed "the exception of lenity," in light of infrequent and inconsistent application. *See* Rick Hills, *Why do I*

noted that the modern Supreme Court rarely invokes the rule except in very limited contexts.[5] Reflecting this decline, some scholars have even suggested that the rule of lenity should be abolished.[6]

As Professor Lawrence Solan has persuasively argued, the rule of lenity has gradually been narrowed from its robust historical origins.[7] Yet, with the appointment of Justice Scalia and the wave of new textualism came a revival of interest in the rule of lenity on the Court.[8] In contemporary Supreme Court jurisprudence, decisions are often deeply divided, with a slim majority applying the rule of lenity infrequently and a persistent minority, led by Justice Scalia, advocating for a more robust application of lenity (with occasional victories).[9] More specifically, debate over the rule of lenity has become fractured over the question of how much ambiguity is necessary before the rule of lenity is triggered. Courts employ several different and widely-inconsistent standards when determining this issue.[10]

The Supreme Court's recent decision, *Abramski v. United States* powerfully illustrates the division among members of the Court.[11] In *Abramski*, the Court by a narrow 5–4 decision ultimately upheld the conviction of an individual who had purchased a gun on behalf of his uncle and checked a box on the purchasing form asserting that he was the buyer.[12] The majority and dissent disagreed on the proper interpretation of the terms of the statute, including whether or not

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Waste my Time Teaching the So-Called Rule of Lenity?, PRAWFSBLAWG (Mar. 22, 2011, 4:28 PM), http://prawfsblawg.blogs.com/prawfsblawg/2011/03/why-do-i-waste-my-time-teaching-the-so-called-rule-of-lenity.html.

[5] Zachary Price has argued that the rule of lenity is only used as part of "a grab-bag of techniques available to support ad hoc departures from literal readings in uncomfortable cases," and as "a supplemental justification for interpretations favored on other grounds" as opposed to more principled, traditional justifications. Zachary Price, *The Rule of Lenity As A Rule of Structure*, 72 FORDHAM L. REV. 885, 886 (2004). *But see The New Rule of Lenity*, 119 HARV. L. REV. 2420, 2434 (2006) (arguing that the rule of lenity is used consistently to prevent the criminalization of innocent conduct).

[6] *See* Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345, 395 (1994) (arguing that Lenity should be placed last among interpretive conventions or abolished altogether). Some states have also eliminated the rule of lenity altogether. *See* CAL. PENAL CODE § 4 (West 1988) ("The rule of the common law, that penal statutes are to be strictly construed, has no application to this Code. All its provisions are to be construed according to the fair import of their terms, with a view to effect its objects and to promote justice.").

[7] *See* Lawrence M. Solan, *Law, Language, and Lenity*, 40 WM. & MARY L. REV. 57, 108 (1998). Professor Lawrence Solan is a leading scholar on law and linguistics.

[8] *Id.*

[9] *See infra* Section II.

[10] *See infra* Section II.

[11] 134 S. Ct. 2259 (2014).

[12] *Id.* at 2265.

a straw buyer was the actual buyer of a firearm.[13] In affirming the conviction, the majority declined to apply the rule of lenity,[14] acknowledging that while "the text creates some ambiguity, the [statute's] context, structure, history, and purpose resolve it."[15] In doing so, the Court relied upon two highly-stringent and prosecution-friendly standards for determining whether sufficient ambiguity existed for the rule of lenity to apply.[16] The Court refused to apply the rule of lenity unless "there remains a grievous ambiguity or uncertainty in the statute" that cannot be resolved by considering its context, structure, history, and purpose.[17] Likewise, the court emphasized that lenity only applies if after this inquiry "the Court must simply guess as to what Congress intended."[18]

In contrast, Justice Scalia, writing for the four dissenting Justices, concluded that lenity should apply "when a criminal statute has two possible readings."[19] Absent "clear" and "definite" statutory language the dissent refused to "choose the harsher alternative."[20] Scalia used two lenity-promoting and defendant-friendly standards to conclude that the rule of lenity applied. First, lenity would apply if the "text, structure, and history" of the law did not make it "unambiguously correct" that the defendant's conduct was criminal.[21] Second, lenity would apply if, "after all legitimate tools of interpretation" have been applied, "a reasonable doubt persists."[22]

I have labeled these four standards as "unambiguously correct," "reasonable doubt," "no more than a guess," and "grievous ambiguity." The Supreme Court and lower courts have frequently cited all four standards in cases where application of the rule of lenity has been in question.[23] On its face it is apparent that application of these different standards for lenity could lead to widely divergent outcomes in the same case.[24] The two lenity-friendly standards are "more defendant-friendly than most of the other formulations"[25] because they

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[13] *Id.* at 2267, 2278.

[14] *Id.* at 2274.

[15] *Id.* at n.10.

[16] *Id.* at 2272.

[17] *Id.*

[18] *Id.*

[19] *Id.* at 2281 (Scalia, J., dissenting).

[20] *Id.* (Scalia, J., dissenting) (internal quotations omitted).

[21] *Id.*

[22] *Id.*

[23] Throughout this article, I consider the first two standards to be "lenity friendly," while other two are considered "stringent" or "prosecution friendly." The historical analysis in Part II reveals greater ambiguity and historical anomaly than this labeling suggests. Nevertheless, I believe that these labels are conceptually sound and I rely upon them for clarity.

[24] *See* discussion *infra* Section II for more detail on how different standards of lenity impact the level of ambiguity needed for the rule of lenity to apply.

[25] ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 299 (Thomson/West, 2012).

allow for lenity in cases where a pro-defendant interpretation of a statute is not the most likely interpretation, but still a possible, plausible, or reasonable one.[26] In other words, the defendant must merely show that his favored interpretation is consistent with the statute's text, purpose, or history.[27] The two more stringent standards for lenity, however, are far less likely to result in the application of lenity because they require a defendant to actively show that the government's preferred interpretation is either consistent with the defendant-friendly interpretation or grievously defective.[28]

These standards can be placed on a continuum of linguistic ambiguity. Applying lenity unless a criminal statute is unambiguous requires a low threshold of ambiguity.[29] In theory, the mere existence of ambiguity should suffice. Requiring a "reasonable doubt" to persist is somewhat more stringent because it requires the proposed interpretation in favor of lenity to be reasonable after the application of tools of interpretation.[30] A "reasonable doubt," however, need not be the most common or likely interpretation.[31] Thus, one would hypothesize that this standard would lead to pro-lenity results less frequently than the unambiguous standard, but more frequently than the other formulations.[32] The "no more than a guess" standard on the other hand requires that the interpretation in favor of lenity be equally plausible and that there are no clear indications to the contrary.[33] On the other extreme, requiring a "grievous ambiguity"

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[26] *See* discussion *infra* Section II.

[27] *See* discussion *infra* Section II.

[28] The "no more than a guess" standard is one common expression of the notion that lenity applies only to resolve a balance between possible statutory interpretations. *See* analysis *infra* Section II.C. There are several other formulations that are ultimately similar, such as the requirement that lenity applies only when "two proffered constructions . . . are plausible in roughly equal measure," or "are in equipoise." *See* Kawashima v. Holder, 132 S. Ct. 1166, 1177 (2012) (Ginsburg, J., dissenting); Johnson v. United States, 529 U.S. 694, 713 (2000). While each of these standards could be explored separately, for purposes of this paper they will be grouped under the "no more than a guess" standard. This choice is based on two considerations. First, "no more than a guess" is the formulation that continues to be invoked in recent Supreme Court cases such as *Abramski*. *See* discussion *infra* Section II.C; *see also* Abramski v. United States, 134 S. Ct. 2259 (2014). Second, the "no more than a guess" standard has a fascinating history which illustrates the evolution of less generous applications of the rule of lenity, which will be discussed in Section II.C in greater detail.

[29] *See* discussion *infra* Section II.A.

[30] *See* discussion *infra* Section II.B. This is the original understanding of this standard as well as the interpretation pursued by Justice Scalia in several dissents and in his book *Reading Law*. SCALIA & GARNER, *supra* note 25. As will be discussed in Section II.B, however, it has been applied in a far less deferential fashion and is, in practice, less pro-lenity than the "no more than a guess" standard.

[31] *See* discussion *infra* Section II.B.

[32] *See* discussion *infra* Section II.B.

[33] As will be discussed in Section II.C, this analysis is based on the current application of the standard, which, starting in 1995, led to a complete reversal of a standard that was once

suggests that the more punitive interpretation of the statute must itself be unreasonable, or that the ambiguity is so great that the more lenient interpretation is the court's only recourse.[34]

While many articles have considered the different approaches towards lenity in the courts, this article attempts to add empirical and analytical heft to the debate in two ways. First, this article will look to the various formulations invoked by the Supreme Court and lower courts when applying the rule of lenity and discuss how these standards are applied in practice.[35] By quantifying the outcome of the application of various standards, the assumptions made above regarding the standards will be affirmed or challenged.[36] For instance, this study will posit that both the "reasonable doubt" and the "no more than a guess" standards are in a state of flux: despite both originally starting as defendant-friendly standards, the "no more than a guess" standard is increasingly linked with the "grievous ambiguity" standard to reject lenity,[37] while the "reasonable doubt" standard is gradually becoming more lenity friendly as a result of Justice Scalia's strong advocacy.[38] Ultimately, Section II of the paper will confirm that the standard or degree of ambiguity required to trigger the rule of lenity will often be outcome-determinative.[39]

Second, this article will consider several Supreme Court decisions involving lexical ambiguity in which a majority adopted one standard of lenity, and the dissent adopted a different standard.[40] By applying Corpus Linguistics analysis, this article will attempt to quantify the degree of ambiguity that existed.[41] Doing so will allow for certain conclusions to be drawn regarding the application of lenity. For instance, this analysis helps illustrate that a majority of the Court does reverse the burden of proof and requires a defendant to actively discredit the government's interpretation, even in cases where the majority's interpretation is specious and inconsistent with common usage.[42]

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highly pro-lenity. Once, the "no more than a guess" language was used to oppose imposing harsher sentences in situations where the statute did not clearly intend to do so. Starting in 1995, this was inverted to state that lenity only applied in such circumstances. *See* discussion *infra* Section II.C.

[34] *See* Sarah Newland, *The Mercy of Scalia: Statutory Construction and the Rule of Lenity*, 29 HARV. C.R.-C.L. L. REV. 197, 212 (1994) ("The Court erred in setting such a high standard for considering lenity, a standard that fails adequately to address lenity's constitutional concerns with fair warning, arbitrary penalties and the balance between the courts and Congress."). *See also* discussion *infra* Section II.D.

[35] *See* discussion *infra* Section II.

[36] *See* discussion *infra* Section II.

[37] *See* discussion *infra* Section II.C.

[38] *See* discussion *infra* Section II B.

[39] *See* discussion *infra* Section II.

[40] *See* discussion *infra* Section III.

[41] *See* discussion *infra* Section III.A for an overview of Corpus Linguistics.

[42] *See* discussion *infra* Section IV.

II. STANDARDS OF LENITY AND LEXICAL AMBIGUITY

This part of the article will consider each of the four aforementioned standards of lenity in practice by describing the history and application of each standard by the Supreme Court, and then surveying lower court opinions that apply each of the standards to examine whether the courts ultimately applied the rule of lenity.[43]

A. *Unambiguously Correct Standard*

As hypothesized, this formulation of lenity is by far the most defendant-friendly formulation of lenity. The Supreme Court in *United States v. Granderson* applied this standard in an illustrative and informative way.[44] In *Granderson*, the Court considered whether a statute, which required resentencing of a defendant who violated parole to a term of at least one-third of the original sentence, referred to the sentencing guidelines for the offense or to the actual sentence that was imposed.[45] Because the defendant had been sentenced in excess of the sentencing guidelines, the prosecution argued that the statute required imposition of a period of incarceration of no less than one-third of the original sentence.[46] The defendant, on the other hand, argued that the statute required imposition of only one-third of the maximum sentence of incarceration that the sentencing guidelines would have proscribed.[47] The majority held that the prosecution's interpretation would create "linguistic anomalies" by requiring the court to apply different interpretations of the word "sentence" to the same clause, and create "startling disparities" in sentencing.[48] While acknowledging the prosecution's interpretation had some merit, the Court concluded it "cannot say with assurance" that the legislature intended the harsher outcomes.[49] Thus, the Court concluded that because the "text, structure, and history fail[ed] to establish the government's position is unambiguously correct," the rule of lenity applied in the defendant's favor.[50]

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[43] Although most of the cases cited are Circuit Court or Federal District Court cases, some state court cases are cited when the state court utilized one of the four tests. It is worth noting, however, that state approaches may vary and may be constrained by statute or state court decisions. For an overview of modern state practice, see Price, *supra* note 5, at 901–07.

[44] United States v. Granderson, 511 U.S. 39 (1994).

[45] *Id.* at 41.

[46] *Id.*

[47] *Id.*

[48] *Id.* at 47–48. The court was concerned that the state's proposed reading would lead to inconsistent application of the term "sentence" in the statute. *Id.* at 41 ("The law at issue provides that if a person serving a sentence of probation possesses illegal drugs, 'the court shall revoke the sentence of probation and sentence the defendant to not less than one-third of the original sentence.'").

[49] *Id.* at 53.

[50] *Id.* at 54.

In his dissent, Chief Justice Rehnquist criticized the majority for ignoring "the most natural meaning" of the words in question and creating an ambiguity where none existed.[51] Justice Rehnquist relied on the plain meaning of the words "original sentence" and argued that in ordinary usage "sentence" never refers to "a range of available punishment," as the majority's interpretation requires.[52] Thus, Justice Rehnquist concluded there was no "grievous ambiguity or uncertainty" as to the meaning of the statute.[53]

As *Granderson* illustrates, the unambiguously correct standard is highly defendant-friendly in several ways. First, the burden is clearly on the government to prove that its definition is correct and to resolve any "linguistic anomalies" that arise.[54] Second, the majority required "assurance" that the harsher outcomes were intended.[55] Thus, lenity applies when the state cannot conclusively resolve existing ambiguities and provide assurance, perhaps from statutory context or other tools of construction, that a harsher reading is proper.

This standard has been cited by the Supreme Court four times—three times in dissent and once by a majority: in each instance, it has been invoked in favor of lenity.[56]

When the rule of lenity applies, circuit and district courts have frequently invoked the unambiguously correct standard. For example, of the twenty-seven decisions that have quoted the "unambiguously correct" language, nineteen have ultimately concluded in favor of lenity (70%).[57] Two decisions were am-

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[51] *Id.* at 74 (Rehnquist, J., dissenting).

[52] *Id.* at 74–75.

[53] *Id.* at 70–71.

[54] *Id.* at 47.

[55] *Id.* at 53.

[56] *See* Abramski v. United States, 134 S. Ct. 2259, 2275 (2014) (Scalia, J., dissenting); Barber v. Thomas, 560 U.S. 474, 500 (2010) (Kennedy, J., dissenting); Muscarello v. United States, 524 U.S. 125 (1998) (Ginsburg, J., dissenting); United States v. Granderson, 511 U.S. 39 (1994).

[57] United States v. Kerr, 737 F.3d 33, 44 (4th Cir. 2013) (Davis, J., dissenting); United States v. Turner, 689 F.3d 1117, 1125 (9th Cir. 2012); United States v. Yepez, 704 F.3d 1087, 1103 (9th Cir. 2012); United States v. Holcomb, 657 F.3d 445 (7th Cir. 2011) (Williams, J., dissenting); King v. United States, 595 F.3d 844, 852 (8th Cir. 2010); United States v. Villanueva-Sotelo, 515 F.3d 1234, 1247 (D.C. Cir. 2008) (Henderson, J., dissenting); United States v. W., 393 F.3d 1302, 1315 (D.C. Cir. 2005); United States v. Cabaccang, 332 F.3d 622, 635 (9th Cir. 2003); United States v. Webb, 218 F.3d 877, 882 (8th Cir. 2000) (Morris, J., dissenting); United States v. Pacheco, 225 F.3d 148, 155 (2d Cir. 2000) (Straub, J., dissenting); United States v. Turpin, 65 F.3d 1207, 1215 (4th Cir. 1995) (Motz, J., dissenting); United States v. Rainey, 946 F. Supp. 2d 518, 537 (E.D. La. 2013); United States v. Dicristina, 886 F. Supp. 2d 164, 168 (E.D.N.Y. 2012) *rev'd*, 726 F.3d 92 (2d Cir. 2013); United States v. Walters, 225 F. Supp. 2d 684, 687 (E.D. Va. 2002) *aff'd*, 359 F.3d 340 (4th Cir. 2004); United States v. Davis, 234 F. Supp. 2d 601, 606 (E.D. Va. 2002); United States v. Wheeler, 44 F. Supp. 2d 1030, 1038 (D. Neb. 1999); United States v. Mango, 997 F.

biguous or not fully on point (7.4%).[58] Of the remaining six cases, one concerned an amended version of the statute that had been struck down in *Granderson*, which explained the invocation of the standard (3.7%),[59] and one was a decision by a court not yet ready to rule on whether ambiguity existed (3.7%).[60] Thus, there have only been four cases where a court has clearly applied the "unambiguously correct" standard and ultimately did not invoke lenity in the defendant's favor (14.8%).[61]

B. *Reasonable Doubt Standard*

The "reasonable doubt" standard is one of the oldest standards of lenity, having its roots in an 1850 decision by the Supreme Court that was strongly pro-lenity.[62] Surprisingly, however, courts applying this standard today nevertheless frequently conclude that the rule of lenity is inapplicable. Despite this, Justice Scalia has cited this standard frequently in recent years, and has strongly advocated for its adoption as a highly deferential and just standard of lenity.[63]

In *Harrison v. Vose*, the Supreme Court considered a requirement for ships to register at the point of arrival.[64] In interpreting "arrival" to refer solely to instances where a ship arrived to actually conduct business, the Court explained that "it is well settled, also, that all reasonable doubts concerning its meaning ought to operate in favor of the respondent," because doubtful phrases should not become "a drag-net for penalties."[65] Subsequently, in 1909, the Court explained that the plain meaning of the statute must be such that it "leave[s] no

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Supp. 264, 290 (N.D.N.Y. 1998) *rev'd*, 199 F.3d 85 (2d Cir. 1999); United States v. Fenton, 10 F. Supp. 2d 501, 505 (W.D. Pa. 1998).

[58] United States v. Gonzalez, 407 F.3d 118, 125 (2d Cir. 2005) (concerning efforts to get factual ambiguities resolved in the defendant's family); Dixon v. State, 673 A.2d 1220, 1224 (Del. 1996) (definition used to explain the rule, but the state has an anti-lenity provision).

[59] United States v. Byrd, 116 F.3d 770, 774 (5th Cir. 1997) (applying the same statute as in *Granderson* post-amendment).

[60] United States v. Gholson, No. 96–CR–553, 2003 WL 21466954 (N.D. Ill. June 25, 2003) (finding the Court not yet ready to decide on the existence of ambiguity).

[61] United States v. E-Gold, Ltd., 550 F. Supp. 2d 82, 100 (D.C. Cir. 2008); United States v. Hinckley, 550 F.3d 926, 948 (10th Cir. 2008) *abrogated by* Reynolds v. United States, 132 S. Ct. 975 (2012) (noting that the Supreme Court briefly invoked lenity as one possible rationale for reversing/abrogating); United States v. Carson, No. SACR–09–00077–JVS, 2011 WL 5101701 (C.D. Cal. May 18, 2011); Cuellar v. State, 70 S.W.3d 815, 826 (Tex. Crim. App. 2002) (Keasler, J., dissenting) (citing the unambiguously correct standard while rejecting the concurrences usage of the rule of lenity).

[62] Harrison v. Vose, 50 U.S. 372 (1850).

[63] SCALIA & GARNER, *supra* note 25, at 299.

[64] *Id.*

[65] *Id.* at 378 (quoting Justice Story).

room for a reasonable doubt upon the subject."[66] Each of these early invocations is highly pro-lenity, and seems to link the high burden of the rule of lenity with the high burden of proving guilt in a criminal trial beyond a reasonable doubt. Just as all reasonable doubts regarding questions of facts must be resolved in favor of the criminal defendant by the jury, all reasonable doubt regarding questions of law must likewise be resolved in favor of the criminal defendant.[67]

After these decisions, the Supreme Court did not invoke this standard for more than eighty years. In *Moskal v. United States*, the Court explained that lenity applied "only to those situations in which a reasonable doubt persists about a statute's intended scope even after resort to the language and structure, legislative history, and motivating policies of the statute."[68] The court then ultimately concluded that the statute they were interpreting was unambiguous.[69] The following year in *Chapman v. United States*, the Court again concluded that lenity did not apply because a "straightforward reading" did not "produce a result so absurd or glaringly unjust as to raise a reasonable doubt about Congress' intent."[70] Likewise, in *Granderson*, the dissent concluded that because no "reasonable doubt" existed, lenity was ultimately inappropriate.[71] This usage of the reasonable doubt standard is far less defendant-friendly than the original usage. In this modern formulation, the government's favored interpretation must produce "a result so absurd or glaringly unjust" in order for a reasonable doubt to remain.[72]

Scalia's dissent in *Moskal* harshly criticized the majority for rejecting lenity, arguing that the Court had used an "ill-defined general purpose" to "stretch the law to fit the evil."[73] Two years later, the majority determined in *United States v. R.L.C.* that no "reasonable doubt [persisted]" as to the meaning of a statute after consulting legislative history and other extra-textual sources.[74] Scalia, in a dissent joined by Justices Kennedy and Thomas, argued that the language of the statute was ambiguous enough that a "reasonable doubt remains."[75] Scalia contended that using legislative history to resolve reasonable doubt as to statutory meaning "disserves" the primary purpose of the rule of lenity, to require Congress to clearly proscribe criminal conduct, as well as give fair warning.[76]

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[66] United States v. Corbett, 215 U.S. 233 (1909) (ultimately concluding that the plain meaning left no reasonable doubt and deciding against lenity).

[67] SCALIA & GARNER, *supra* note 25, at 299.

[68] Moskal v. United States, 498 U.S. 103, 103 (1990).

[69] *Id.*

[70] Chapman v. United States, 500 U.S. 453, 463–64 (1991) (citation omitted).

[71] United States v. Granderson, 511 U.S. 39, 77 (1994) (Rehnquist, J., dissenting).

[72] *Chapman*, 500 U.S. at 463–464.

[73] *Moskal*, 498 U.S. at 132 (Scalia, J., dissenting).

[74] United States v. R.L.C., 503 U.S. 291, 293 (1992).

[75] *Id.* at 307 (Scalia, J., dissenting).

[76] *Id.* at 309.

Justice Scalia has labeled the reasonable doubt standard as "more defendant-friendly than most other formulations," as well as "more comprehensible than the others."[77] In Justice Scalia's *Abramski* dissent, this standard was prominently invoked in favor of lenity.[78] Scalia labeled the majority's application of lenity "miserly" and quoted the reasonable doubt standard from *Moskal*.[79] Scalia then interpreted the standard to mean that when "legitimate tools of interpretation . . . do not decisively dispel the statute's ambiguity," lenity must be invoked in favor of the defendant.[80] Scalia's dissent attempts to reclaim this standard and restore it to its historic roots as a deeply pro-lenity standard.

Scalia's use of the "reasonable doubt" standard differs from the majority predominantly because he is not willing to rely on extra-textual factors, such as legislative history.[81] By focusing on "legitimate tools of interpretation," Scalia focuses mostly on the application of textual canons of interpretation.[82] In contrast, others use the "reasonable doubt" standard in a more restrictive fashion by considering legislative history and legislative purpose before determining whether to apply the rule of lenity.[83] Because courts will often find that legislative purpose supports aggressive prosecution under a statute, courts using this approach rarely apply the rule of lenity.[84]

The harsh application of the "reasonable doubt" standard post-*Moskal* is reflected at both the appellate and trial court levels. For example, thirty-two (64%) of a sample of fifty cases[85] invoked this standard and ultimately refuse to apply lenity.[86] Moreover, only seventeen cases applied the rule of lenity under

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[77] SCALIA & GARNER, *supra* note 25, at 299.

[78] Abramski v. United States, 134 S. Ct. 2259, 2281 (2014) (Scalia, J., dissenting).

[79] *Id.* ("[C]ontrary to the majority's miserly approach, the rule of lenity applies whenever, after all legitimate tools of interpretation have been exhausted, 'a reasonable doubt persists' regarding whether Congress has made the defendant's conduct a federal crime . . .").

[80] *Id.*

[81] *Id.* (applying lenity after "all *legitimate tools* of interpretation have been exhausted") (emphasis added).

[82] Scalia's antipathy towards legislative history is well known. *See, e.g.*, SCALIA & GARNER, *supra* note 25, at 369–390.

[83] *See* Price, *supra* note 5, at 889 (arguing that the reasonable doubt standard as utilized by the court places lenity last in the hierarchy of interpretive tools).

[84] *Id.*

[85] This was by far the most frequently invoked standard with 2,830 results on Westlaw. Although several of those results would have likely been irrelevant, this sample was too extensive for reading through all of them. As such, I read a sample of 50 cases excluding Supreme Court cases sorted by relevance.

[86] Van Der Hule v. Holder, 759 F.3d 1043, 1050 (9th Cir. 2014); United States v. DiCristina, 726 F.3d 92, 105 (2d Cir. 2013); United States v. Jimenez, 507 F.3d 13, 22 (1st Cir. 2007); United States v. Curry, 404 F.3d 316, 320 (5th Cir. 2005); United States v. Jolibois, 294 F.3d 1110, 1113 (9th Cir. 2002); United States v. Gonzalez, 250 F.3d 923, 929 (5th Cir. 2001); United States v. Aguilar-Caballero, 233 F.3d 574 (5th Cir. 2000); United States v. Warren, 149 F.3d 825 (8th Cir. 1998); United States v. Devorkin, 159 F.3d 465, 469 (9th

this standard (34%).[87] Additionally, the majority and dissent in one case both applied the standard and reached different conclusions (2%).[88] It will be interesting to see if this standard is invoked more frequently in future pro-lenity decisions as a result of Justice Scalia's efforts.[89]

Cir. 1998); United States v. Brummels, 15 F.3d 769, 774 (8th Cir. 1994); United States v. Schneider, 14 F.3d 876, 881 (3d Cir. 1994); Gutierrez v. United States, No. ED-CV-08-770-PLA, 2010 WL 3446918, at *4 (C.D. Cal. Aug. 31, 2010); United States v. Rivera-Crespo, 543 F. Supp. 2d 436, 441 (E.D. Pa. 2008); United States v. Hill, 893 F. Supp. 1034, 1039 (N.D. Fla. 1994); People v. Bolter, 108 Cal. Rptr. 2d 760, 764 (Cal. Ct. App. 2001); State v. Lutters, 853 A.2d 434, 446 (Conn. 2004); State v. Courchesne, 816 A.2d 562, 574 (Conn. 2003); State v. Jason B., 729 A.2d 760, 769 (Conn. 1999); State v. Custer, 956 A.2d 604, 609 (Conn. 2008); State v. Clein, No. CR10230423, 1996 WL 686905, at *2 (Conn. Super. Ct. Nov. 19, 1996); State v. LaGrange, 279 P.3d 105, 109 (Kan. 2012); State v. Williams, 272 P.3d 1282, 1286 (Kan. 2012); State v. Chavez, 254 P.3d 539, 543 (Kan. 2011); *In re* Celler, No. A-2639-07T4, 2008 WL 5156449, at *2 (N.J. Super. Ct. App. Div. Dec. 10, 2008); State v. Hall, 294 P.3d 1235, 1239 (N.M. 2012); State v. Tafoya, 237 P.3d 693, 702 (N.M. 2010); State v. Johnson, 218 P.3d 863, 867 (N.M. 2009); State v. Davis, 74 P.3d 1064, 1070 (N.M. 2003); State v. Rowell, 908 P.2d 1379, 1384; (N.M. 1995); State v. Ogden, 880 P.2d 845, 857; (N.M. 1994); State v. Montoya, 104 P.3d 540, 546 (N.M. Ct. App. 2004); State v. Yparrea, 845 P.2d 1259, 1262 (N.M. Ct. App. 1992); State v. McGee, 864 P.2d 912 (Wash. 1993).

[87] United States v. Dicristina, 886 F. Supp. 2d 164, 224 (E.D.N.Y. 2012) *rev'd*, 726 F.3d 92 (2d Cir. 2013); State v. Coman, 273 P.3d 701, 709 (Kan. 2012) ("The majority appears to suggest that if its interpretation of the statute is reasonable and sensible, then it can ignore the rule of lenity, even if the accused's statutory interpretation is also reasonable and sensible. That application of the rule directly contradicts the whole concept of lenity, and we unequivocally reject it. If, as here, there are two reasonable and sensible interpretations of a criminal statute, the rule of lenity requires the court to interpret its meaning in favor of the accused."); United States v. Orellana, 405 F.3d 360, 371 (5th Cir. 2005); United States v. Reedy, 304 F.3d 358, 368 (5th Cir. 2002); United States v. Herrera, 289 F.3d 311, 323 (5th Cir. 2002); United States v. Dauray, 215 F.3d 257, 264 (2d Cir. 2000); United States v. LeCoe, 936 F.2d 398, 405 (9th Cir. 1991); United States v. Brown, No. S1-07-CR-109 (PKC), 2008 WL 2775762, at *2 (S.D.N.Y. July 14, 2008); United States v. Racing Servs., Inc., No. CRIM. C3-03-112, 2004 WL 3245932, at *3 (D.N.D. Dec. 2, 2004); United States v. Fermin, No. 91-CR-634 (LJF), 1993 WL 258677, at *3 (S.D.N.Y. July 2, 1993); People v. Coelho, 107 Cal. Rptr. 2d 729, 748 (Cal. Ct. App. 2001); State v. Sostre, 802 A.2d 754, 772 (Conn. 2002); State v. Horn, 206 P.3d 526, 528 (Kan. 2009); State v. Braun, 273 P.3d 801, 803 (Kan. Ct. App. 2012); State v. Driskell, 276 P.3d 838 (Kan. Ct. App. 2012); State v. Olsson, 324 P.3d 1230, 1242 (N.M. 2014) (Chavez, J., dissenting); State v. Anaya, 933 P.2d 223, 233 (N.M. 1996).

[88] Cuellar v. State, 70 S.W.3d 815, 839 (Tex. Crim. App. 2002) ("Fair doubt").

[89] As of 2014, Lenity cases since *Abramski* do not evidence any significant change in the use of this standard, but the data set is relatively small. Of the eleven cases that mention the reasonable doubt standard since *Abramski*, only three have applied lenity (27%), while eight have been opposed (73%). However, only two of those decisions were by circuit courts, and none of the decisions have cited Scalia's dissent in *Abramski*.

C. *"No More than a Guess" Standard*

The "no more than a guess" standard also has an intriguing history. As with the reasonable doubt standard, over time this standard has transformed from a pro-lenity standard to one highly antithetical to lenity. It first developed in *Ladner v. United States*, a case which involved the question of whether an individual who shot at two federal officers with a single shotgun discharge could be held guilty of two assaults or one.[90] The Supreme Court found both the statutory language and the surrounding legislative history to be highly ambiguous.[91] The Court therefore held that in such a situation lenity would apply because "the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended."[92] Thus, this standard was initially invoked in a pro-defendant context to suggest that harsher penalties would not be imposed without clear congressional guidance.

Indeed, for more than thirty years, this standard was almost always invoked by members of the Supreme Court in favor of lenity.[93] These cases typically concerned questions of sentencing, such as *Ladner*, rather than questions of whether conduct was criminal in the first place.[94] Interestingly, due to the no more than a guess standard's reference to what Congress intended, this standard

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For

United States v. Miller, 767 F.3d 585, 592 (6th Cir. 2014) (not explicitly using the language, but invoking lenity as a result of the beyond a reasonable doubt requirement of criminal law); *In re* M.G., 176 Cal. Rptr. 3d 459, 466 (Cal. Ct. App. 2014); State v. Morningstar, 329 P.3d 1093, 1101 (Kan. 2014).

Against

Van Der Hule v. Holder, 759 F.3d 1043, 1050 (9th Cir. 2014); People v. Brown, No. E059809, 2014 WL 4843672, at *7 (Cal. Ct. App. Sept. 30, 2014); United States v. Becker, No. 09–CR–77–GKF, 2014 WL 4656489, at *4 (N.D. Okla. Sept. 17, 2014); United States v. Faiella, No. 14–CR–243, 2014 WL 4100897, at *2 (S.D.N.Y. Aug. 19, 2014); State v. Jamison, 99 A.3d 1273 (Conn. App. Ct. 2014); State v. Nankervis, 761 S.E.2d 1, 4 (Ga. 2014); State v. Simmons, 329 P.3d 523, 533 (Kan. Ct. App. 2014); State v. Hulsey, 333 P.3d 204 (Kan. Ct. App. 2014).

[90] Ladner v. United States, 358 U.S. 169, 177 (1958).

[91] *Id.* at 177–78.

[92] *Id.*

[93] United States v. Granderson, 511 U.S. 39, 42 (1994); Custis v. United States, 511 U.S. 485, 510 (1994) (Souter, J., dissenting); United States v. Yermian, 468 U.S. 63, 76 (1984) (Rehnquist, J., dissenting); Whalen v. United States, 445 U.S. 684, 684 (1980); Bifulco v. United States, 447 U.S. 381 (1980); Simpson v. United States, 435 U.S. 6, 15 (1978); Callanan v. United States, 364 U.S. 587, 602 (1961).

[94] *See Granderson*, 511 U.S. at 42; *Custis*, 511 U.S. at 510 (Souter, J., dissenting). *But see Yermian*, 468 U.S. at 63 (determining whether actual knowledge was an element of a crime); *Whalen*, 445 U.S. at 684; *Bifulco*, 447 U.S. at 381; *Simpson*, 435 U.S. at 15; *Callanan*, 364 U.S. at 602.

has usually been invoked in cases that heavily depend on legislative history.[95] In at least one instance, however, Justice Rehnquist invoked this standard to critique the use of legislative history to interpret criminal statutes.[96] But only one Supreme Court case before 1995 rejected the application of lenity after invoking the "no more than a guess" standard due to the statute's ambiguity.[97]

Beginning with *Reno v. Koray* in 1995, the "no more than a guess" standard took a decidedly pro-prosecution direction that ran contrary to its original usage.[98] *Reno* involved a dispute over whether time spent at a community treatment facility qualified as "official detention" and therefore should be credited towards a prisoner's sentence.[99] Chief Justice Rehnquist looked at the context, history, and plain meaning of the term "official detention."[100] While conceding that "read in isolation" the defendant's interpretation of the statute was a "plausible interpretation," Rehnquist concluded that it was "not the only plausible interpretation" and that "in light of the foregoing textual and historical analysis, the initial plausibility of respondent's reading simply does not carry the day."[101] Responding to arguments in favor of invoking the rule of lenity, Rehnquist argued that the rule "applies only if, after seizing everything from which aid can be derived . . . we can make no more than a guess as to what Congress intended."[102]

Under Rehnquist's invocation of the test, the defendant seeking lenity had the burden to show that the Court could do no more than guess at what Congress intended. This was an inversion of how the formulation had previously been used, because it originally placed the burden on the government to show that its favored harsher interpretation was more than an effort to guess at congressional intent.

Since *Reno*, Justice Rehnquist's implementation of the standard has predominated. For example, a couple years later in *United States v. Wells*, the Court considered whether materiality of falsehood was an element of a statute prohibiting making false statements to a bank.[103] The majority briefly mentions and then rejects the rule of lenity because the statute "reveals no ambiguity" and because "this is not a case of guesswork reaching out for lenity."[104] The following year in *Muscarello v. United States*, which will be extensively dis-

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[95] *See* cases cited *supra* note 86.

[96] *Yermian*, 468 U.S. at 76–77 ("I believe that the language and legislative history of § 1001 can provide "no more than a guess as to what Congress intended."); *Ladner*, 358 U.S. at 178.

[97] *See* Albernaz v. United States, 450 U.S. 333, 342 (1981).

[98] Reno v. Koray, 515 U.S. 50, 50–51 (1995).

[99] *Id.*

[100] *Id.*

[101] *Id.* at 662.

[102] *Id.* at 65.

[103] United States v. Wells, 519 U.S. 482 (1997).

[104] *Id.* at 499.

cussed in Section III.D, the majority acknowledged "the existence of some statutory ambiguity," but rejected lenity.[105] In doing so, it invoked and merged the "no more than a guess" standard and the "grievously ambiguous" standard, stating, "[c]ertainly, our decision today is based on much more than a guess as to what Congress intended," and there is no "grievous ambiguity here"[106] Since then, in several opinions rejecting the rule of lenity, the Court has invoked the "no more than a guess" standard and linked it to the "grievously ambiguous" standard.[107] Of course, the original usage of this standard has not completely dissipated, but since *Muscarello* it has only been invoked in favor of lenity in dissent.[108]

A diachronic[109] search on Westlaw reveals how the usage of this standard altered in the aftermath of *Reno* and *Muscarello*. Specifically, before *Reno*, this standard was invoked in favor of lenity in in almost two-thirds of the cases citing it.[110] In contrast, every single case to invoke this standard in 2014 was

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[105] Muscarello v. United States, 524 U.S. 125, 138 (1998).

[106] *Id.* at 139 (1998). *See* Barber v. Thomas, 560 U.S. 474, 488 (2010) (Souter, J., dissenting) (citing *Muscarello*, 524 U.S. at 139).

[107] United States v. Castleman, 134 S. Ct. 1405, 1416 (2014); Abramski v. United States, 134 S. Ct. 2259, 2272 (2014); Maracich v. Spears, 133 S. Ct. 2191, 2209 (2013); DePierre v. United States, 131 S. Ct. 2225, 2237 (2011).

[108] United States v. Rodriquez, 553 U.S. 377, 405 (2008) (Souter J., dissenting); Holloway v. United States, 526 U.S. 1, 12 (1999) (Scalia, J., dissenting).

[109] Diachronic means analysis of language over time in its historical development. *See e.g.* http://www.merriam-webster.com/dictionary/diachronic.

[110] Of seventy-eight cases, fifty cited the standard in favor of lenity while twenty-six cited it and ultimately concluded that lenity was inappropriate. Two cases were in circumstances removed from the traditional lenity application (decisions of sentencing commissions, or the question of which conviction to nullify).

For Lenity

United States v. Lazaro-Guadarrama, 71 F.3d 1419, 1421 (8th Cir. 1995); United States v. Penn, 17 F.3d 70, 74 (4th Cir. 1994); United States v. Brame, 997 F.2d 1426, 1428 (11th Cir. 1993); United States v. Alese, 6 F.3d 85, 87 (2d Cir. 1993); United States v. Oppedahl, 998 F.2d 584, 586 (8th Cir. 1993); United States v. Diaz, 989 F.2d 391, 393 (10th Cir. 1993); United States v. Rivera, 996 F.2d 993, 1002 (9th Cir. 1993); United States v. Latimer, 991 F.2d 1509, 1514 (9th Cir. 1993); United States v. Hooker, 834 F. Supp. 465, 469 (D.C. Cir. 1993); United States v. Clay, 982 F.2d 959, 965 (6th Cir. 1993); United States v. Romano, 970 F.2d 164, 167 (6th Cir. 1992); United States v. Koehler, 973 F.2d 132, 135 (2d Cir. 1992); United States v. Granderson, 969 F.2d 980, 985 (11th Cir. 1992); United States v. Abreu, 962 F.2d 1447, 1453 (10th Cir. 1992); United States v. Chapman, 932 F.2d 964 (4th Cir. 1991); United States v. LeCoe, 936 F.2d 398, 405 (9th Cir. 1991); United States v. Guion, 914 F.2d 249 (4th Cir. 1990); United States v. Werlinger, 894 F.2d 1015, 1018 (8th Cir. 1990); United States v. Winchester, 916 F.2d 601, 607 (11th Cir. 1990); United States v. Badillo, 909 F.2d 849, 850 (5th Cir. 1990); United States v. R.L.C., 915 F.2d 320, 325 (8th Cir. 1990) *aff'd*, 503 U.S. 291 (1992); United States v. Headspeth, 852 F.2d 753, 759 (4th Cir. 1988); United States v. Sink, 851 F.2d 1120, 1124 (8th Cir. 1988); United States v. Taylor, 716 F.2d 701, 712 (9th Cir. 1983); United States v. Reed, 647 F.2d 678, 690 (6th Cir.

ultimately decided against lenity.[111] 2014 seems to be a bit anomalous however.

1981); United States v. Davis, 656 F.2d 153, 158 (5th Cir. 1981); United States v. Leek, 665 F.2d 383, 390 (D.C. Cir. 1981); United States v. Rodriguez, 612 F.2d 906, 927 (5th Cir. 1980) (Rubin, J., dissenting); United States v. Gomez, 593 F.2d 210, 214 (3d Cir. 1979); United States v. Girst, 636 F.2d 316, 321 (D.C. Cir 1979); United States v. Howard, 449 F.2d 1086, 1095 (D.C. Cir. 1971) (MacKinnon, J., concurring); United States v. Abbadessa, 848 F. Supp. 369, 379 (E.D.N.Y. 1994); United States v. Johnson, 826 F. Supp. 439, 441 (S.D. Fla. 1993); United States v. Cordoba-Hincapie, 825 F. Supp. 485, 518 (E.D.N.Y. 1993); United States v. Percival, 727 F. Supp. 1015, 1019 (E.D. Va. 1990) aff'd, 932 F.2d 964 (4th Cir. 1991) *and aff'd sub nom*; United States v. Housley, 718 F. Supp. 1486, 1490 (D. Nev. 1989); United States v. Computer Sciences Corp., 511 F. Supp. 1125, 1135 (E.D. Va. 1981) rev'd, 689 F.2d 1181 (4th Cir. 1982); United States v. Figueredo, 350 F. Supp. 1031, 1036 (M.D. Fla. 1972); United States v. Greenberg, 334 F. Supp. 1092, 1095 (N.D. Ohio 1971); Whitton v. State, 479 P.2d 302, 307 (Alaska 1970); People v. Paino, 484 N.E.2d 1106, 1120 (Ill. App. Ct. 1985); Carawan v. State, 515 So. 2d 161, 170 (Fla. 1987); Wheeler v. State, 549 So. 2d 687, 691 (Fla. Dist. Ct. App. 1989); DeLeon v. State, 648 A.2d 1053, 1063 (Md. 1994); People v. Wakeford, 341 N.W.2d 68, 87 (Mich. 1983); People v. Sawyer, 302 N.W.2d 534, 535 (Mich. 1981); People v. Wilder, 308 N.W.2d 112, 127 (Mich. 1981) (Ryan, J., concurring); Mayfield v. State, 612 So. 2d 1120, 1128 (Miss. 1992); *In re* Sietz, 880 P.2d 34, 38 (Wash. 1994); State v. Farmer, 669 P.2d 1240, 1243 (Wash. 1983) (Roselini, J., dissenting); State v. Harper, 291 N.W.2d 660 (Wis. Ct. App. 1980).

Against Lenity

United States v. Sowels, 998 F.2d 249, 252 (5th Cir. 1993); United States v. Harrison, 815 F. Supp. 494, 499 (D.C. Cir. 1993); United States v. Bland, 961 F.2d 123, 128 (9th Cir. 1992); United States v. Cambra, 933 F.2d 752, 756 (9th Cir. 1991); United States v. Contreras, 950 F.2d 232, 243 (5th Cir. 1991); United States v. Smith, 947 F.2d 952 (9th Cir. 1991); United States v. Collar, 904 F.2d 441, 443 (8th Cir. 1990); United States v. Camacho-Dominguez, 905 F.2d 82, 84 (5th Cir. 1990); United States v. Ferryman, 897 F.2d 584, 591 (1st Cir. 1990); United States v. Restrepo, 883 F.2d 781, 787 (9th Cir. 1989) (Boochever, J., dissenting); United States v. Blannon, 836 F.2d 843, 845 (4th Cir. 1988); Vladovic v. Wash. State Penitentiary, 865 F.2d 266 (9th Cir. 1988); United States v. Jackson, 805 F.2d 457, 465 (2d Cir. 1986); United States v. Ferguson, 758 F.2d 843, 852 (2d Cir. 1985); Tarrant v. Ponte, 751 F.2d 459, 466 (1st Cir. 1985); United States v. Coachman, 727 F.2d 1293, 1302 (D.C. Cir. 1984); United States v. Everett, 700 F.2d 900, 909 (3d Cir. 1983); United States v. Anderez, 661 F.2d 404, 408 (5th Cir. 1981); Dobbs v. Neverson, 393 A.2d 147, 154 (D.C. Cir. 1978); United States v. Ford, 844 F. Supp. 1092, 1096 (D. Md. 1994); United States v. Conley, 833 F. Supp. 1121, 1157 (W.D. Pa. 1993) *vac'd*, 37 F.3d 970 (3d Cir. 1994); United States v. Ramirez, 737 F. Supp. 980, 983 (N.D. Tex. 1990); United States v. Sanders, 705 F. Supp. 396, 400 (N.D. Ill. 1988); United States v. Baker, 14 M.J. 361, 371 (C.M.A. 1983) (Cook, J., dissenting); State v. Williams, No. C–800818, 1981 WL 10068 (Ohio Ct. App. Oct. 21, 1981); Whack v. State, 416 A.2d 265, 269 (Md. 1980); Dumas v. State, 280 N.W.2d 310, 313 (Wis. Ct. App. 1979).

Other

United States v. Wolfe, 23 F.3d 404 (4th Cir. 1994) (Not applying lenity to actions of sentencing commission); State v. Chicano, 584 A.2d 425, 436 (Conn. 1990) (refusing to apply lenity over a question of which conviction should be nullified).

[111] As of the end of November 2014. United States v. Salahuddin, 765 F.3d 329, 340 (3d

A sample of fifty cases employing this standard since *Reno* revealed that twenty-eight cases (or around 56%) invoked it against lenity and seventeen cases (or around 34%) invoked it in favor of lenity.[112] There were also five cases in the sample where the majority and dissent disagreed as to whether the standard was

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Cir. 2014); Donnell v. United States, 765 F.3d 817, 820 (8th Cir. 2014); United States v. Rainey, 757 F.3d 234, 246 (5th Cir. 2014); United States v. Pritchett, 749 F.3d 417, 427 (6th Cir. 2014); United States v. Nash, 558 F. App'x 599, 605 (6th Cir. 2014); United States v. Cruz, 558 F. App'x 264, 267 (3d Cir. 2014); *In re* Deepwater Horizon, No. 12–30883, 2014 WL 5801350, at *6 (5th Cir. Nov. 5, 2014); Binderup v. Holder, No. 13–CV–06750, 2014 WL 4764424, at *10 (E.D. Pa. Sept. 25, 2014); Alexis v. State, 87 A.3d 1243, 1259 (Md. 2014); State v. Chambers, 437 S.W.3d 816, 820 (Mont. Ct. App. 2014).

[112] *For Lenity*

United States v. Washington, 714 F.3d 962, 971 (6th Cir. 2013); United States v. Kerr, 737 F.3d 33, 45 (4th Cir. 2013) (Davis, J., dissenting); United States v. Galaviz, 645 F.3d 347, 364 (6th Cir. 2011); United States v. Ehle, 640 F.3d 689, 698 (6th Cir. 2011); United States v. Concha, 233 F.3d 1249, 1256 (10th Cir. 2000); United States v. Vig, 167 F.3d 443, 451 (8th Cir. 1999) (Morris, J., dissenting); United States v. Sicurella, 3 F. Supp. 2d 330, 336 (W.D.N.Y.) *rev'd*, 157 F.3d 177 (2d Cir. 1998); United States v. Gardner, 534 F. Supp. 2d 655, 662 (W.D. Va. 2008); United States v. Hammons, 438 F. Supp. 2d 125, 131 (E.D.N.Y. 2006); Settembrino v. United States, 125 F. Supp. 2d 511, 516 (S.D. Fla. 2000); State v. Vellina, 106 P.3d 364, 369 (Haw. 2005); Gloria H., 979 A.2d 710, 721 (Md. 2009); Harris v. State, 899 A.2d 934, 938 (Md. 2006); Moore v. State, 878 A.2d 678, 687 (Md. 2005); Cantine v. State, 864 A.2d 226, 239 (Md. 2004); State v. Rodgers, 396 S.W.3d 398, 403 (Mo. Ct. App. 2013); Fainter v. State, 174 S.W.3d 718, 721 (Mo. Ct. App. 2005); State v. Duffey, 981 P.2d 1, 6 (Wash. 1999).

Against Lenity

Donnell v. United States, 765 F.3d 817, 820 (8th Cir. 2014); United States v. Walker, 720 F.3d 705, 708 (8th Cir. 2013); United States v. Martinez-Gonzalez, 663 F.3d 1305, 1309 (11th Cir. 2011); United States v. Snapp, 423 F. App'x 706, 708 (9th Cir. 2011); United States v. Lawrence, 555 F.3d 254, 260 (6th Cir. 2009); United States v. Doe, 564 F.3d 305, 315 (3d Cir. 2009); United States v. Smith, 549 F.3d 355, 363 (6th Cir. 2008); United States v. Hubbard, 480 F.3d 341, 350 (5th Cir. 2007); United States v. Kay, 513 F.3d 432, 445 (5th Cir. 2007); United States v. Jahagirdar, 466 F.3d 149, 154 (1st Cir. 2006); Perez-Olivo v. Chavez, 394 F.3d 45, 53 (1st Cir. 2005); United States v. Sanchez, 389 F.3d 271, 275 (1st Cir. 2004) ("While the language . . . is less than crystal clear, it is not so unclear that resort to the rule of lenity should follow."); United States v. Speakman, 330 F.3d 1080, 1083 (8th Cir. 2003); United States v. Bert, 292 F.3d 649, 654 (9th Cir. 2002); United States v. Boucha, 236 F.3d 768, 774 (6th Cir. 2001); Warren v. Crabtree, 185 F.3d 1018, 1023 (9th Cir. 1999); United States v. Graham, 169 F.3d 787, 790 (3d Cir. 1999); United States v. Iverson, 162 F.3d 1015, 1025 (9th Cir. 1998); United States v. Warren, 149 F.3d 825, 828 (8th Cir. 1998); United States v. Lawson, 618 F. Supp. 2d 1251, 1262 (E.D. Wash. 2009); State v. Haugen, 85 P.3d 178, 184 (Haw. 2004); Nelson v. State, 975 A.2d 298, 311 (Md. 2009); Alston v. State, 858 A.2d 1100, 1111 (Md. 2004); Holbrook v. State, 772 A.2d 1240, 1251 (Md. 2001); Melgar v. State, 734 A.2d 712, 717 (Md. 1999); State v. Chambers, 437 S.W.3d 816, 820 (Mo. Ct. App. 2014); State v. Loughridge, 395 S.W.3d 605, 609 (Mo. Ct. App. 2013); State v. Ondo, 232 S.W.3d 622, 628 (Mo. Ct. App. 2007).

met.[113] Thus, the transformation of the "no more than a guess" standard into a prosecution friendly standard has been very successful.

D. *Grievous Ambiguity Standard*

As expected, the "grievous ambiguity" standard leads to the most stringent application of the rule of lenity. In *Huddleston v. United States,* Justice Blackmun first employed the "grievous ambiguity" standard.[114] *Huddleston* involved the conviction of an individual for making a false statement regarding a prior conviction while redeeming guns that he had sold to a pawnshop.[115] The statute punished any individual who makes false statements in the "acquisition" of a firearm, and the ambiguity concerned whether that encompassed buying back a firearm that one had previously owned.[116] Relying primarily on legislative history, the Court rejected the defendant's argument that pawnshop redemption should be excluded due to the ambiguity of the statute.[117] The Court emphasized that the rule of lenity should not be used to "destroy the spirit and force of the law which the legislature intended to [and did] enact."[118] Specifically, the Court reasoned that because there was "no grievous ambiguity or uncertainty in the language and structure of the Act," lenity should not apply.[119] The Court also emphasized that lenity was unnecessary because fair notice had been given on the gun acquisition form.[120]

It is clear that the *Huddleston* Court was concerned with efforts to apply the rule of lenity to undermine congressional purpose and weaken statutes.[121] Thus, in order to cover conduct that the court assumes Congress intended to cover, textual ambiguity is swept aside.[122] In contrast, Justice Douglas' dissent, argues that it is "odd to think" that a person redeeming his own gun could be said to be "acquiring" the weapon, and therefore that lenity should apply.[123]

Of the eleven Supreme Court cases citing the "grievous ambiguity" standard, not a single case was ultimately decided in favor of lenity.[124] The picture is

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[113] *Other*

United v. Burke, 694 F.3d 1062, 1065 (9th Cir. 2012); United States v. Dauray, 215 F.3d 257, 265 (2d Cir. 2000); United States v. Inthavong, 48 M.J. 628 (A. Ct. Crim. App. 1998); Stanley v. State, 851 A.2d 612 (Md. 2004); State v. Liberty, 370 S.W.3d 537, 555 (Mo. 2012) (Russell, J., concurring in part and dissenting in part).

[114] Huddleston v. United States, 415 U.S. 814, 831 (1974).

[115] *Id.* at 832.

[116] *Id.*

[117] *Id.* at 824.

[118] *Id.* at 832.

[119] *Id.*

[120] *Id.*

[121] *Id.*

[122] *Id.*

[123] *Id.* at 833 (Douglas, J., dissenting).

[124] Abramski v. United States, 134 S. Ct. 2259 (2014); Robers v. United States, 134 S.

similarly stark at the circuit court and trial court level. Although there are sixty-nine circuit court cases that invoke the "grievous ambiguity" standard in order to reject lenity,[125] only ten ultimately conclude that an ambiguity was suffi-

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Ct. 1854, 1859 (2014); United States v. Castleman, 134 S. Ct. 1405, 1416 (2014); Maracich v. Spears, 133 S. Ct. 2191, 2209 (2013); Barber v. Thomas, 560 U.S. 474 (2010); Dean v. United States, 556 U.S. 568, 577 (2009); Muscarello v. United States, 524 U.S. 125, 138–39 (1998); Staples v. United States, 511 U.S. 600, 619 (1994) (rejecting the application of the rule of lenity but still ultimately ruling against the defendant as a matter of statutory construction); United States v. Granderson, 511 U.S. 39, 70 (1994) (Rehnquist, J., dissenting); Chapman v. United States, 500 U.S. 453, 463 (1991); Huddleston v. United States, 415 U.S. 814, 831 (1974).

[125] United States v. Rainey, 757 F.3d 234, 246 (5th Cir. 2014) (using the "grievous ambiguity" standard but also invoking the "unambiguously correct" language); United States v. Smith, 756 F.3d 1070, 1075 (8th Cir. 2014); United States v. Gonzalez-Medina, 757 F.3d 425, 432 (5th Cir. 2014); United States v. Bishop, 740 F.3d 927, 934 (4th Cir. 2014); United States v. Wright, 562 F. App'x 885, 888 (11th Cir. 2014); United States v. Morgan, 572 F. App'x 292, 301 (6th Cir. 2014); United States v. Bridges, 741 F.3d 464, 470 (4th Cir. 2014); Donnell v. United States, 765 F.3d 817, 820 (8th Cir. 2014); Kporlor v. Attorney Gen. of U.S., 529 F. App'x 173, 176 (3d Cir. 2013); United States v. Adams, 716 F.3d 1066, 1072 (8th Cir. 2013); Soto-Hernandez v. Holder, 729 F.3d 1, 6 (1st Cir. 2013); United States v. Edelman, 726 F.3d 305, 310 (2d Cir. 2013); United States v. Ford, 479 F. App'x 221, 222 (11th Cir. 2012); United States v. Burwell, 690 F.3d 500 (D.C. Cir. 2012); Lawson v. FMR LLC, 670 F.3d 61, 76 (1st Cir. 2012); United States v. Pruett, 681 F.3d 232, 240 (5th Cir. 2012); Edwards v. Dewalt, 681 F.3d 780, 787 (6th Cir. 2012); United States v. Hill, 487 F. App'x 518 (11th Cir. 2012); United States v. Block, 635 F.3d 721, 724 (5th Cir. 2011); United States v. Booker, 644 F.3d 12, 21 (1st Cir. 2011); United States v. Maciel-Alcala, 612 F.3d 1092, 1102 (9th Cir. 2010); United States v. Maciel-Alcala, 598 F.3d 1239, 1248 (9th Cir. 2010); United States v. Millis, 621 F.3d 914 (9th Cir. 2010) (majority applied lenity, and dissent rejected it on the basis of the grievous ambiguity language); Gollehon v. Mahoney, 626 F.3d 1019, 1027 (9th Cir. 2010) ("We cannot say, after 'seizing every thing from which aid can be derived,' that there remains any ambiguity, let alone grievous ambiguity, as to the penalties applicable to aiders and abettors in Montana."); United States v. Gallenardo, 579 F.3d 1076, 1087 (9th Cir. 2009); Carachuri-Rosendo v. Holder, 570 F.3d 263, 268 (5th Cir. 2009); United States v. Bendtzen, 542 F.3d 722, 727 (9th Cir. 2008); United States v. Maupin, 520 F.3d 1304, 1304 (11th Cir. 2008); United States v. Herrera-Martinez, 525 F.3d 60 (1st Cir. 2008); United States v. Nader, 542 F.3d 713 (9th Cir. 2008); United States v. Cullen, 499 F.3d 157, 164 (2d Cir. 2007); United States v. Councilman, 418 F.3d 67, 83 (1st Cir. 2005) ("Here, while the statute contains some textual ambiguity, it is not 'grievous.'"); United States v. Clawson, 408 F.3d 556, 559 (8th Cir. 2005); United States v. Kirchoff, 387 F.3d 748, 752 (8th Cir. 2004); United States v. Speakman, 330 F.3d 1080, 1083 (8th Cir. 2003); United States v. Plotts, 347 F.3d 873, 876 (10th Cir. 2003); United States v. Jeppeson, 333 F.3d 1180, 1182 (10th Cir. 2003); United States v. Morris, 43 F. App'x 150, 157 (9th Cir. 2002); United States v. Thompson, 281 F.3d 1088, 1092 (10th Cir. 2002) ("While the dissent and the Defendants have come up with another interpretation, we think we have found a reasonable interpretation."); United States v. Harris, 313 F.3d 1228, 1240 (10th Cir. 2002); United States v. Gay, 240 F.3d 1222, 1224 (10th Cir. 2001); United States v. Onheiber, 173 F.3d 1254, 1257 (10th Cir. 1999); United States v. Vig, 167 F.3d 443 (8th Cir.

ciently unclear to justify the application of lenity.[126] Thus, seventy of the eighty cases using the "grievous ambiguity" standard (87%) were ultimately resolved against lenity.

Specific language from a few of these circuit court decisions further illustrates how unlikely application of the rule of lenity is when the Court searches for a "grievous ambiguity." For example, the Ninth Circuit concluded that while an interpretation of a statute proffered by the defendant was "plausible," the statute was "not grievously ambiguous" and thus chose the less lenient in-

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1999); United States v. Warren, 149 F.3d 825, 828 (8th Cir. 1998); United States v. Ehsan, 163 F.3d 855, 857 (4th Cir. 1998); United States v. Devorkin, 159 F.3d 465, 469 (9th Cir. 1998) ("While Devorkin's interpretation of the statute is plausible, § 373 is not grievously ambiguous"); United States v. Kahoe, 134 F.3d 1230, 1234 (4th Cir. 1998); Modern Muzzleloading, Inc. v. Magaw, 18 F. Supp. 2d 29, 33 (D.C. Cir. 1998); United States v. Wildes, 120 F.3d 468 (4th Cir. 1997); United States v. Trapilo, 130 F.3d 547, 548 (2d Cir. 1997); United States v. Workinger, 90 F.3d 1409, 1419 (9th Cir. 1996) ("That test isn't met here. Although Workinger's interpretation can't be rejected out of hand, it's not as persuasive as the alternative.") (Kozinski J., concurring); United States v. Basinger, 60 F.3d 1400, 1410 (9th Cir. 1995); United States v. Hands, 41 F.3d 1511 (7th Cir. 1994); United States v. Mitchell, 39 F.3d 465 (4th Cir. 1994); United States v. Wilson, 10 F.3d 734, 736 (10th Cir. 1993); Binderup v. Holder, No. 13–CV–06750, 2014 WL 4764424 (E.D. Pa. Sept. 25, 2014); United States v. Hossain, No. 2:13–CR–00119–GMN–GWF, 2014 WL 4354121 (D. Nev. June 23, 2014); United States v. Goad, No. 14–CR–28–LRR, 2014 WL 1669980 (N.D. Iowa Apr. 28, 2014); United States v. Hsieh, Crim. No. 11–00082, 2013 WL 1499520 (D. Guam Apr. 12, 2013); United States v. Castro, Crim. No. 12–00018, 2013 WL 829046 (D. Guam Feb. 28, 2013); United States v. Shill, No. 3:10-CR–493–BR, 2012 WL 529964 (D. Or. Feb. 17, 2012) *aff'd*, 740 F.3d 1347 (9th Cir. 2014); United States v. Atkinson, Crim. No. 12–0086–WS, 2012 WL 3206446 (S.D. Ala. Aug. 7, 2012) *aff'd*, 532 F. App'x 873 (11th Cir. 2013); United States v. Felton, 3:09–CR–00124–RRB (D. Alaska Apr. 11, 2011); Vera v. O'Keefe, 791 F. Supp. 2d 959 (S.D. Cal. 2011); United States v. Reyes, Crim. No. 1:08CR98, 2008 WL 5170184 (W.D.N.C. Dec. 9, 2008) *aff'd*, 340 F. App'x 868 (4th Cir. 2009); Charles Schwab & Co. v. Carter, No.04–C–7071, 2005 WL 351929 (N.D. Ill. Feb. 11, 2005); Dammons v. Carroll, 340 F. Supp. 2d 628, 636 (M.D.N.C. 2004); United States v. Triumph Capital Grp., Inc., 260 F. Supp. 2d 470, 475 (D. Conn. 2003); United States v. Pierre-Louis, No. 00–434–CR–GOLD/SIMON, 2002 WL 1268396 (S.D. Fla. Mar. 22, 2002); United States v. Jackson, 8 F. Supp. 2d 1239, 1244 (D. Colo. 1998) *aff'd*, 248 F.3d 1028 (10th Cir. 2001).

[126] United States v. Flemming, 617 F.3d 252, 270 (3d Cir. 2010); United States v. Dauray, 215 F.3d 257, 264 (2d Cir. 2000) (Katzmann, J., dissenting). *But see* United States v. Flemming, 723 F.3d 407, 411 (3d Cir. 2013); United States v. Izurieta, 710 F.3d 1176, 1178 (11th Cir. 2013); United States v. Ashurov, 726 F.3d 395, 396 (3d Cir. 2013); United States v. W., 393 F.3d 1302 (D.C. Cir. 2005); United States v. Ray, 21 F.3d 1134, 1140 (D.C. Cir. 1994); Debel v. Dubois, No. 13–CIV–6028(LTS)(JLC), 2014 WL 708556 (S.D.N.Y. Feb. 25, 2014); United States v. Brown, Crim. No. 11-174, 2012 WL 4506553 (W.D. Pa. Sept. 28, 2012); United States v. Brown, Crim. No. 11–174, 2012 WL 3144328 (W.D. Pa. Aug. 2, 2012); United States v. Fenton, 10 F. Supp. 2d 501, 505 (W.D. Pa. 1998).

terpretation.[127] In another instance, the Ninth Circuit concluded that while the defendants' "interpretation can't be rejected out of hand," it was "not as persuasive as the alternative."[128] Meanwhile, the First Circuit in one case explained that, "while the statute contains some textual ambiguity, it is not 'grievous.'"[129] These circuit court opinions, and countless others, illustrate how difficult it is for a defendant to successfully argue for lenity under the grievous ambiguity standard.

E. *Conclusion*

As this section has shown, the standard of ambiguity the Court chooses to apply is seemingly outcome determinative. If a judge is looking for a "grievous ambiguity" before the rule of lenity applies, the judge will conclude the rule of lenity applies in only 13% of cases.[130] In contrast, a judge considering whether a statute is "unambiguously correct" will apply lenity far more frequently, about 70% of the time.[131] Those employing the two intermediate standards will vary depending on whether they are applying Justice Rehnquist's stringent lenity formulations[132] or the more robust formulations from earlier decisions, which Justice Scalia vigorously champions.[133] Section III will consider how the tools of corpus linguistics can shed light into what degree of ambiguity actually exists when the court is applying or rejecting the rule of lenity.

III. Application of Corpus Linguistics in Rule of Lenity Cases

This section of the article looks closely at four Supreme Court cases in which the majority and dissent disagreed about the application of the rule of lenity. They were chosen by looking at Supreme Court cases involving the rule of lenity from the 1990's onward. As noted in Section II, the 1990's are a turning point where a majority of the Court consistently began applying a stricter standard of lenity.[134] I looked at the cross-section of sixty-three cases that mentioned the rule of lenity, and focused on cases in which there was disagreement between the majority and the dissent as to whether lenity should apply.[135]

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[127] United States v. Devorkin, 159 F.3d 465, 469 (9th Cir. 1998).

[128] United States v. Workinger, 90 F.3d 1409, 1419 (9th Cir. 1996).

[129] United States v. Councilman, 418 F.3d 67, 83 (1st Cir. 2005).

[130] *See* discussion *supra* Section II.D.

[131] *See* discussion *supra* Section II.A.

[132] *See* discussion *supra* Section II.C.

[133] *See* discussion *supra* Section II.B.

[134] *See* discussion *supra* Section II.

[135] I also excluded cases such as Crandon v. United States, which focus on the intersection of Chevron deference and the Rule of Lenity. *See* Crandon v. United States, 494 U.S. 152 (1990). That intersection is outside the scope of this article and deserves far more extensive analysis. This is especially true in light of Justices Scalia and Thomas, who recently signaled a willingness to reconsider the degree of deference given to agency and prosecutor

Therefore, I excluded opinions that were unanimous or where only the majority or dissent invoked lenity.[136] I also excluded cases that dealt with immigration because the rule of lenity applies differently in that context.[137] Finally, I focused on cases where lexical[138] rather than structural ambiguity existed, because Corpus Linguistics is best suited for resolving lexical ambiguity.[139] I ultimately ended up with four cases.[140]

Despite the conclusion reached in part one that the "reasonable doubt" stan-

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interpretations of statutes. *See* Whitman v. United States, 135 S. Ct. 352, 352–54 (2014). *See also* Orin Kerr, *The Rule of Lenity v. Chevron Deference*, VOLOKH CONSPIRACY (Nov. 27, 2013, 4:34 PM), http://volokh.com/2013/11/27/rule-lenity-versus-chevron-deference/.

[136] Of course, it is possible that this criterion excluded some cases where one side implicitly invoked lenity.

[137] The Rule of Lenity in the immigration law context involves a greater degree of deference to the government under the government's plenary powers to control immigration, as well as the application of *Chevron* deference. *See* Clark v. Martinez, 543 U.S. 371, 372 (2005). *See also*, Brian G. Slocum, *The Immigration Rule of Lenity and Chevron Deference*, 17 GEO. IMMIGR. L.J. 515 (2003).

[138] Other scholars have expressed this distinction by focusing on the difference between "rulelike" and "wordlike" distinctions in statutory interpretation. *See* LAWRENCE SOLAN, THE LANGUAGE OF STATUTES: LAWS AND THEIR INTERPRETATION (The University of Chicago Press, 2010). Professor Solan argues that rulelike distinctions are often easily resolved by reference to statutory context, while wordlike distinctions are more difficult because they rely on questions of prototypical meaning. *Id. See also* Linda D. Jellum, *On Reading the Language of Statutes*, 8 U. MASS. L. REV. 184, 194 (2013). Dictionaries have traditionally been one of the primary tools for resolving wordlike distinctions. *See* Stephen C. Mouritsen, *The Dictionary Is Not a Fortress: Definitional Fallacies and a Corpus-Based Approach to Plain Meaning*, 2010 B.Y.U. L. REV. 1915, 1915 (2010). Corpus linguistics is well-suited for resolving such questions because it helps to show which meaning or meanings tend to predominate in the ordinary or common usage of a word or phrase.

[139] Thus, cases focusing on the required mens rea element of a statute were excluded. *See, e.g.*, Holloway v. United States, 526 U.S. 1, 1–2 (1999) (determining whether intent to kill could include conditional intent); Ratzlaf v. United States, 510 U.S. 135, 146 (1994). *See also* Moskal v. United States, 498 U.S. 103, 109 (1990) (determining what level of knowledge is required when a product was falsely made). Likewise, cases involving sentencing enhancements typically focused on technical elements or meanings that cannot be classified as wholly lexical in nature. *See* Barber v. Thomas, 560 U.S. 474, 500 (2010); United States v. Granderson, 511 U.S. 39, 71 (1994); Deal v. United States, 508 U.S. 129, 129 (1993); United States v. R.L.C., 503 U.S. 291, 314 (1992). One case was excluded because the plurality and dissent agreed on a factor that was not textual. United States v. Thompson/Ctr. Arms Co., 504 U.S. 505, 524 (1992) (examining whether making an illegal gun included manufacturing kits that sometimes but not always could create that gun). Finally, one case was excluded because it dealt with the meaning of a lengthy statutory phrase, which would not be especially conducive to Corpus analysis. Caron v. United States, 524 U.S. 308, 319 (1998).

[140] Interestingly, all four of these cases involve statutes penalizing the use, carrying, discharging, or selling of a gun. Even though gun rights are often perceived as a conservative

dard is actually frequently used in a way critical of lenity, I will now consider and apply the "reasonable doubt" standard as articulated by Justice Scalia. I do so for three reasons. First, I find Justice Scalia's interpretation more consistent with the history and purpose of the test.[141] Second, in *Abramski*, the most recent opinion analyzed in this article, Justice Scalia applied the reasonable doubt standard in this fashion.[142] Third, it is convenient to have two tests that tend to favor the application of lenity and two that tend to reject the application of lenity.

Each of these cases is ultimately consistent with the pattern revealed in Section II.[143] A slim but decisive majority of the Court adheres to less lenity friendly tests that reject the application of lenity, even when there is strong linguistic evidence to the contrary.[144] On the other hand, a decisive minority, often led by Justice Scalia, adheres to a more lenient standard for the rule of lenity.[145]

A. *Overview of Corpus Linguistics*

Corpus Linguistics is a linguistic methodology that allows for the study of language function and usage through examination of a collection of large collections of written and/or spoken language.[146] Words in a corpus are naturally occurring; therefore, they provide a window into how language is actually used.[147]

Corpus Linguistics has increasingly found its way into Court decisions in recent years. Most notably, Corpus Linguistics research was highly influential in the outcome of *FCC v. AT&T*, which involved a dispute over whether corporations had "personal privacy" in order to invoke a FOIA exemption.[148] An amicus brief submitted by linguists used Corpus Linguistics to decisively show that "personal" was used in the contemporary English solely to refer to individ-

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issue, the coalitions formed in these opinions reveal that the rule of lenity is an issue that cuts across ideological lines.

[141] *See* discussion *supra* Section II.B.

[142] *See* discussion *infra* Section III.E.

[143] *See* discussion *supra* Section II.

[144] *See* discussion *supra* Section II.

[145] *See* discussion *infra* Section IV.

[146] Stephen Mouritsen is one of the foremost scholars currently engaging in corpus-based legal research. For general information on the use of corpus linguistics and its potential to provide empirical evidence for courts seeking to discern plain meaning, see Stephen C. Mouristen, *Hard Cases and Hard Data: Assessing Corpus Linguistics As an Empirical Path to Plain Meaning*,13 COLUM. SCI. & TECH. L. REV. 156 (2011).

[147] *Id.* at 159.

[148] FCC v. AT&T Inc., 131 S. Ct. 1177 (2011). *See also* Stephen C. Mouritsen, *The Dictionary Is Not a Fortress: Definitional Fallacies and a Corpus-Based Approach to Plain Meaning*, 2010 B.Y.U. L. REV. 1915, 1255 n.224 (2010).

uals rather than entities.[149] This study was raised during oral arguments and seems to have heavily influenced the final opinion.[150] The use of Corpus Linguistics in this case was also featured in an article by Ben Zimmer in *The Atlantic*.[151] Other judges have begun incorporating corpus research into their opinions, most notably Justice Thomas R. Lee on the Utah Supreme Court.[152]

For this section, I used the Corpus of Contemporary American English (COCA), which is "the largest freely-available corpus of English."[153] COCA has several features that make it well suited for this research.[154] COCA is a balanced corpus meaning, and it has a diversity of examples from different genres and types of speech.[155] Moreover, words are tagged for grammatical content, which allows users to search for words in their correct contexts.[156] For instance, with the *Dean* case discussed below, I searched for uses of the verbs "fire" and "discharge." Without grammatical tagging, results would feature a mix of uses of "fire" and "discharge" as both a noun and a verb, which would dilute the effectiveness of the search.[157] Finally, searches on COCA are easily replicable, and links to search results may be saved and shared.[158]

In COCA, results are arranged in concordance lines, which allow one to see how the selected word is used in the context of a sentence that appears as part of the results.[159] COCA can also show extended context, which lets the user see the surrounding 150 words to determine more precisely how the word is being used.[160]

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[149] Brief in Support of Petitioners, F.C.C. v. AT&T, 562 U.S. 397 (2011) (No. 09-1279), http://www.americanbar.org/content/dam/aba/publishing/preview/publiced_preview_briefs_pdfs_09_10_09_1279_PetitionerAmCuPOGO_BrechnerCtr_andTaxAnalysts.authcheckdam.pdf.

[150] Transcript of Oral Argument at 37, FCC v. AT&T, Inc., 131 S. Ct. 1177 (2011) (No. 09–1279).

[151] Ben Zimmer, *The Corpus in the Court: Like Lexis on Steroids*, THE ATLANTIC, March 4, 2011, http://www.theatlantic.com/national/archive/2011/03/the-corpus-in-the-court-like-lexis-on-steroids/72054/.

[152] *See* State v. Rasabout, 356 P.3d 1258, 1271 (Utah 2015) (Lee, J., concurring); *In re* Baby E.Z., 266 P.3d 702, 724 n.21 (Utah 2011) (Lee, J., concurring). Other judges have used data from google searches or newspaper articles in order to obtain empirical data. *See* United States v. Costello, 666 F.3d 1040, 1044 (7th Cir. 2012). While such usage is preferable to relying on dictionaries and intuition, use of a corpus is a far more empirical and useful tool because it allows for replicable and consistent results.

[153] CORPUS OF CONTEMPORARY AMERICAN ENGLISH, http://corpus.byu.edu/coca/.

[154] Professor Mouritsen provides a through overview of the use of COCA in his article on definitional fallacies. *See Mouritsen*, *supra* note 138.

[155] *Id.*

[156] *Id.*

[157] *Id.*

[158] *Id.*

[159] *Id.*

[160] *Id.*

COCA also allows one to search for collocates, or words most commonly associated with a particular word.[161] Analyzing collocates can be very helpful to determine what words or concepts are strongly associated with a particular word.[162] Use of collocates can also be seen as a "short-cut" to quickly acquire information that would otherwise require extensive reading.[163]

B. Smith v. United States

In *Smith v. United States*, the Defendant was convicted of firearm and drug trafficking offenses after he offered to trade an automatic weapon to an undercover officer in exchange for narcotics.[164] The Defendant received a sentence enhancement as an individual who "uses . . . firearm[s] . . . during and in relation to" a drug crime.[165] The Court split on whether trading a gun constitutes use of a firearm.[166] The majority looked to the dictionary definition of "to use" and concluded that its plain meaning was a broad one which included "to employ" or "to derive service from" the weapon.[167] Thus, the majority rejected the argument that the firearm had to be used as a weapon.[168] They dismissed the suggestion that the average person would "not think immediately of a guns-for-drugs trade as an example of 'us[ing] a firearm,'" because it lacked a "citation to authority," or evidence.[169] They also relied on other statutes that allowed for the forfeiture of guns to be used in "transfer, sale, trade, gift, transport, or delivery."[170]

The majority rejected the use of lenity because the "mere possibility of articulating a narrower construction . . . does not by itself make the rule of lenity applicable."[171] The Court saw the narrower interpretation as "implausible" and "at odds with the generally accepted contemporary meaning."[172]

In contrast, Justices Scalia, Stevens, and Souter dissented invoking the rule of lenity.[173] The dissent focused on the ordinary meaning of using a firearm and concluded that the ordinary usage did not "[embrace] such extraordinary em-

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161 *Id.*

162 *Id.*

163 *Id.* at 1963.

164 Smith v. United States, 508 U.S. 223, 225–26 (1993).

165 *Id.*

166 *Id.*

167 *Id.* at 229. Professor Solan has harshly criticized the majority's use of the dictionary, arguing that "the dictionary approach of the majority does not even allow for intelligent debate about the matter." *See* Lawrence M. Solan, *Learning Our Limits: The Decline of Textualism in Statutory Cases*, 1997 WIS. L. REV. 235, 272 (1997).

168 *Smith*, 508 U.S. at 225–226.

169 *Id.* at 229–30.

170 *Id.* at 234.

171 *Id.* at 239–40.

172 *Id.*

173 *Id.* at 241 (Scalia, J., dissenting).

ployments" as selling or trading them.[174] After reciting all of the textual and contextual reasons in favor of a more narrow definition, Scalia emphasized that even if one "does not consider the issue to be clear . . . it is eminently debatable—and that is enough under the rule of lenity."[175] Because the issue was "subject to some doubt," the more lenient definition should triumph.[176]

Professors Cunningham and Fillmore first raised the possibility of using a corpus to determine the ordinary meaning of "use a firearm" in the context of the *Smith* case almost twenty years ago.[177] Using a variety of sentences listed in the British National Corpus, Professors Cunningham and Fillmore concluded that there were two major meanings that could be ascribed to using a firearm.[178] The first was an "eventive" interpretation, which meant that the weapon played an instrumental role in the occurrence of a specific event (such as the firing of the weapon).[179] The second was a "designative" interpretation, where the weapon is merely mentioned without direct impact on the event.[180] Cunningham and Fillmore used a corpus in order to find real world uses of the phrase "use a firearm," but they did not use the other tools of a corpus such as frequency analysis or looking at collocates.[181]

Use of the COCA strongly supports the dissent's position. Of ninety-one instances of "using a firearm" found in the Corpus,[182] twenty-seven involved an unmistakable firing of a firearm.[183] These uses clearly fit into Cunningham and

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[174] *Id.* at 243.

[175] *Id.*

[176] *Id.* at 245–46.

[177] Clark D. Cunningham & Charles J. Fillmore, *Using Common Sense: A Linguistic Perspective on Judicial Interpretations of "Use A Firearm,"* 73 WASH. U. L.Q. 1159, 1183 (1995).

[178] *Id.*

[179] *Id.*

[180] *Id.*

[181] *Id.* Additionally, use of a British Corpus was less than ideal for determining the plain or ordinary meaning for a statutory term in an American statute.

[182] Search for [use].[v*] within 9 words of firearm. CORPUS OF CONTEMPORARY AMERICAN ENGLISH, http://corpus.byu.edu/coca/. For results and data used regarding the *Smith* case, see https://docs.google.com/document/d/1hQBX6MYYUUGSn4JHiDtW6bY1DgJPBedBIomlUHLfmEE/edit.

[183] For this case, because the verb "use" is so ubiquitous and can be used in such a wide variety of settings, simply searching for [use].[v*] in COCA did not provide useful results. Likewise, collocates of the word "use" were too diverse to be especially useful. No gun related terminology was contained in the top 100 collocates of use. As such, I focused directly on looking at "use" in the context of guns and firearms. CORPUS OF CONTEMPORARY AMERICAN ENGLISH, http://corpus.byu.edu/coca/. Moreover, as Justice Scalia suggests in his dissent, "adding the direct object 'a firearm' to the verb use narrows the meaning of that verb," which makes the more focused inquiry especially appropriate in this case. *See* Smith v. United States, 508 U.S. 223, 245 (1993) (Scalia, J., dissenting).

Fillmore's "eventive" category.[184] The rest of the uses are slightly ambiguous; however, they are used in the context of self-defense or the commission of a crime, implying that the gun is used in an aggressive or intimidating fashion as a weapon.[185] As such, most of these uses are also "eventive" rather than "designative" because none of them appear broad enough to encompass the barter or trade of a gun.[186] Likewise, of one hundred and eighty-five instances of using a gun,[187] one hundred and seventeen clearly involved the firing of a weapon.[188] Of the remaining sixty-eight uses, sixty-four focused on the commission of crime or on self-defense.[189] Only four instances even loosely support the use of a gun in a broader sense that could encompass a use such as trading a gun.[190] Other instances include: using a discarded gun barrel as a prop or support, a generic reference to using a gun for good or evil, using a gun as evidence, and the use of the image of a gun.[191] None of these actually show a gun used in exchange for another object or thing.[192]

While neither the majority nor the dissenting opinions in *Smith* clearly articulate what the threshold for the application of lenity should be, the divergent approaches of both the majority and dissent allow us to draw some conclusions. The majority emphasized that the existence of a more narrow definition does not preclude the application of a broader definition so long as the broader definition is not implausible or illogical.[193] This standard most closely resembles the "grievous ambiguity" standard, because it requires one advocating for a more lenient definition to affirmatively point out serious or grievous flaws in the government's preferred interpretation.[194] Indeed, the majority in *Smith*

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[184] *See corpus search data*, *supra* note 182.

[185] Search for [use].[v*] within 9 words of firearm. CORPUS OF CONTEMPORARY AMERICAN ENGLISH, http://corpus.byu.edu/coca/. *See* corpus search data, *supra* note 182.

[186] *See* corpus search data, *supra* note 182.

[187] Search for [use].[v*] within 9 words of gun. CORPUS OF CONTEMPORARY AMERICAN ENGLISH, http://corpus.byu.edu/coca/. *See* corpus search data, *supra* note 182.

[188] *See* corpus search data, *supra* note 182.

[189] *See id.*

[190] *See id.*

[191] *See id.*

[192] *See id.* These results also support the conclusion that the Supreme Court unanimously reached two years later in *Bailey v. United States* that "use" of a firearm requires some sort of active usage. *See* Bailey v. United States, 516 U.S. 137, 148–49 (1995). Merely carrying a weapon was deemed insufficient. *See id.* The majority of the usages were "eventive" and focused on active employment of a weapon rather than mere presence. For a discussion of the Court's decision in *Bailey*, see Lawrence M. Solan, *The New Textualists' New Text*, 38 LOY. L.A. L. REV. 2027, 2048 (2005).

[193] Smith v. United States, 508 U.S. 223, 230 (1993). The majority acknowledged that its broad interpretation of using a firearm was not "the first to come to mind when the phrase . . . is uttered," but emphasized that this "does not preclude us from recognizing that there are other 'uses' that qualify as well." *Id.* at 230.

[194] *See* discussion *supra* Section II.D.

seems to go a bit further, putting the burden on the defendant to show that the more stringent definition is not just less plausible, but actually absurd or unjust.

In contrast, the dissent seems to embrace a position somewhere between the "unambiguous" and "reasonable doubt" standards. "Some doubt" remaining at the end of the interpretive process is sufficient to trigger lenity, which implies a pretty low standard for triggering lenity akin to the unambiguous standard.[195] However, the argument that the issue is "eminently debatable" suggests a slightly higher standard, which seems to approximate reasonableness.[196]

Regardless of the exact threshold employed in this case, the result seems out of line with the data, which emphasizes that by far the most common usage of a gun or firearm is to fire it, and that most other instances arise in contexts where it is used as a weapon.[197] Such an overwhelming finding should be highly persuasive even under the most stringent parameters of the rule of lenity.[198]

Sarah Newland has criticized the majority in *Smith* and argued that it "inappropriately ignored the rule of lenity" by allowing its interpretation of statutory purpose to trump the plain meaning.[199] This corpus analysis supports Newland's argument by pointing out that the evidence of ambiguity was overwhelming.[200] Indeed, the *Smith* decision is pretty glaring evidence that a majority of the Court has inverted the traditional meaning of the rule of lenity. Instead of searching for proof that an alternative interpretation of a statute advocated by a defendant is plausible or even likely, the Court is instead content with a bare showing of proof that the interpretation proposed by the state is not implausible or impossible.[201]

C. Dean v. United States

In *Dean v. United States,* the Court considered a sentence enhancement provision for crimes that occurred while in possession of a firearm.[202] The statute requires a minimum of five years if a firearm is possessed, seven years if a firearm is brandished, and ten years if a firearm is discharged.[203] In *Dean*, petitioner had been convicted and subject to the penalty enhancement because his

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[195] *Smith,* 508 U.S. at 246 (Scalia J., dissenting). *See* discussion *supra* Section II.A.

[196] *Smith*, 508 U.S. at 246.

[197] *See* analysis *supra* notes 182–92.

[198] It is worth noting that the fact that the most common "use" of a gun is to fire it does not exclude the possibility that "use a firearm" in the statute extends to other, uncommon uses. However, it is at this point where the rule of lenity should be applied in favor of the more defendant-friendly interpretations.

[199] Sarah Newland, *The Mercy of Scalia: Statutory Construction and the Rule of Lenity*, 29 HARV. C.R.–C.L. L. REV. 197, 226 (1994).

[200] *See* analysis, *supra* notes 182–92.

[201] Newland, *supra* note 199, at 226.

[202] Dean v. United States, 556 U.S. 568, 577 (2009).

[203] 18 U.S.C.A. § 924 (West 2006).

gun discharged in the midst of a robbery.[204] Petitioner argued that the discharge was accidental and therefore he should not be subject to the penalty enhancement.[205] The petitioner specifically argued the statute was ambiguous and that "any doubts about the proper interpretation of the statute should be resolved in his favor under the rule of lenity."[206]

The Court's majority considered the plain meaning of the word discharge and found that "the language of the statute" did "not require that the discharge be done knowingly or intentionally, or otherwise contain words of limitation."[207] Relying on both the text and the structure of the clause, the majority concluded that intent to discharge was not required.[208] Specifically, in regard to the meaning of the word discharge, the Court looked to the fact that "discharge" used "the passive voice," which "focuses on an event that occurs without respect to a specific actor, and therefore without respect to any actor's intent or culpability."[209] Therefore, the Court ultimately concluded that the defendant's arguments in favor of ambiguity "are not enough to render the statute grievously ambiguous."[210]

Justice Stevens and Justice Breyer wrote separate dissenting opinions: Justice Stevens' dissent focused on a presumption that criminal provisions must include an intent requirement, and did not expressly invoke the rule of lenity.[211] On the other hand, Justice Breyer acknowledged that the majority "lists strong arguments to the contrary," but argued "the rule of lenity tips the balance against the majority's position."[212] Justice Breyer noted the asymmetries that exist when a mandatory minimum applies (a judge can increase but not decrease the sentence), argued that these asymmetries "give the rule of lenity special force in the context of mandatory minimum provisions," and noted the provisions were "sufficiently ambiguous to warrant the application of the rule."[213] Justice Breyer's dissent does not, however, point to any ambiguity in the text or in the meaning of the word discharge.[214] Justice Breyer also does not specify what threshold of ambiguity he would require to apply lenity in favor of the defendant.[215]

Still, examining the usage of the word discharge in COCA is illustrative and

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[204] *Dean,* 556 U.S. at 572.

[205] *Id.*

[206] *Id.* at 577.

[207] *Id.* at 572.

[208] *Id.*

[209] *Id.*

[210] *Id.* at 577.

[211] *Id.* at 578 (Stevens, J., dissenting).

[212] *Id.* at 583 (Breyer, J., dissenting).

[213] *Id.* at 585.

[214] *See id* at 583–585.

[215] *See id.*

ultimately provides mixed support for either side.[216] I looked at gun or weapon related words that were among the top seventy-five collocates of discharge.[217] These related words included: weapon (25th), gun (30th), weapons (37th), firearm (49th), and firearms (70th).[218] Some of these collocates strongly support the majority's embrace of accidental discharge.[219] For example, of the twenty one instances the verb "discharge" was found within four words of the word "gun," fifteen were clearly references to guns accidentally discharging (71.4%), four were ambiguous, and only two were clearly intentional.[220] Some collocates showed something close to equipoise.[221] For instance, with "weapon," nine of twenty-three instances were clearly accidental (39%), ten were intentional (43%), and four were ambiguous (17%).[222] Other collocates more strongly supported intentional discharge.[223] For example, with respect to "weapons," eleven of nineteen instances were intentional (58%), four were accidental (21%), three were ambiguous (16%), and one was irrelevant/wrongly coded.[224] With "firearm," seven of fifteen (47%) instances were intentional, two were accidental (13%), and six were ambiguous (40%).[225] For other collocates, ambiguity predominated.[226] Of ten instances of "discharge with firearms," nine were ambiguous (90%) and only one was intentional (10%).[227] Thus, purely based on these collocates, the results are ambiguous as some strongly support the majority's conclusion that discharging a firearm does not require intent or volition, while others cut against the court's conclusion. However, other COCA results also support the majority's conclusion. For instance, "accidentally" was one of the most common collocates of "discharge" (30th).[228]

Likewise, the majority's conclusion is also strengthened when the verb "discharge" is contrasted with the verb "fire."[229] Of a sample of 200 instances

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[216] For all of the results relating to the *Dean* case, please see https://docs.google.com/document/d/1vUyWozbiwwqqq1p2xFJ46pZ_1TSwMCDb6EYNi6OHXoA/edit?usp=sharing.

[217] [Discharge].[v*]. *See* corpus search data *supra* note 216.

[218] *See id.*

[219] *See id.*

[220] *See id.*

[221] *See id.*

[222] *See id.*

[223] *See id.*

[224] *See id.*

[225] *See id.*

[226] *See id.*

[227] *See id.*

[228] *See id.* Many of the top collocates come from contexts completely unrelated to weapons or firearms (for example, "hospital" is 1st, "patients" 2nd, "water" 3rd etc . . .). Because discharge is so frequently used in other contexts, terms from these other contexts crowd out the top collocates list. *See id.*

[229] *See id.*; Dean v. United States, 556 U.S 568, 572 (2009). Justice Breyer in dissent suggests that discharge is the equivalent of fire based on a highly specious argument of

where the verb "fire" is used in the context of "guns" or "weapons," only thirty-seven are instances of accidentally fired weapons (18.5%).[230] In contrast, eighty-nine (44.5%) are clearly intentional instances.[231] The remaining seventy-four (37%) are ambiguous, but many arise in contexts (warfare, crime, etc.) where intentionality could be inferred.[232] Thus, active usage was far more common with "fire" than "discharge."[233] Additionally, "accidentally" is a collocate of "fire," but it is 75th on the list of the 100 most frequent collocates; with "fire" the top collocates list is not crowded out by unrelated terms ("shot" and "shots" are 1st and 2nd).[234]

Of course, the text by itself is not the only factor the Court can consider in determining the plain meaning of a word. In this instance the majority had other strong reasons to conclude that intent to discharge was not required: In particular, the Court contrasted the heightened penalty for brandishing a weapon, which was defined to include displaying or showing a firearm "in order to intimidate."[235] The absence of a similar qualifier with discharge was taken as evidence that Congress had not required intent to discharge the gun.[236] In contrast, the dissent suggested that the discharge provision should be read in light of the presumption of a *mens rea* requirement.[237] The weight given to these various factors will invariably play a large role in determining whether the threshold level of ambiguity necessary to trigger the rule of lenity is present.

Nevertheless, despite other factors that might tip the scale, we can at least consider where on the spectrum of ambiguity discharge would lie. Under the "unambiguously correct" standard, it is almost certain that sufficient ambiguity would exist to justify invoking the rule of lenity.[238] After all, nearly a third of the instances of discharge were intentional.[239] As in *Granderson*, the Court

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legislative intent in light of the Court's previous decision in *Bailey* regarding what constitutes using a gun. *Dean*, 556 U.S. at 572. As the following corpus analysis shows, however, these words have very different uses and this difference is highly material specifically in regards to the question of intentionality. *See* corpus search data *supra* note 216.

230 *See* corpus search data *supra* note 216.

231 *See id.*

232 *See id.*

233 *See id.*

234 *See id.*

235 Dean v. United States, 556 U.S. 568, 572 (2009).

236 *Id.*

237 *Id.* at 578–83 (Stevens, J., dissenting). Some have argued that the presumption of a *mens rea* requirement is actually an extension or outgrowth of the rule of lenity. *See* Elizabeth H. Kelly, *Applying the Presumption of Mens Rea to A Sentencing Factor: Does 18 U.S.C. S 924(c)(1)(a)(III) Penalize the Accidental Discharge of A Firearm?,* 41 SUFFOLK U. L. REV. 615, 635–36 (2008). *See also The New Rule of Lenity*, 119 HARV. L. REV. 2420, 2432 (2006).

238 *See* discussion *supra* Section II.A.

239 *See* corpus search data *supra* note 216.

"[could not] say with assurance" that Congress clearly intended to provide an enhanced penalty for accidental discharge.[240] Indeed, it is not entirely clear to what degree the "unambiguously correct" standard would take into account anything beyond the "linguistic anomalies" which clearly exist in this case.[241]

In contrast, a member of the Court applying the "grievously ambiguous" standard would almost certainly conclude that this statute was not sufficiently ambiguous to trigger lenity. After "seizing everything" from the structure, text, and purpose, it is unlikely that sufficient ambiguity remains.[242] One applying the "grievously ambiguous" standard would likely be persuaded by the fact that many of the uses of the word "discharge" ultimately support the government's conclusion.[243]

While application of the post-*Reno* "no more than a guess" standard would be a closer call than the application of the "grievously ambiguous" standard, the conclusion would likely be the same. The Court's interpretation of the statute is ultimately based on textual distinctions as well as the structure of the statute and its place in the statutory scheme.[244] Given all of these factors, it seems like a stretch to call the government's interpretation "no more than a guess." As in *Wells*, the Court could easily conclude that its decision "is based upon much more than a 'guess as to what Congress intended.'"[245] Congress, by using the more passive word "discharge" as opposed to the more active word "fire," provided useful hints to determine how to ultimately read the statute.[246]

A "reasonable doubt" standard is much harder to apply in this case. There exists some degree of ambiguity given that the verb "discharge" was used in an active sense with some frequency.[247] One could certainly infer an intent requirement in light of the presumption in favor of a *mens rea* requirement.[248] On the other hand, the contrast between "fire" and "discharge" suggests that the two verbs are often used to convey this difference in active versus passive usage of a weapon.[249] The structural evidence is also likely to be persuasive. Application of these tools of statutory interpretation suggests that the government's conclusion is most likely correct. Thus, this seems to be an instance where one applying the "reasonable doubt" standard could be persuaded in either direction. This could explain the outcome in this case since Justice Scalia, who is normally highly pro-lenity, ultimately joined the majority's opinion.[250]

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[240] United States v. Granderson, 511 U.S. 39, 53 (1994).

[241] *See id* at 47–48.

[242] Reno v. Koray, 515 U.S. 50, 50–51 (1995).

[243] *See* corpus search data *supra* note 216.

[244] Dean v. United States, 556 U.S 568, 572 (2009).

[245] United States v. Wells, 519 U.S. 482, 499 (1997).

[246] *Dean*, 556 U.S at 572.

[247] *See* corpus search data, *supra* note 216.

[248] *See Dean*, 556 U.S. at 578–83 (Stevens, J., dissenting).

[249] *See* corpus search data, *supra* note 216.

[250] *Dean,* 556 U.S. at 572.

It is unfortunate that Justice Scalia did not write separately to clarify his rejection of the rule of lenity, or that the dissent did not set out exactly what level of ambiguity it was detecting. Nevertheless, the outcome of this opinion is consistent with a Court in which a majority of its members refuse to invoke lenity absent a grievous ambiguity or no more than a guess. Meanwhile, those on the Court that adhere to the "reasonable doubt" standard were divided as to whether the alternative definition proposed by the defense truly was reasonable given the application of tools of textual and statutory interpretation.[251]

D. Muscarello v. United States

In *Muscarello*, the Defendant was arrested for selling marijuana and received a penalty enhancement for having a locked gun in the glove compartment of his car.[252] The statute required a penalty enhancement for any individual who "carries a firearm" during and in relation to drug trafficking crimes.[253] The defendant argued that term "carry" required him to carry the firearm on his person rather than in the vehicle.[254]

The majority relied upon dictionary definitions, historical origins of the word "carry," and instances of usage in newspapers to determine that "carry" should be given its broad meaning and encompass carrying a firearm in a vehicle.[255] The dissent rejected the application of the rule of lenity because "[t]he simple existence of some statutory ambiguity . . . is not sufficient to warrant application of that rule."[256] The Court emphasized that because "most statutes are ambiguous to some degree," the rule of lenity required "a grievous ambiguity or

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[251] *See notes* 204–17 and accompanying text describing the contrasting approaches of the majority and dissent.

[252] Muscarello v. United States, 524 U.S. 125 (1998).

[253] *Id.*

[254] For an overview of the circuit split that existed regarding the definition of the word "carry" before the *Muscarello* decision, see Heather L. Howard, *Federal Courts United States v. Padilla: Firearms in Vehicles and the Definition of "Carry" Under 18 U.S.C. S 924 (c)(1)*, 21 AM. J. TRIAL ADVOC. 419, 419 (1997).

[255] For criticism of the Court's usage of the dictionary in *Muscarello*, see Danielle D. Giroux, *My Dictionary or Yours? The Supreme Court's Interpretation of "Carrying" Under 18 U.S.C. S 924(c)(1) in Muscarello v. United States*, 8 GEO. MASON L. REV. 355, 377 (1999). *See also* Stephen C. Mouritsen, *The Dictionary Is Not a Fortress: Definitional Fallacies and a Corpus-Based Approach to Plain Meaning*, 2010 B.Y.U. L. REV. 1915 (2010). For a general criticism of the usage of dictionaries in legal analysis, see also Craig Hoffman, *Parse the Sentence First: Curbing the Urge to Resort to the Dictionary When Interpreting Legal Texts*, 6 N.Y.U. J. LEGIS. & PUB. POL'Y 401 (2003); Jason Weinstein, *Against Dictionaries: Using Analogical Reasoning to Achieve A More Restrained Textualism*, 38 U. MICH. J.L. REFORM 649, 663 (2005) (arguing that the use of a dictionary is a form of delegation whereby the members of the Court rely more on dictionary writers than the legislators that crafted a piece of legislation).

[256] *Muscarello*, 524 U.S. at 139 (Ginsburg, J., dissenting).

uncertainty" in the statute, such as when the Court can make "no more than a guess as to what Congress intended."[257] The Court emphasized that "the problem of statutory interpretation" in this case was no different from that in a myriad of criminal cases, and the rule of lenity does not "automatically [permit] a defendant to win."[258]

The dissent in contrast canvassed various meanings of the word "carry" and concluded that the statute was "not decisively clear one way or another."[259] The dissent found that in light of "the Legislature's capacity to speak plainly, and of overriding concern," the rule of lenity should apply when Congress does not speak "in language that is clear and definite."[260] Because the narrower definition of "carry" "fits plausibly with other provisions" of the code and is "consistent with the statutory text," it should be selected rather than "the harsher construction."[261]

Stephen Mouritsen uses *Muscarello* as a test case for the application of corpus linguistics to questions of statutory interpretation.[262] He argues persuasively that the overreliance on dictionaries by both the majority and the dissent to discern plain meaning was inappropriate because this usage failed to actually examine the words as they are used in context.[263]

One factor that makes this case especially fascinating is that the majority in *Muscarello* actually did engage in something resembling corpus analysis. It conducted a *New York Times* and *U.S. News* database search using Westlaw and Lexis Nexis.[264] Professor Mouritsen has ably pointed out many of the flaws in the majority's methodology.[265] Most strikingly, the majority looked only for sentences containing the terms "carry," "weapon" and "vehicle". Given these search parameters, it is surprising that the majority's definition did not occur even more frequently.

Nevertheless, for purposes of the Court's application of the rule of lenity, the results of the majority's searches are deeply revealing. Of the thousands of results Justice Breyer found, "perhaps more than one-third" of the results contain the terms *carry*, *weapon* and *vehicle*.[266] As Justice Ginsburg points out in her dissent, "[o]ne is left to wonder what meaning showed up some two-thirds

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[257] *Id.* at 138–39 (majority opinion) (quoting United States v. Wells, 519 U.S. 482, 499 (1997)).

[258] *Id.* at 139.

[259] *Id.* at 148 (Ginsburg, J., dissenting).

[260] *Id.*

[261] *Id.* at 150.

[262] Stephen C. Mouritsen, *The Dictionary Is Not a Fortress: Definitional Fallacies and a Corpus-Based Approach to Plain Meaning*, 2010 B.Y.U. L. REV. 1915, 1916 (2010).

[263] *Id.*

[264] *Muscarello*, 524 U.S. at 128–29.

[265] *Mouritsen*, supra note 262, at 1946.

[266] *Id.* at 129.

of the time."[267] As Professor Mouritsen suggests, this reveals that the majority cannot truly be looking for the "ordinary" or "primary" meaning as the majority suggests.[268] Indeed, it is clear that Justice Breyer is not looking to see what is the most prevalent or common usage, but merely to affirm that the government's usage is "linguistically permissible" or not inconsistent with usage.[269] This is one of the clearest indications that the majority has inverted the traditional inquiry of lenity. Instead of looking to see if an alternative definition is "linguistically permissible" and then applying lenity, the Court is requiring affirmative proof that the government's definition is an implausible definition of "carry" adopted by the dissent (a ratio of 15% to 85%). Looking at collocation of the word "carry" in the context of firearms, guns, handguns, rifles, and pistols, the results were likewise stark.[270] Of two hundred and twenty-five uses of the verb "carry" in the context of these terms, one hundred forty three (64%) clearly conveyed the dissent's usage, while only three (1.3%) clearly conveyed the majority's meaning.[271] The remaining seventy-nine were either ambiguous or conveyed neither meaning.[272]

As with *Smith*, it is surprising that in light of such overwhelming evidence, the Court's majority concluded that the rule of lenity should not apply. The usage of "carry" favored by the government is quite conclusively a minority usage. Indeed, it seems that even under the "grievously ambiguous" standard there should exist sufficient uncertainty to justify the application of lenity. While the results of the majority's poorly conceived textual analysis somewhat supports the rejection of the rule of lenity under the "grievously ambiguous" standard (if 33% of uses support an interpretation its usage can plausibly be said to not be grievously wrong), the results from Mouritsen's corpus analysis do not.[273] Likewise, under the "no more than a guess" standard, lenity should apply when, as in this case, the defendant-friendly usage clearly predominates. *Muscarello* again therefore reveals the strictness of the lenity standard that is being employed by the majority to reject lenity.[274]

On the other hand, under either the "reasonable doubt" or "unambiguous" standards, this is a pretty straightforward case for the application of lenity.[275]

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[267] *Id.* at 143 (Ginsburg, J., dissenting).

[268] Mouritsen, *supra* note 262, at 1947.

[269] Professor Mouritsen also points out and criticizes the court's conflation of ordinary meaning and a meaning that is linguistically permissible. *See id.* at 1952.

[270] *Id.* at 1962–65.

[271] *Id.*

[272] *Id.*

[273] *Id.*

[274] *See generally* Giroux, *supra* note 255, for an additional critique of the majority's rejection of lenity.

[275] *See* Wendy Biddle, *Let's Make A Deal. Liability for "Use of A Firearm" When Trading Drugs for Guns Under 18 U.S.C. § 924(c)*, 38 VAL. U. L. REV. 65, 103 (2003) ("Using the [reasonable doubt] test, it is clear that the rule of lenity would apply").

Indeed, even under the majority's highly skewed search, only 33% of the results supported their conclusion.[276] Given that two-thirds of the results were either ambiguous or supportive of the defendant's conclusion, lenity should have applied. The word "carry" in the statute was certainly not unambiguous, and the defendant's definition was not only reasonable, but actually more likely than the government's less defendant-friendly definition.

E. Abramski v. United States

Abramski v. United States concerned an individual who was convicted for purchasing a gun for his uncle who had paid him for the gun.[277] The defendant had indicated on a form that he was the buyer of the gun even though he was purchasing it for someone else.[278] The statute forbade making false statements material "to the lawfulness of the sale" of a firearm.[279] *Abramski* argued that because he could legally purchase the gun and because his uncle then legally took possession of the weapon, his conduct did not fall under the gambit of the statute.[280]

The majority upheld Abramski's conviction based on an interpretation of the statute which forbade a straw purchaser from buying guns for third parties, regardless of whether that party could legally possess the gun.[281] The Court held that Abramski's interpretation of the statute would frustrate congressional intent because it would allow for a large loophole for straw purchasers to buy guns and defeat the record keeping purpose of the law.[282] The Court also looked at other provisions of the code that broadly prohibited not just the illegal purchase, but also the acquisition of guns.[283] The Court argued that these provisions revealed that Congress was concerned with the "practical realities" of the sale.[284] As such, the true purchaser rather than the straw purchaser was in fact the one to whom the dealer was selling the gun.[285]

The majority rejected the rule of lenity in a brief footnote.[286] The Court reiterated "that rule, as we have repeatedly emphasized, applies only if, 'after considering text, structure, history and purpose, there remains a grievous ambiguity or uncertainty in the statute such that the Court must simply guess as to what Congress intended.'"[287] The majority conceded "the text creates some ambigui-

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[276] *Muscarello*, 524 U.S. at 140 (Ginsburg, J., dissenting).
[277] Abramski v. United States, 134 S. Ct. 2259, 2266–68 (2014).
[278] *Id.*
[279] *Id.*
[280] *Id.*
[281] *Id.*
[282] *Id.*
[283] *Id.* at 2268–79.
[284] *Id.* at 2269.
[285] *Id.*
[286] *Id.* at 2272 n.10.
[287] *Id.*

ty," but argued that "the context, structure, history, and purpose resolve it."[288] The Court also criticized the dissent for applying the rule of lenity "because the statute's text, taken alone, permits a narrower construction," even though "that is not the appropriate test."[289]

Justice Scalia argued in dissent that the majority's interpretation "founders on the plain language of the Act."[290] He argued that according to "ordinary English usage," a vendor "sells . . . an item of merchandise to the person who physically appears in the store. . . ."[291] As such, the government could not interpret the statute to require an individual to disclose whether he was purchasing the gun for someone else.[292] Justice Scalia also contrasted the terms buy and sell with the term "acquire," which the Court had previously interpreted as "aimed at providing maximum coverage," because it "is defined to mean simply 'to come into possession, control, or power of disposal of,'" with "no intimation . . . that title or ownership would be necessary."[293]

Scalia relied on the rule of lenity and passionately argued for its application in this case.[294] He explained that even if the Government's interpretation was possible, "when a criminal statute has two possible readings, we do not 'choose the harsher alternative'" unless Congress has "spoken in language that is clear and definite."[295] Moreover, in this instance, the Government had actually adopted the interpretation favored by the defendant for a period of about 25 years, before adopting the view upheld by the majority.[296] As such, this was "powerful evidence" that the act could be read in a way that was "natural and reasonable" without being made "meaningless" or absurd.[297] Because "[i]t cannot honestly be said that the text, structure, and history of the Gun Control Act establish as 'unambiguously correct' that the Act makes [defendants] conduct a federal crime," the rule of lenity should apply.[298]

Scalia emphasized that lenity was "a liberty-protecting and democracy-promoting rule" that was meant to apply precisely in such circumstances where the government relies on "the false imperative to make the statute as effective as possible, rather than as effective as the language indicates Congress desired."[299] Lenity "forbids a court to criminalize an act simply because the court deems that act 'of equal atrocity, or of kindred character, with those which are enu-

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288 *Id.*

289 *Id.*

290 *Id.* at 2277 (Scalia, J., dissenting).

291 *Id.*

292 *Id.*

293 *Id.*

294 *Id.* at 2280–81.

295 *Id.* (quoting United States v. Bass, 404 U.S. 336, 347–49 (1971)).

296 *Id.*

297 *Id.* at 2280.

298 *Id.*

299 *Id.* at 2279.

merated.'"[300] Scalia memorably bemoaned that "[i]f lenity has no role to play in a clear case such as this one, we ought to stop pretending it is a genuine part of our jurisprudence."[301]

Usage of "sell to" in the corpus strongly supports Justice Scalia's conclusion.[302] Out of one-hundred random uses of "sell to," seventy-nine were clearly examples of direct sales to a purchaser.[303] These were instances where there was no indication of resale. Sixteen instances even more strongly support Scalia's conclusion regarding "sale."[304] These were all instances in which an object was sold where it was obvious that it would shortly or immediately be resold: for instance, sale to a broker or dealer.[305] Some expressly mentioned sale to a middleman who then sold the item a second time.[306] There were no uses of "sell to" that supported the majority's conclusion that one could sell to a third-party other than the direct buyer.[307]

The most frequent collocates of "sell to" also support the dissent's argument.[308] Some of the top twenty frequent collocates are clearly examples of direct sales: Public (2nd) Customers (4th) Consumers (8th) and Collectors (16 th).[309] These provide some support to the dissent's argument, although they do not impact the plausibility of the majority's argument. On the other hand, other collocates in the top twenty even more strongly support the dissent's position, because they imply that one sells to the immediate buyer even if it is clear the product will be immediately or shortly resold: Companies (3d) Market (6th) Dealers (7th) Stores (11th) Restaurants (18th), and Investors (19th).[310]

With that said, looking at uses of "buying a gun" provides at least some evidence in favor of the majority's definition, although it still appears to be a rather uncommon usage.[311] Of one hundred and thirty-five instances, only six supported the government's usage of buy.[312] However, one instance in particular is highly persuasive because it spoke specifically of using straw men to buy

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[300] *Id.* at 2281 (internal citation omitted).

[301] *Id.*

[302] For all of the results regarding the Abramski case, see https://docs.google.com/document/d/1vUyWozbiwwqqq1p2xFJ46pZ_ITSwMCDb6EYNi6OHXoA/edit?usp=sharing. For this search, I simply searched for "sell to." This search produced concordances that were almost all the correct part of speech.

[303] *See* corpus search data *supra* note 302.

[304] *See id.*

[305] *See id.*

[306] *See id.*

[307] *See id.* The remaining five instances were other uses of sell such as describing something as an "easy sell," which were not relevant. *See id.*

[308] *See id.*

[309] *See id.*

[310] *See id.*

[311] *See id.*

[312] *See id.*

guns (for the third party).[313] The other five are also supportive to a lesser degree.[314] Three instances came from a single news story concerning a woman who accompanied the Columbine shooters to a gun show and bought the guns for them because they were under age.[315] Another involves a conspiracy alleged by Martin Luther King shooter James Earl Ray, who claimed he was buying guns on behalf of a third party.[316] The final involves a group buying Israeli guns for a drug cartel.[317] Thus, these searches make clear that an individual can purchase a gun without being the buyer. However, this usage is not common or predominant.[318] On the other hand, many uses support the majority's argument that the buyer is usually the direct person purchasing the weapon.[319] Just as with "sell," there are also several examples in the concordance lines which show buyers or dealers buying weapons even though it is clear that they intend to sell the weapon.[320]

Buying a handgun is likewise supportive of the dissent's position.[321] Handgun is the 94th most frequent collocate of the verb buy and the only weapon-related collocate in the top 100—none of the collocates of "sell" or "to sell" were weapon-related.[322] Of forty-one uses, twenty-four are clearly for individual use, fourteen could be classified as ambiguous and usually involved descriptions of waiting laws or other gun purchase policies, which could equally apply to a direct or indirect purchaser.[323] Only three involved buying a handgun for someone else.[324] Two involved parents buying for their children, while the third involved repeat buyers of guns who then gave some of their guns to children.[325]

The picture is similar with buying a firearm or firearms.[326] Of sixty instances in the corpus, six support the government's usage, while forty-nine are instances of direct sales.[327] Three come from a single letter regarding the same Columbine shooting purchase discussed above.[328] Two involve individuals

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313 *See id.*

314 *See id.*

315 *See id.*

316 *See id.*

317 *See id.*

318 *See id.*

319 *See id.*

320 *See id.*

321 *See id.*

322 *See id.*

323 *See id.*

324 *See id.*

325 *See id.*

326 The search conducted was "[buy].[v*] within nine words of [firearm]." *See id.*

327 *See id.* Five instances were miscoded or out of place. *See id.*

328 *See id.* ("Hello, Robyn, you bought three firearms for two boys who obviously were reluctant to buy them themselves. That alone should have set off alarm bells for you. So

buying guns for gangs or smugglers.[329] The final one is the most persuasive as it deals directly with individuals using bona fide straw purchasers to buy guns.[330] Thus, as with buying a gun, these results indicate that the government's usage is certainly permissible, albeit a minority or less frequent usage.[331]

These results make a lot of sense when applied to the *Abramski* decision. For the majority, who was looking to see if there was a grievous ambiguity or inconsistency in the Government's usage, these results support their conclusion that the rule of lenity should not apply. Certainly, including straw purchases does not do grievous injustice to the concepts of buying or selling. Justifying the majority's conclusion under the "no more than a guess" standard is somewhat trickier, but still possible. In light of the statute's purpose and other factors considered by the majority, the fact that a usage is infrequent might not be enough to make it less favored.[332]

Abramski also seems like an easy case for the application of lenity by Justice Scalia and others that rely on the more lenient standards. Selling or buying clearly does not unambiguously refer to the proxy seller or buyer. Likewise, in light of the liberty protecting purpose of the rule of lenity, it seems that there is certainly a reasonable doubt here. The defendant's proposed interpretation is consistent with common usage as well as the usage employed by the government for decades.

IV. CONCLUSION: OBSERVATIONS ON LENITY

As this paper suggests, corpus linguistics can have interesting implications for application of the rule of lenity as well as other canons of statutory interpretation. Corpus linguistics is not a perfect tool for resolving disputes involving the rule of lenity. It is not especially useful, for instance, for resolving structural

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instead of accepting personal responsibility, you want to duck it and instead pass the buck to background checks at gun shows.").

[329] *See id.* ("Well, Fast and Furious was an investigation in the ATF office in Phoenix. And it was intended to monitor, but not stop certain sales of firearms to people who were suspected to be buying weapons on behalf of smugglers, who would then send it over to Mexico for—to sell to the cartels." "And what brings you up in the country, if it's any of my business?" "I'm bringing some business to one of your local dealers," he replied. "Firearms." "You buying or selling?" "Hot guns or legal?").

[330] *See id.*

[331] *Id.* "Or getting what we call a straw purchaser, someone they know in the state who is a bona fide resident to buy firearms for them." *Id.*

[332] Indeed, it is likely that in *Abramski* as with many other lenity cases, the Court concludes that a statute is unambiguous due to a desire to reach a substantive outcome consistent with the alleged purpose of a statute. *See id. See also* Lawrence M. Solan, *Learning Our Limits: The Decline of Textualism in Statutory Cases*, 1997 WIS. L. REV. 235, 261 (1997) ("The tension between the substantive canons and the goal of reaching a desired result frequently pressures the Court to find ambiguous language plain.").

ambiguities. Likewise, it can merely illustrate the degree to which a word's ordinary meaning is ambiguous and point to which definitions or interpretations are most common or consistent with ordinary usage. Such results cannot be applied mathematically or formulaically (for instance, applying lenity if 33% of the uses support the defendant's interpretation). Instead, corpus results must be weighed against other factors such as the requirement to read statutes *in pari materia*.[333]

One interesting facet of the application of the rule of lenity is that it seems to defy facile labeling of liberal or conservative members of the court, or even the divide between originalism and purposivism. For instance, looking at the five cases cited above, three justices applied lenity in the overwhelming majority of the cases: Justices Scalia (3-1), Souter (2-1), and Stevens (2-1); not typically ideological bedfellows. Even more intriguingly, fellow originalist Justice Thomas was one of the strictest Justices in his application of lenity (1-3) along with Justices Breyer (1-2), Alito (1-1), and Kennedy (1-3).

One of the more interesting findings is that in all of the lenity cases with the exception of *Dean*, the defendant-friendly interpretation of the statute was actually the predominant or more common usage of the disputed terms.[334] In practically all of the cases, the side arguing against lenity often relied on a variety of extra-textual factors such legislative history or congressional purpose.[335] In all of the cases, the side opposing lenity seemed to actively shift the burden onto the defendant to disprove the government's interpretation rather than simply prove ambiguity or present a reasonable alternative.[336]

On the other hand, these results also may suggest that the "unambiguously correct" standard is perhaps too lenity-friendly.[337] In none of the four cases could the statutory terms be plainly or clearly considered unambiguous.[338] Those opposed to the application of lenity are correct that "some ambiguity" can almost always be found.[339] The "reasonable doubt standard" as applied by Justice Scalia seems to strike a better balance.[340] It is "more defendant-friendly than most other formulations," but it can still result in the rejection of lenity in

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[333] *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 252–55 (Thomson/West, 2012) (noting that "laws dealing with the same subject—being *in pari materia* (translated as "in a like manner")—should if possible be interpreted harmoniously").

[334] *See* discussion *supra* Section III.

[335] *See* discussion *supra* Section III.

[336] *See* discussion *supra* Section III.

[337] *See* discussion *supra* Section II.A.

[338] *See* discussion *supra* Section III.

[339] Muscarello v. United States, 524 U.S. 125, 138 (1998). *FCC v. AT&T* seems somewhat anomalous in that there were no uses of "personal" which could apply to a corporation. FCC v. AT&T, 131 S. Ct. 1177 (2011). In almost every case, one can measure some kind of ambiguity and perhaps find some support for a less likely interpretation.

[340] *See* discussion *supra* Section II.B.

a case like *Dean* where the evidence supports the government's interpretation.[341] In other cases, the evidence will be more ambiguous, but could still plausibly be used to make an argument for conviction, even under the "reasonable doubt" standard.[342]

Corpus linguistics is a tool that is neither inherently favorable to nor opposed to the rule of lenity. As seen above, the results in *Dean* provided evidence and support for the majority's rejection of lenity that was lacking in the original majority opinion.[343] Using the corpus merely allows for assumptions regarding ordinary usage to be tested as well as the discovery of a wide range of actual uses. However, it is my hope that corpus analysis will help to point out that in many instances, the court has replaced "the doctrine of lenity with a doctrine of severity," and turned "upside-down" the traditional inquiry required by the Rule of Lenity.[344] It is also my hope that the use of corpus linguistics will lead to a more robust application of the rule of lenity in the future.[345]

On the other hand, if the Court continues to apply the rule of lenity in a stringent fashion, I fear corpus linguistics could be used to show that the government's interpretation is plausible and therefore not grievously ambiguous. After all, it is not hard to find at least a couple of uses of almost any word that could support the government's position.[346] Such a use would "create a fortress" out of the corpus by using it as a way to justify convictions under an ambiguous statute.[347] This outcome would be unfortunate for the "venerable," "liberty-protecting and democracy-promoting" rule of lenity.[348]

Certainly, what is needed is a more candid discussion as to what degree of ambiguity is needed to trigger lenity and a reevaluation of where the burden of proof lies. If the corpus results in each of these cases do not give pause to those

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[341] *See* discussion *supra* Section III.C.

[342] *See* discussion *supra* Section III.C.

[343] *See* discussion *supra* Section III.C.

[344] *See* Whitman v. United States, 135 S. Ct. 352 (2014) (Scalia, J., concurring) (agreeing with the Court's decision not to grant Cert).

[345] *See also* Zachary Price, *The Rule of Lenity As A Rule of Structure*, 72 FORDHAM L. REV. 885, 893 (2004) (arguing that "accepting a plain reading will ordinarily mean rejecting the more attenuated implications of a text").

[346] Even in *Smith*, which was the Corpus result that most clearly supported the defendant, the government/majority could only point to a couple of instances where the use a gun was used abstractly as evidence of their conclusion.

[347] Judge Learned Hand warned against making "a fortress out of the dictionary" by using the dictionary mechanically and in an outcome driven fashion. A corpus unfortunately has the potential to be abused in a similar fashion. *See* Cabell v. Markham, 148 F.2d 727, 739 (2d Cir 1945). *See also* LAWRENCE SOLAN, THE LANGUAGE OF STATUTES: LAWS AND THEIR INTERPRETATION 40 (2010); Stephen C. Mouritsen, *The Dictionary Is Not a Fortress: Definitional Fallacies and a Corpus-Based Approach to Plain Meaning*, 2010 B.Y.U. L. REV. 1915, 1916 (2010).

[348] United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95 (1820); Abramski v. United States, 134 S. Ct. 2259, 2281 (2014) (Scalia J., dissenting).

on the Court that are stringent in their application of the rule of lenity, then perhaps it truly is time to do as Justice Scalia counseled in *Abramski* and "stop pretending it is a genuine part of our jurisprudence."[349]

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[349] Abramski v. United States, 134 S. Ct. at 2281.