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The Rule of Lenity in Sentencing

The rule of lenity provides that in construing an ambiguous criminal statute, the court should resolve the ambiguity in favor of the defendant. It is the name given to the principle that "penal statutes should be strictly construed against the government or parties seeking to enforce statutory penalties and in favor of the persons on whom penalties are sought to be imposed."[1]

The rule of lenity has played a relatively quiet role in American criminal statutory construction until its recent resurgence, surprisingly championed by conservative Supreme Court Justice Antonin Scalia. Most recently, defendants and members of the defense bar have urged courts to use the rule of lenity to interpret sentencing law.

In earlier centuries, courts applied the rule of lenity broadly because the sentence for most crimes was death. With the diminution of capital punishment in the ensuing years, courts have narrowed the scope of the doctrine's applicability. But with recent notable examples in white-collar cases of punishment approaching life sentences, and with mandatory minimum sentences in other contexts, criminal justice may be well-served by revisiting the applicability of the rule of lenity to a sentencing process still replete with ambiguity and prone to undue severity in more than the occasional case.

Historical Basis of Rule of Lenity

The rule of lenity developed in England in the 17th and 18th centuries in order to "thwart the will of a legislature bent on seeing statutory violators hanged."[2] Felony statutes, known as the Black Codes, criminalized a wide variety of wrongful acts, ranging from theft of horses and shoplifting to bankruptcy fraud, and penalized all violators by imposing the death penalty. To avoid such draconian results, the courts narrowly read the criminal statutes, invoking the principle that "penal statutes must be construed strictly."[3]

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This principle became a rule of statutory construction in American courts. In *United States v. Wiltberger,* Chief Justice John Marshall, writing for the Supreme Court, adopted the rule of lenity, stating it was founded both on "the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department."[4] Today, the purpose of the rule of lenity is widely recognized as threefold: 1) to provide adequate notice to defendants and satisfy due process obligations; 2) to uphold the principle of legality requiring that the criminal sanctions be imposed only pursuant to law; and 3) to reinforce the notion that it is the duty of the legislature, not the judiciary, to define criminal conduct.[5]

Modern Day Application

There is some question whether the rule of lenity continues to have the same force and effect in 2008 as it did when created. Some believe that a "process of degradation inevitable in a common law environment" has occurred, resulting in the rule being restated often and differently enough to "drain away much of its utility as a constraint."[6] For instance, the rule of lenity has been said to apply to resolve ambiguity in the defendant's favor "where text, structure, and history fail to establish that the Government's position is unambiguously correct."[7] In another case, the rule was found to apply "only if, after seizing everything from which aid can be derived,…we can make no more than a guess as to what Congress intended."[8] Scholars note that members of the current Supreme Court have signed on to both of these definitions of the rule of lenity, as well as others, leaving the nature of the rule somewhat in question.[9]

There is a general recognition that the rule of lenity has many strong critics, including some state legislatures that have eliminated the rule of lenity altogether.[10] Critics complain that the application of the rule of lenity does not further its purposes of "legislative primacy and fair notice."[11] As a result, the rule of lenity applied today is significantly narrower than that initially adopted by Chief Justice Marshall as a result of shifting focus by courts to legislative history and other extratextual materials in interpreting statutes.[12] In fact, some believe the rule of lenity has been "relegate[ed] to a tie breaker [to be used] only after courts [have] exhausted all other interpretive aids."[13]

On the other hand, many believe that the rule of lenity has an important place in criminal jurisprudence and should be reinvented and reinforced. Proponents argue that the rejection of lenity is "tantamount" to endorsing severity. Accepting certain criticism of the rule, supporters of the rule suggest that the rule be reconceptualized as a "check on disproportionate criminal penalties in the federal system…[to] restore the doctrine to a solid foundation in the policies that gave rise to its creation."[14]

The rule of lenity has a strong, and unlikely, champion in Supreme Court Justice Scalia. In employing his textualist interpretation, Justice Scalia frequently relies on the rule of lenity in interpreting the text of substantive criminal statutes narrowly, thereby often finding in favor of criminal defendants. In *United States v. O'Hagan,* Justice Scalia rejected the majority's support of the misappropriation theory of securities fraud under §10(b), finding that the rule of lenity mandated a reading of the statute requiring "manipulation or deception of a party to a securities transaction."[15] In *Evans v. United States,* Justice Scalia dissented from the majority again, arguing that the rule of lenity required a narrow reading of extortion under the Hobbs Act.[16]

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In 1998, Justice Scalia wrote that "[i]n our era of multiplying new federal crimes, there is more reason than ever to give this ancient canon of construction consistent application…."[17] The recent revitalization of the rule of lenity may exist in part as a result of the creation of the U.S. Sentencing Guidelines in the late 1980s and the often harsh prison sentences mandated therein. "Just as the death penalty of the Black Codes generated judicial resistance to harsh and mandatory punishments, the often-mandatory prison sentences of the federal sentencing guidelines have generated a similar—albeit more limited—response from a Court that operates within a society with somewhat more delicate sensibilities than 17th-century England."[18] Although the Sentencing Guidelines are no longer mandatory, sentencing courts still are required to apply and consider the guidelines.

Rule of Lenity, Sentencing

The application of the rule of lenity within the context of sentencing laws has not been altogether consistent. The U.S. Court of Appeals for the Second Circuit, like the majority of its sister circuits, has long held that the rule of lenity is applicable to the Sentencing Guidelines where the provision at issue is ambiguous.[19] In so finding, the Second Circuit said that the application of the rule of lenity to the guidelines promoted the goals of "fair notice to those subject to the criminal laws, minimiz[ing] the risk of selective or arbitrary enforcement, and maintain[ing] the proper balance between Congress, prosecutors, and courts."[20]

The Fifth and Seventh circuit courts previously found the rule of lenity inapplicable when considering the guidelines. The Seventh Circuit said that "[t]he Guidelines make more uniform among defendants and sentencers a use that has been customary for many generations of judges. We are not at risk of imposing penalties greater than Congress authorized, or of inducing the ultracautious to abstain from lawful activities that might be confused with the subjects of the statute; we are not worried about the adequacy of notice."[21] These opinions no longer seem to be good law, however, and the Supreme Court consistently has applied the rule of lenity in sentencing cases for the past half century.[22]

Observers note that application of the rule of lenity in sentencing cases may seem counterintuitive because notice typically is not a concern at the sentencing stage where it has been determined that a defendant has engaged in culpable conduct and "the question of statutory interpretation affects only the degree of punishment."[23] Regardless, due process concerns still exist during the sentencing stage. As noted by the Supreme Court, this "fair warning" function of the rule is concerned less with actual notice to the particular defendants than with the "certainty and predictability that the justice system as a whole derives from ensuring that statutes providing for criminal punishments contain clear statements rather than calling for judicial extrapolation."[24]

Nevertheless, there are those who believe that the rule of lenity should not be applied to sentencing statutes, contending that the few justifications for use of the rule in the sentencing context are "weak at best" and that "the sentencing rule of lenity verges dangerously close to a rule of federal common law that picks prisoners at random and summarily releases them early from prison." To remedy this situation, one author suggests that the rule of lenity as applied to sentencing cases should be invalidated or, at the very least, "downgraded and accorded much less weight than its substantive [non-sentencing] counterpart."[25]

Ruling Pending in Spring

Despite criticism from scholars and academics, courts continue to apply the rule of lenity. The Supreme Court will have another opportunity to revisit the rule, particularly as applied in sentencing cases, this spring in *Burgess v. United States*. In *Burgess*, the Court will focus on the meaning of "felony drug offense" as it is used in federal statutes requiring the imposition of enhanced mandatory minimum sentence of 20 years. Specifically, petitioner asks "[w]hether 21 U.S.C. §841(b)(1)(A), which imposes the 20-year mandatory minimum sentence upon certain defendants previously convicted of a 'felony drug offense,' applies to a defendant previously convicted of a state offense classified as a misdemeanor under state law but punishable by more than one year's imprisonment."

A second question presented to the Court asks whether when the court finds that a criminal statute is ambiguous, it must turn to the rule of lenity to resolve the ambiguity. Petitioner argues that the definition of a felony under the statute is ambiguous and that the rule of lenity requires that it be interpreted narrowly in his favor. The Fourth Circuit rejected this argument, concluding that the rule of lenity had no application here because there was "no grievous ambiguity or uncertainty in the pertinent statutes."[26]

Both petitioner's brief and an amicus brief submitted by the National Association of Criminal Defense Lawyers and Families Against Mandatory Minimums strenuously argue that the rule of lenity is especially appropriate in the context of mandatory minimum sentencing provisions. "Like the English statutes…, mandatory minimums require a harsher punishment than might otherwise be imposed after judicial consideration of the circumstances of a particular case. Mandatory minimums are thus contrary to the usual rule permitting discretion in sentencing."[27]

Further, petitioner and amici curiae argue that application of the rule of lenity to questions related to mandatory minimum sentences further the bases underlying the rule of lenity. "A mandatory minimum sentence, with its serious consequences for individual liberty, should be imposed only when Congress has spoken clearly. In addition, the certainty offered by the rule of lenity enhances the smooth operation of the criminal justice system—promoting clarity and reducing litigation over the meaning of such statutes."[28]

In *Gall v. United States*,[29] the Supreme Court recently held that appellate courts should apply a deferential abuse of discretion standard in determining whether nonguidelines sentences imposed by district courts were reasonable. In so doing, the Court found that sentences considerably below the guidelines sentencing range could be justified by the "parsimony provision," a statutory clause that provides an instruction to sentencing courts to "impose a sentence sufficient, but not greater than necessary" to accomplish the goals of sentencing enumerated in the same statute.[30] To be sure, the rule of lenity is not inconsistent with this notion.

1. Norman J. Singer, Statutes and Statutory Construction 59.03 (6th Ed. 2002).
2. Lawrence M. Solan, "Law, Language, and Lenity," William & Mary Law Review (October 1998).
3. William Blackstone, 1 Commentaries on the Laws of England at p. 88.
4. 18 U.S. (5 Wheat.) 76, 95 (1820).
5. Rebecca L. Spiro, "Federal Sentencing Guidelines and the Rehnquist Court: Theories of Statutory Interpretation," American Criminal Law Review (Winter 2000); Solan, "Law, Language, and Lenity."
6. Ward Farnsworth, "Signatures of Ideology: The Case of the Supreme Court's Criminal Docket," Michigan Law Review, Vol. 104 (October 2005).
7. *United States v. Granderson*, 511 U.S. 39, 54 (1994).
8. *United States v. Wells*, 519 U.S. 482, 499 (1997) (citations omitted).
9. Farnsworth, "Signatures of Ideology," at p. 103.
10. Solan, "Law, Language, and Lenity," at pp. 58-59.
11. John Calvin Jeffries Jr., "Legality, Vagueness, and the Construction of Penal Statutes," 71 Va. L. Rev. 189, 198-200 (1985); Dan M. Kahan, "Lenity and Federal Law Crimes," 1994 Sup. Ct. Rev. 345, 345-46 (1994).
12. Solan, "Law, Language, and Lenity," at p. 60.
13. Id. (citing opinions of Justice Frankfurter).
14. Stephen F. Smith, "Proportionality and Federalization," Virginia Law Review (June 2005).
15. 521 U.S. 642, 679 (1997) (Scalia, J., concurring in part and dissenting in part).
16. 504 U.S. 255, 289-90 (1992) (Thomas, J., dissenting, joined by Chief Justice William Rehnquist and Justice Scalia).
17. *Bryan v. United States*, 524 U.S. 184, 205 (1998) (Scalia, J., dissenting).
18. Joseph E. Kennedy, "Making the Crime Fit the Punishment," Emory Law Journal (Spring 2002).
19. *United States v. Simpson*, 319 F.3d 81 (2d Cir. 2003); see also *United States v. Gonzalez-Mendez*, 150 F.3d 1058, 1061 (9th Cir. 1998); *United States v. Lazaro-Guadarrama*, 71 F.3d 1419, 1421 (8th Cir. 1995); *United States v. Cutler*, 36 F.3d 406, 408 (4th Cir. 1994).
20. *Simpson*, 319 F.3d at 86-87 (citing *United States v. Kozminski*, 487 U.S. 931, 952 (1988)).
21. *United States v. White*, 888 F.2d 490, 498 (7th Cir. 1989); see also *United States v. Wake*, 948 F.2d 1422, 1434 (5th Cir. 1991).
22. Phillip M. Spector, "The Sentencing Rule of Lenity," University of Toledo Law Review (Spring 2002).
23. "The Supreme Court, 2006 Term, Leading Cases," Harvard Law Review (Nov. 2007).
24. *Burgess v. United States*, Supreme Court of the United States, No. 06-11429, Brief of the National Association of Criminal Defense Lawyers and Families Against Mandatory Minimums as Amici Curiae in Support of Petitioner ("NACDL Brief") at pp. 11-12 (citing *McBoyle v. United States*, 283 U.S. 25, 27 (1931)).
25. Spector, "The Sentencing Rule of Lenity," at p. 531.
26. *Burgess v. United States*, No. 06-11429, Brief for Petitioner at pp. 5-6.
27. *Burgess*, NACDL Brief at p. 4.
28. Id. at p. 4, 19.
29. 128 S.Ct. 586 (2007).
30. 18 U.S.C. §3553(a).