

1-1-2011

## Evidence of Ambiguity: The Effect of Circuit Splits on the Interpretation of Federal Criminal Law

Julian W. Smith

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### Recommended Citation

16 Suffolk J. Trial & App. Advoc. 79 (2011)

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# EVIDENCE OF AMBIGUITY: THE EFFECT OF CIRCUIT SPLITS ON THE INTERPRETATION OF FEDERAL CRIMINAL LAW

## I. INTRODUCTION

Federal criminal laws have rampantly escalated in number and effect.<sup>1</sup> They have increased overwhelmingly in recent years, some becoming harsher, and some overlapping state laws that punish the same acts.<sup>2</sup> States generally enact and enforce criminal laws—a tradition entrenched in the United States Constitution and promoted by dual sovereignty and Federalism.<sup>3</sup> But now prosecutors find within the morass of federal criminal law a bounty of offenses to charge and numerous ways to increase the severity of those offenses.<sup>4</sup> As a result, defendants find little

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<sup>1</sup> See Geraldine Szott Moohr, *The Federal Interest in Criminal Law*, 47 SYRACUSE L. REV. 1127, 1130-37 (1997) (critiquing expansive effects of federalizing criminal law). See generally Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 704-11 (2005) (criticizing expansion of federal criminal law and exemplifying its overcriminalization).

<sup>2</sup> See *United States v. Kimes*, 246 F.3d 800, 811 (6th Cir. 2001) (Merritt, J., dissenting) (describing “increasingly harsh and rigid” federal criminal laws); *United States v. Snyder*, 136 F.3d 65, 70 (1st Cir. 1998) (expressing “judicial dissatisfaction” with “continuing federalization of criminal law”). The *Snyder* court lamented over disparities between federal and state sentencing guidelines and the ability of prosecutors to “expose selected defendants to elevated sentences.” *Id.* at 70. The court further expressed its inability to depart from federal sentencing guidelines despite its dissatisfaction. See *id.* Additionally, defendants can be charged with state and federal crimes for the same act. See *United States v. Angleton*, 221 F. Supp. 2d 696, 708-09 (S.D. Tex. 2002) (explaining positive and negative results caused by overlapping federal criminal prosecutions with state criminal prosecutions); David A. Fusco, *The Constitutional Issue Hidden Within a Circuit Split: Double Jeopardy in the Context of Proving Predicate Offenses*, 4 SETON HALL CIRCUIT REV. 265, 283 (2008) (explaining defendants can be charged twice for same act under dual sovereign doctrine).

<sup>3</sup> See Luna, *supra* note 1, at 744 (criticizing “potential smothering effect[s] of national legislation” on “libertarian-style federalism”) (internal quotation omitted); see also *Graves v. New York ex rel. O’Keefe*, 306 U.S. 466, 488 (1939) (Frankfurter, J., concurring) (warning federalism should not cause state and federal governments to “cripple . . . operations of the other”); *W.B. v. Latimer*, 1 L. Ed. 915, \*5 (Del. 1788) (recognizing “spirit of federalism” governing apportionment of authority between states and Congress). From early on, the Court sought to “prevent any conflict between the federal and state powers; to construe both so as to avoid an interference . . . and to preserve that harmony of action in both, on which the prosperity and happiness of all depend.” *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316, 338 (1819).

<sup>4</sup> See Geraldine Szott Moohr, *Prosecutorial Power in an Adversarial System: Lessons From Current White Collar Cases and the Inquisitorial Model*, 8 BUFF. CRIM. L. REV. 165, 181 (2004) (noticing broad prosecutorial power resulting from numerous vague statutes); see also Conrad Hester, Note, *Reviving Lenity: Prosecutorial Use of the Rule of Lenity as an Alternative to Limitations on Judicial Use*, 27 REV. LITIG. 513, 513-14 (2008) (discussing power of federal

mercy from the federal criminal justice system.<sup>5</sup>

The federal criminal justice system affords defendants some measure of relief when courts construe ambiguous statutes in favor of the defendant.<sup>6</sup> Courts apply principles of statutory construction to interpret federal criminal laws.<sup>7</sup> If a statute remains ambiguous after a court applies the traditional methods of statutory construction, the court should apply the rule of lenity, a doctrine that requires courts to resolve ambiguities in criminal statutes in the defendant's favor.<sup>8</sup> But federal courts of appeals sometimes interpret the same federal criminal statute differently, thus creating a judicial irony dubbed the "circuit split."<sup>9</sup> Circuit splits indicate that the law in question not only had the ability to be interpreted multiple ways, but that it was actually interpreted multiple ways.<sup>10</sup> Do these

prosecutors). The "most powerful person in America is the prosecutor," whose power is "prone to abuse" because "[t]he prosecutor's discretion in interpreting ambiguous statutes" lacks incentive for constraint. *See Hester, supra*, at 513-14.

<sup>5</sup> *See United States v. Palmer*, 3 F.3d 300, 305-06 (9th Cir. 1993) (denying unconstitutionality of federal mandatory minimum). The *Palmer* court upheld a federal sentence of ten years imprisonment where the defendant's accomplice received a sentence under state law consisting of a mere \$176 fine. *Id.* at 306, 306 n.3; Steven D. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 S. CAL. L. REV. 643, 647-48 (1997) (denouncing excessive federalizing of criminal law as too harsh on defendants). Defendants "often fare worse [when] prosecuted in federal court rather than state court." Clymer, *supra*, at 647. For example, defendants prosecuted in federal courts more often "receive a longer sentence and . . . serve far more of that sentence than [the defendant] would if sentenced in state court." *Id.* at 648.

<sup>6</sup> *See United States v. Santos*, 553 U.S. 507, 515 (2008) (plurality opinion) (describing rule of lenity as interpreting ambiguous laws to favor defendants); *see also* Randall S. Abate and Dayna E. Mancuso, Article, *It's All About What You Know: The Specific Intent Standard Should Govern "Knowing" Violations of the Clean Water Act*, 9 N.Y.U. ENVTL. L.J. 304, 335 (2001) ("[T]he rule of lenity promotes fairness in that it helps avoid overcriminalizing allegedly criminal conduct . . .").

<sup>7</sup> *See United States v. Dauray*, 215 F.3d 257, 262-64 (2d Cir. 2000) (laying roadmap of statutory construction). Courts apply the following principles of statutory construction to interpret an ambiguous statute: examining its plain language, its legislative history, and relevant case law. *Id.* at 264.

<sup>8</sup> *See Moskal v. United States*, 498 U.S. 103, 107-08 (1990) (advising for application of lenity only after use of other canons of statutory construction). The principles of statutory construction end by applying lenity as a last resort if the statute remains ambiguous. *Dauray*, 215 F.3d at 262-64. The *Dauray* court first looked to the statute's language, determining the meaning of the words as they related to each other. *Id.* at 262. The court then looked to the overall statutory structure, attempting to discern the provision's meaning in light of the entire statute. *Id.* at 262-63. The court could not reach a result that was not absurd based on the statute's language and looked to the legislative history to discern the statute's meaning and applicability. *Id.* at 263-64. The court finally found the statute too ambiguous to determine the legislative intent and refused to apply the statute against the defendant. *Id.* at 264-65.

<sup>9</sup> *See United States v. Lopez-Salas*, 513 F.3d 174, 179-80 (5th Cir. 2008) (evidencing circuit split in single drug trafficking law).

<sup>10</sup> *See id.* (explaining varying interpretations by different circuits of same law); *see also infra* note 37 (laying out specified circuit split).

alternative interpretations present *prima facie* evidence of ambiguity?<sup>11</sup>

This Note advocates closer review of federal criminal statutes where a circuit split exists regarding their interpretation.<sup>12</sup> A circuit split should evidence the statute's ambiguity, be considered by the deciding federal circuit before construing the statute against the defendant, and thus support an interpretation favoring the defendant.<sup>13</sup> Part II assesses this Note's premise: the negative consequences of the current state of overcriminalization of federal law and various circuit splits within federal criminal law.<sup>14</sup> Part III provides the history of resolving statutory ambiguity in the defendant's favor through various modes of statutory construction and examines the ways federal circuits treat circuit splits when interpreting federal criminal laws.<sup>15</sup> Part IV first argues a necessary remedy for overcriminalization of federal law: A court should favor the defendant when a criminal statute is ambiguous.<sup>16</sup> Part IV then analyzes how federal circuits appropriately look to other circuits to aid in statutory interpretation.<sup>17</sup> Finally, Part IV advocates that a circuit split presents evidence of ambiguity and should thus help define a court's interpretation of a criminal statute.<sup>18</sup> Part V concludes that the deciding court should construe such a statute in favor of the defendant.<sup>19</sup>

## II. THE OVERCRIMINALIZATION OF FEDERAL LAW AND CIRCUIT SPLITS WITHIN

Federal criminal laws have ballooned recently.<sup>20</sup> This is largely due to increased legislative interest in policies propagated by proponents on both sides of the political aisle.<sup>21</sup> Regardless of cause, the effect remains: Enforcing "repetitive and overlapping statutes" treads on states' rights and

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<sup>11</sup> See *infra* Part IV.C (arguing affirmative answer to question presented).

<sup>12</sup> See *infra* Part IV.

<sup>13</sup> See *infra* Part IV.

<sup>14</sup> See *infra* Part II.

<sup>15</sup> See *infra* Part III.

<sup>16</sup> See *infra* Part IV.A.

<sup>17</sup> See *infra* Part IV.B.

<sup>18</sup> See *infra* Part IV.C.

<sup>19</sup> See *infra* Part V.

<sup>20</sup> See Moohr, *supra* note 1, at 1130-37 (expressing negative effects of federalization of criminal law). See generally Luna, *supra* note 1, at 704-11 (detailing examples of expanded federal criminal law).

<sup>21</sup> See Moohr, *supra* note 1, at 1130 (postulating increased legislative interest in federalization of criminal law). Liberals generally support a strong federal government and criticize states' rights as a throwback to anti-civil rights rhetoric while conservatives promote ideals of law and order despite their frequent states' rights position. *Id.*

on a defendant's individual freedoms.<sup>22</sup> The ballooned federal criminal law threatens to float beyond reach without hope of coming back to earth.<sup>23</sup>

Manufacturing a glut of federal laws inevitably allows more federal prosecutions.<sup>24</sup> This glut bolsters the prosecutor's power, especially when statutes are vague, thereby providing great latitude to define criminal behavior.<sup>25</sup> A want of specificity further allows prosecutors to charge a federal crime for an act that also violates state law.<sup>26</sup> This dual-charge ability generates harm where federal criminal laws "smother[]" state and local criminal laws, thus "preempt[ing] local solutions to local . . . problems."<sup>27</sup> Additionally, and more dangerously, federal criminal laws duplicate state and local criminal laws and overlap existing federal criminal laws, providing an overabundance of crimes to charge against a defendant's single act.<sup>28</sup> Indeed, preempting state and local laws endangers the checks and balances against unfairness to the defendant inherent within American federalism.<sup>29</sup>

The unfairness of overcriminalization exists plainly in the dual sovereign doctrine whereby a state court can convict a defendant of a state crime and a federal court can convict that same defendant for a federal

<sup>22</sup> See Clymer, *supra* note 5, at 647 (detailing overlap of federal criminal law onto state criminal law); Luna, *supra* note 1, at 708 (decrying congressional expansion of criminal liability when it overlaps state laws and creates superfluous laws); Moohr, *supra* note 1, at 1137 (noting possibility state and federal courts will be "engaged in essentially identical work").

<sup>23</sup> See Moohr, *supra* note 1, at 1136-37 (noting long-term plans for dealing with increased case-load from federalization of criminal law).

<sup>24</sup> See Ellen S. Podgor, *Jose Padilla and Martha Stewart: Who Should Be Charged With Criminal Conduct?*, 109 PENN. ST. L. REV. 1059, 1061 (2005) ("The increase in new legislation, permitting increased federal prosecution, is not the only cause of overfederalization and overcriminalization.").

<sup>25</sup> See Moohr, *supra* note 4, at 181 ("[B]road, vague statutes enhance[] prosecutorial power by implicitly authorizing prosecutors to classify certain conduct as criminal.").

<sup>26</sup> See Podgor, *supra* note 24, at 1061-62 ("Generic statutes allow federal prosecutors discretion to proceed criminally against conduct that might normally be considered state or local criminal activity.").

<sup>27</sup> See Luna, *supra* note 1, at 743-44 (describing overcriminalization's distortion of federalism).

<sup>28</sup> See Fusco, *supra* note 2, at 283 (noting federal prosecutors' ability to charge defendants for crimes already charged in state courts); Moohr, *supra* note 4, at 181 (noting increase in prosecutorial power resulting from increase in amount of laws). For example, carjacking overlaps robbery and kidnapping, allowing a superfluity for federal prosecutors that, uncontained, could drown defendants' rights. See Luna, *supra* note 1, at 708.

<sup>29</sup> See *Gregory v. Ashcroft*, 501 U.S. 452, 457-59 (1991) (reasoning federalism is meant to protect individual liberties against government tyranny); Luna, *supra* note 1, at 744 (admonishing federal police power as inhibiting state authority). State governments are closer to the people and are the traditional holders of the police power, and thus a federal police power would "preempt local solutions to local . . . problems." See Luna, *supra* note 1, at 744.

crime arising from commission of the same act.<sup>30</sup> Astoundingly, this dual-charging does not violate constitutional protections guarding against double jeopardy.<sup>31</sup> The dual sovereign doctrine epitomizes a surreptitious inequity of federalism; pitting the defendant against two governments in two trials in two court systems for violation of two laws for one act.<sup>32</sup> The overextension of federal criminal law makes this inequity unbearable.<sup>33</sup>

Numerous splits exist throughout the federal circuits regarding the interpretation of federal criminal law.<sup>34</sup> Federal circuits split on the interpretation of language in a felon-in-possession law: whether “in any court” includes foreign courts.<sup>35</sup> The circuits vary on interpreting the intent requirement of the same felon-in-possession law, namely whether an accomplice had to have “knowledge” that the possessor was a felon.<sup>36</sup> Federal circuits split on whether a drug trafficking law presumed intent to

<sup>30</sup> See *United States v. Lanza*, 260 U.S. 377, 382 (1922) (describing dual sovereign doctrine).

<sup>31</sup> See *id.* (describing dual-charging as fair because defendant commits crime violating both federal and state law); see also *Abbate v. United States*, 359 U.S. 187, 195-96 (1959) (upholding *Lanza* by holding Double Jeopardy Clause did not bar federal prosecution after state prosecution); *Bartkus v. Illinois*, 359 U.S. 121, 138-39 (1959) (upholding *Lanza* by holding Fourteenth Amendment did not bar state prosecution after federal prosecution). The *Bartkus* Court refused to apply the Fourteenth Amendment to prevent a state prosecution following a federal prosecution for the same acts because it could obstruct a state’s development of a “just body of criminal law.” *Id.* The Double Jeopardy Clause, however, has since been applied to the states. See *Benton v. Maryland*, 395 U.S. 784, 794 (1969). Despite the Court’s application of the Double Jeopardy Clause to the states, “the circuit courts have continued to reaffirm and apply *Bartkus* . . . [and] *Abbate* . . . to uphold successive prosecutions by state and federal governments . . . .” *United States v. Angleton*, 221 F. Supp. 2d 696, 712 (S.D. Tex. 2002) (citing numerous circuit court cases affirming dual sovereign doctrine application).

<sup>32</sup> See *Bartkus*, 359 U.S. at 150 (Black, J., dissenting) (disagreeing with majority’s dual sovereign doctrine application). Justice Black considered liberty from double prosecutions inherent within American jurisprudence, a fundamental right protected throughout human history. *Id.* at 151-55. Federalism fails to protect individual liberties in these types of scenarios and may suppress them. See *id.* (finding dual sovereign doctrine a dangerous affront to fundamental rights); Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1426 (1987) (noting federalism was made to “protect, not defeat, [the] legal substance of individual rights”).

<sup>33</sup> See *Angleton*, 221 F. Supp. 2d at 712 (noting increase in federal criminal laws heightens tension with dual sovereign doctrine).

<sup>34</sup> See cases cited *infra* notes 35-37 and accompanying text (surveying circuit splits in federal criminal law).

<sup>35</sup> See *United States v. Gayle*, 342 F.3d 89, 91-92 (2d Cir. 2003) (summarizing circuit split regarding meaning of “in any court”). The Third, Fourth, and Sixth Circuits decided that “in any court” includes foreign courts, while the Tenth Circuit determined that the language was too ambiguous to rule against the defendant and decided that “in any court” did not include foreign courts. *Id.* at 92. Importantly, the Tenth Circuit so ruled after applying lenity. *Id.*

<sup>36</sup> See *United States v. Lesure*, 262 F. App’x 135, 142 (11th Cir. 2008) (noting various circuits’ opinions on interpretation of intent requirement for finding accomplice liability). The Seventh and Ninth Circuits determined that the government was not required to prove knowledge of the accomplice that the possessor was a felon, but the Third and Sixth Circuits required the government to prove the knowledge of the accomplice as an element of the offense. *Id.*

distribute based solely on the quantity of the drug.<sup>37</sup> These and other circuit splits provide a backdrop for their effect on federal criminal law.<sup>38</sup>

### III. HISTORICAL PERSPECTIVE ON THE INTERPRETATION OF FEDERAL CRIMINAL LAWS

While federal criminal laws multiply exponentially and prosecutors exert vast powers, defendants find few reprieves.<sup>39</sup> A court has the duty to apply these laws to defendants in specific cases, but judicial construction should not unduly broaden the scope of a law passed by Congress.<sup>40</sup> A court must interpret the federal criminal law's meaning to apply it against a defendant, but when a court considers it ambiguous, it may employ canons of statutory construction to interpret the ambiguous law and may ultimately interpret the law in the defendant's favor absent any ability for clear interpretation.<sup>41</sup> This final step, resolving ambiguity in the defendant's

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<sup>37</sup> See *United States v. Lopez-Salas*, 513 F.3d 174, 179-80 (5th Cir. 2008) (discussing varying circuits' decisions on interpretation of drug trafficking statute). The Fifth Circuit ruled that the drug trafficking law presumed intent to distribute based on the quantity of drugs involved in the trafficking, while the Sixth, Ninth, and Tenth Circuits ruled that intent must be proven and not implied. *Id.*

<sup>38</sup> See *infra* Part III (investigating circuit split effects).

<sup>39</sup> See *supra* notes 1-5 and accompanying text (introducing core reasoning for this Note: rectifying unfairness to defendants caused by overcriminalization).

<sup>40</sup> See *Bouie v. City of Columbia*, 378 U.S. 347, 353 (1964) (warning against retroactive judicial expansion). A court must interpret a law before deciding whether to apply it to a particular defendant, but the court must take care that it does not broaden the statutory meaning beyond its language. See *id.*; see also Trevor W. Morrison, *Fair Warning and the Retroactive Judicial Expansion of Federal Criminal Statutes*, 74 S. CAL. L. REV. 455, 467-68 (2001) (discussing retroactive judicial expansion). A court must guard against broadening a statute's scope beyond the limit of its language, but when it does, it should be treated as an *ex post facto* law. See *Bouie*, 378 U.S. at 353; Morrison, *supra*, at 467. Retroactive judicial expansion effectively applies a statute against a defendant that did not apply when the action now amounting to a crime commenced. See *Bouie*, 378 U.S. at 353; Morrison, *supra*, at 468. But see *Bousley v. United States*, 523 U.S. 614, 620 (1998) (concluding no retroactive application where Court's current interpretation is what law always meant). The federal criminal law in question in *Bousley* concerned the meaning of "use" in a firearms law: "Use" was thought to have meant mere possession, but the Court determined in a subsequent case that "use" meant "active employment." See *id.* at 616. In *Bousley*, the defendant was merely carrying the weapon but was charged under the statute and pleaded guilty because he thought that the law meant mere possession. See *id.* The Court, however, did not allow a habeas petition simply because the law meant something different from what the defendant thought it meant. See *id.* at 622.

<sup>41</sup> See *United States v. Dauray*, 215 F.3d 257, 260-65 (2d Cir. 2000) (mapping statutory construction). The Second Circuit in *Dauray* first examined the plain meaning of the statutory language, then considered the statute's structure and consistency with the overall statutory scheme, and finally examined its legislative history. See *id.* After the court employed these methods of statutory construction, it found the statute ambiguous and applied lenity. See *id.*

favor, constitutes application of lenity.<sup>42</sup> Lenity “promotes fairness in that it helps avoid overcriminalizing allegedly criminal conduct,” meaning that Congress must “plainly and unmistakably” make some act a crime.<sup>43</sup> Further, applying lenity protects against abuses of power.<sup>44</sup>

Various courts have applied lenity after they found a statute ambiguous.<sup>45</sup> The guiding factor in determining whether to apply lenity is the statute’s measure of ambiguity.<sup>46</sup> Some courts apply lenity more leniently, and others more strictly.<sup>47</sup> In whatever way a court applies lenity, it works to belie the oppressive effect of the burgeoning federal criminal law.<sup>48</sup>

Lenity does protect against abuses of power in this mushrooming mass of law, but courts have lessened its application in recent years.<sup>49</sup>

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<sup>42</sup> See *United States v. Bass*, 404 U.S. 336, 347-48 (1971) (defining rule of lenity); cf. Hester, *supra* note 4, at 514-18 (explaining benefits and purpose of lenity).

<sup>43</sup> See *Bass*, 404 U.S. at 347-48 (dictating Congress must unequivocally make a certain act a crime before defendants are properly charged); *Abate & Mancuso*, *supra* note 6, at 335 (describing how application of lenity can promote fairness); see also *Moskal v. United States*, 498 U.S. 103, 107 (1990) (“[Courts] must . . . determine what scope Congress intended [for the allegedly ambiguous law].”).

<sup>44</sup> See Hester, *supra* note 4, at 514 (arguing lenity guards against “unfettered prosecutorial discretion”).

<sup>45</sup> See, e.g., *United States v. Santos*, 553 U.S. 507, 514 (2008) (plurality opinion) (applying lenity where law’s “commands are uncertain . . . [and] punishment . . . is not clearly prescribed”); *Bass*, 404 U.S. at 348 (applying lenity when Court could not discern Congress’s meaning); *Dauray*, 215 F.3d at 264-65 (applying lenity when court could merely “guess as to [law’s] proper meaning”).

<sup>46</sup> See *Moskal*, 498 U.S. at 107 (recognizing “touchstone” of lenity) (internal quotation omitted); *Lewis v. United States*, 445 U.S. 55, 65 (1980) (“The touchstone of [the] principal [of lenity] is statutory ambiguity.”); *Bass*, 404 U.S. at 347-48 (recognizing two policies underlying principle reasons for lenity). The *Bass* Court augmented its lenity analysis by describing the rule’s policy rationales, namely that potential defendants should have fair warning of the law’s language and meaning, and that courts should leave the determination of a law’s meaning to the legislature, thereby preventing the application of a law in a harsher manner than was intended. *Id.* “Thus, where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant.” *Id.*

<sup>47</sup> Compare *Santos*, 553 U.S. at 514 (plurality opinion) (adopting more “defendant-friendly” interpretation of ambiguous law), *Bass*, 404 U.S. at 348 (emphasizing fair warning and cautioning against judicial interpretations of ambiguous criminal laws), and *Dauray*, 215 F.3d at 264 (emphasizing fair warning and cautioning against mere judicial guessing at legislative meaning), with *Muscarello v. United States*, 524 U.S. 125, 138-39 (1998) (defining requirement necessary for application of lenity as “grievous ambiguity”) (internal quotation omitted), *United States v. R.L.C.*, 503 U.S. 291, 306 n.6 (1992) (refusing to require “narrowest” construction of ambiguous law and allowing conviction after applying lenity), *Moskal*, 498 U.S. at 108 (constructing “ambiguous” to mean something more than mere possibility of another interpretation), and *United States v. Rodgers*, 466 U.S. 475, 484 (1984) (declining to apply lenity where law is not sufficiently ambiguous).

<sup>48</sup> See *supra* notes 43-44 and accompanying text (providing benefits to application of lenity).

<sup>49</sup> See Hester, *supra* note 4, at 514 (detailing courts’ scaling back of application of lenity and



Some courts refuse to apply lenity despite its favor in scholarly legal analysis.<sup>50</sup> This is largely due to the focus on applying other canons of statutory construction—examination of the ambiguous statute’s language, structure, and legislative history—before applying lenity.<sup>51</sup> But when courts apply lenity, they balance the scale of justice that would otherwise tip defendants skyward, as beset by the mass of federal criminal law.<sup>52</sup>

Another method courts use to determine the statutory meaning that can affect the defendant is to analyze how other courts from around the country, world, and throughout history, interpret and understand a statutory term.<sup>53</sup> From this analysis, courts can discern that particular word or phrase’s common-law meaning.<sup>54</sup> When a federal criminal statute contains a common-law term of established meaning without otherwise defining it, a

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cautioning against it).

<sup>50</sup> See *id.* at 522 (“Although the rule of lenity maintains a good deal of support in the analytical literature . . . it is disfavored in contemporary jurisprudence.”); see also Abate & Mancuso, *supra* note 6, at 335 (promoting application of lenity); see, e.g., *Muscarello*, 524 U.S. at 138-39 (rejecting application of lenity where ambiguity requirement was not met); *Moskal*, 498 U.S. at 108 (refusing to apply lenity where “ambiguous” means something more than possibility of alternative interpretation); *Rodgers*, 466 U.S. at 484 (declining to apply lenity where law is not sufficiently ambiguous); cf. Recent Cases, *Criminal Law Statutory Interpretation Ninth Circuit Holds that 18 U.S.C. § 924(C)(1)(A) Defines a Single Firearm Offense* United States v. Arreola, 446 F.3d 926 (9th Cir.), Superseded on denial of Reh’g and Reh’g en banc, 467 F.3d 1153 (9th Cir. 2006), cert. denied, 127 S. Ct. 3002, 121 HARV. L. REV. 668, 675 (2007) (advocating lenity should be applied more generically for flexibility in future cases). But cf. Joel M. Cohen et. al., *Under the FCPA, Who Is a Foreign Official Anyway?*, 63 BUS. LAW. 1243, 1266 (2008) (admonishing application of lenity without first exhausting other canons of statutory construction). Some scholars believe that lenity should not narrow a law to favor the defendant merely because a narrower interpretation of a law is possible. See *id.* This scholarly analysis echoes the concern of the *Moskal* Court. See *Moskal*, 498 U.S. at 108 (finding a mere possible alternate interpretation does not create statutory ambiguity sufficient to apply lenity).

<sup>51</sup> See *Moskal*, 498 U.S. at 108 (providing lenity analysis only after applying other canons of statutory construction); Cohen et. al., *supra* note 50, at 1266 (outlining canons of statutory construction to apply before resorting to rule of lenity); Andrew C. Mac Nally, Comment, *A Functional Approach to the Definition of “Cocaine Base” in § 841*, 74 U. CHI. L. REV. 711, 740-41 (2007) (advising lenity application after other statutory construction canons to resolve split over “crack cocaine” definition); cf. Daniel Brenner, Note, *The Firearm Owners’ Protection Act and the Restoration of Felons’ Right to Possess Firearms: Congressional Intent versus Notice*, 2008 U. ILL. L. REV. 1045, 1066 (2008) (“Some scholars . . . believe that courts should consider lenity throughout the interpretive process to resolve textual ambiguities . . .”).

<sup>52</sup> See *supra* notes 43-44 and accompanying text (providing benefits to application of lenity).

<sup>53</sup> See *United States v. Bayes*, 210 F.3d 64, 68 (1st Cir. 2000) (examining common law for guidance on statutory interpretation); *United States v. Merklinger*, 16 F.3d 670, 673 (6th Cir. 1994) (exhuming common-law meaning by looking for common definition).

<sup>54</sup> See *Morrisette v. United States*, 342 U.S. 246, 263 (1952) (“[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts . . . the meaning its use will convey to the judicial mind unless otherwise instructed.”).

court will give the term its common-law meaning.<sup>55</sup> Even this seemingly neutral method of statutory interpretation can profoundly affect a defendant.<sup>56</sup> In this method of statutory interpretation, courts apply laws against defendants after first interpreting its meaning by examining court decisions both in and out of its jurisdiction.<sup>57</sup> When courts search for a common-law meaning, they may look to other circuits for interpretive guidance on how to construe a particular law.<sup>58</sup>

Federal circuit courts do not need to follow the decisions of other federal circuits, but are required to follow decisions within its circuit and the United States Supreme Court.<sup>59</sup> Circuit courts do, however, look to other courts' decisions to benefit their reasoning in the case before it.<sup>60</sup> Therefore, federal court decisions—even those without precedential effect—can influence statutory interpretation in other federal courts.<sup>61</sup>

Circuit splits can affect the Supreme Court's case load; the Court often cites resolving a circuit split as a reason for granting certiorari of a case.<sup>62</sup> The Court further understands that circuit splits can leave a law

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<sup>55</sup> See *id.*; see also *United States v. Gauvin*, 173 F.3d 798, 802 (10th Cir. 1999) (following traditional definition of "assault"); *Merklinger*, 16 F.3d at 673 (adopting traditional English definition of "false making" to define "forgery"); *United States v. Cicco*, 10 F.3d 980, 984 (3d Cir. 1993) (recognizing common law meaning of "attempt"). In addition to case law, a court may also look to law dictionaries, statutes, and scholarly commentaries to determine a word or phrase's meaning. See *Merklinger*, 16 F.3d at 673.

<sup>56</sup> See *Merklinger*, 16 F.3d at 673 (construing statute in favor of defendant based on common-law meaning of "falsely makes"). The *Merklinger* court found that "forgery" was synonymous with "false making" as defined in English common law and has been so interpreted "for centuries." *Id.* Further, the court acknowledged that American federal courts have followed the English common law definition of forgery. *Id.* At English common law, forgery did not include a genuine document with false contents, but was defined as a false document, or a document "falsely made," even where every statement made therein was true in fact. *Id.* The court used this common law meaning of the word and refused to apply a fraud statute, which required the government to prove the element of forgery, against the defendant who made a genuine document with false contents. *Id.*

<sup>57</sup> See *supra* notes 53-56 and accompanying text (providing common-law meaning analysis).

<sup>58</sup> See *supra* notes 53-56 and accompanying text (providing common-law meaning analysis).

<sup>59</sup> See Amanda Frost, *The Limits of Advocacy*, 59 DUKE L.J. 447, 491 (2009) (presenting precedential hierarchy in federal court system).

<sup>60</sup> See Nicholas Melillo, Recent Case, *People v. Lacey*, 21 TOURO L. REV. 223, 226 (2005) (noting federal circuit courts can look to other circuits' interpretations of law). Deciding courts may cite to other circuit court decisions particularly in cases of first impression. See *id.*

<sup>61</sup> See *id.* (determining courts examine other courts to help interpret laws, even those not within same jurisdiction); see also cases cited *supra* notes 55-56 (exemplifying courts' examinations of other courts' decisions that do not have precedential effect).

<sup>62</sup> See, e.g., *Bousley v. United States*, 523 U.S. 614, 618 (1998) ("We . . . granted certiorari to resolve a split among the [c]ircuits . . .") (citations omitted); *Moskal v. United States*, 498 U.S. 103, 106 (1990) ("[W]e granted certiorari to resolve a divergence of opinion among the Courts of Appeals."); *United States v. Rodgers*, 466 U.S. 475, 478-79 (1984) ("We granted certiorari to resolve this conflict [among the circuits].").

without sufficient certainty as required for fair warning.<sup>63</sup> The Court permits a federal court of appeals to recognize other circuits' interpretations of a law when determining whether the defendant had fair warning, applying the statute against the defendant only if the defendant had fair warning.<sup>64</sup> Federal courts of appeals can take into account circuit splits when deciding whether certain principles or rules are satisfied.<sup>65</sup> The Court can instead note a circuit split without attributing any affect to it.<sup>66</sup> The Court may also note a circuit split and explicitly state that it did not affect its ruling.<sup>67</sup>

A circuit split has varying effects on federal courts of appeals as

<sup>63</sup> See *United States v. Lanier*, 520 U.S. 259, 269 (1997) (“[D]isparate decisions in various Circuits might leave [a federal criminal] law insufficiently certain . . . [and] such a circumstance may be taken into account in deciding whether the warning is fair enough . . .”). The Court noted that fair warning corresponds to statutory ambiguity in that an ambiguous statute does not provide fair warning. See *id.*; see also cases cited *supra* note 46 (discussing fair-warning requirement and its correlation to application of lenity). The *Lanier* Court, however, would not create a “categorical rule that [such] decisions . . . are inadequate as a matter of law to [find fair warning].” *Lanier*, 520 U.S. at 269.

<sup>64</sup> See *Lanier*, 520 U.S. at 269 (allowing federal courts to take into account other circuits' decisions to analyze fair-warning requirement).

<sup>65</sup> See *id.*; see also *United States v. Lesure*, 262 F. App'x 135, 142 (11th Cir. 2008) (taking into account circuit split when determining no plain error in lower court's statutory interpretation); *United States v. Moriarty*, 429 F.3d 1012, 1019 (11th Cir. 2005) (finding no plain error where circuits are split on proper statutory interpretation). Plain error review requires a defendant to “show there is (1) error, (2) that is plain, and (3) that affects substantial rights,” when arguing that the lower court incorrectly interpreted a criminal statute. *Id.* at 1019 (citing *United States v. Olano*, 507 U.S. 725, 732 (1993)). When other circuits are split on the issue and when the Supreme Court and the deciding circuit have not ruled on it, the deciding court takes the circuit split into account—the fact of the split itself lessens the plainness, the obviousness, of that error. *Id.* But see *Bousley v. United States*, 523 U.S. 614, 625 (1998) (Stevens, J., concurring in part and dissenting in part) (noting circuit split had “no great[] legal significance”). In *Bousley*, Justice Stevens argued that the Court should have allowed the habeas petition sought by the defendant because the defendant “received critically incorrect legal advice” as to the meaning of the statute: The trial judge, defense counsel, and the prosecutor interpreted the term “use” in the statute to mean mere possession, but the Court later interpreted the term “use” within the statute to mean “active employment.” *Id.* at 626. Justice Stevens determined the “constitutionally invalid” application of the law, though constitutionally invalid after the fact, was “severe” and “unfair” enough to allow a habeas petition. *Id.* Though Justice Stevens gave the circuit split little legal significance, the law was undeniably ambiguous because the defendant simply did not know what the law truly meant. *Id.* at 625-26.

<sup>66</sup> See *Moskal*, 498 U.S. at 115 (discerning meaning of term from various courts' interpretations). The Tenth Circuit did not determine washed titles to be “falsely made,” but the Third Circuit did. *Id.* at 115 n.7. The Supreme Court granted certiorari from this split, but also looked at the lower courts' reasoning and others' to determine that no overriding common-law meaning of “falsely made” existed, so Congress could not have meant to extract meaning from the common law. *Id.* at 115 n.7, 116.

<sup>67</sup> See *United States v. Johnson*, 529 U.S. 53, 59 (2000) (refusing to apply lenity even where circuits were split on statute's interpretation); see also *Cohen et. al.*, *supra* note 50, at 1266 (“[A] split among the courts about the meaning of a statute is not enough to trigger lenity.”).

well.<sup>68</sup> A federal court of appeals may cite to a split, merely noting it, while agreeing with one interpretation and not another.<sup>69</sup> Alternatively, a court of appeals may merely mention the circuit split, though it ultimately holds no significance to its ruling.<sup>70</sup> Making the split even less significant, a court may present evidence of a circuit split without mentioning it as such.<sup>71</sup> Conversely, a court may note the lack of a circuit split on a statute's interpretation and provide as the reasoning for its ruling, at least in part, the refusal to create a circuit split.<sup>72</sup> A court may attempt to prevent a split in interpretation to increase its own decision's credibility or, perhaps artificially, prevent ambiguity from impinging the statute's applicability.<sup>73</sup> Circuit splits create ambiguity and uncertainty, especially for "officers, prosecutors, defendants, and courts."<sup>74</sup> A federal court of appeals should recognize a circuit split on a federal criminal law's interpretation and use it, along with canons of statutory construction, to determine whether to construe the statute against or in favor of the defendant.<sup>75</sup>

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<sup>68</sup> See *infra* notes 69-73 and accompanying text (detailing potential treatment of circuit splits by circuit courts).

<sup>69</sup> See *United States v. Lopez-Salas*, 513 F.3d 174, 180 (5th Cir. 2008) (agreeing with Sixth, Ninth, and Tenth Circuits and disagreeing with Eleventh Circuit). The *Lopez-Salas* court found that the quantity of drugs possessed did not amount to a drug trafficking offense in the meaning of the federal guidelines. *Id.* Along with its stated agreement of the Sixth, Ninth, and Tenth Circuits' interpretations and its disagreement with the Eleventh Circuit's interpretation, the court additionally cited to its own circuit's precedent in reaching its holding. *Id.*

<sup>70</sup> See *United States v. Dauray*, 215 F.3d 257, 261 (2d Cir. 2000) (noting various interpretations of "other matter"). The *Dauray* court applied the rule of lenity, but the circuit split was merely incidental and not the deciding factor in the court's application of lenity. *Id.* at 264.

<sup>71</sup> See *United States v. Small*, 333 F.3d 425, 427 n.2 (3d Cir. 2003) (referring to circuit split by citing solely contradictory holdings among circuits).

<sup>72</sup> See *United States v. Alderman*, 565 F.3d 641, 648 (9th Cir. 2009) ("Nor do we think it prudent to create a circuit split on this important statutory issue that Congress views as having nationwide implications.").

<sup>73</sup> See Wendy Biddle, Note, *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, 103-04 (2003) ("[A] plausible alternative reading . . . suggest[s] that . . . the statutory language . . . [is] not . . . precisely defined . . ."). But see *United States v. Rodgers*, 466 U.S. 475, 484 (1984) (refusing to apply lenity where circuit split gave defendant notice); Cohen et. al., *supra* note 50, at 1266 (claiming circuit splits do not imbue ambiguity).

<sup>74</sup> See Christopher Lieb Nybo, Comment, *Dialing M for Murder: Assessing the Interstate Commerce Requirement for Federal Murder-for-Hire*, 2001 U. CHI. LEGAL F. 579, 584 (2001) (noting disagreement on interpretation creates uncertainty); cf. Morrison, *supra* note 40, at 513-20 (noting critical opinions of inconsistency caused by circuit splits). If "[f]ederal courts addressing the [requirements of a statute] have clearly disagreed over how to resolve the issue" of the statute's interpretation, then "law enforcement officers, prosecutors, defendants, and courts [would] remain uncertain as to whether [the statute applies]." Nybo, *supra*, at 584.

<sup>75</sup> See *In re S. Star Foods, Inc.*, 144 F.3d 712, 715 (10th Cir. 1998) (evidencing federal statute's ambiguity through recognition of circuit split on its interpretation). "The split in the circuits is, in itself, evidence of the ambiguity" of the statutory language. *Id.* Note that the statute

#### IV. EFFECT OF CIRCUIT SPLITS IN FEDERAL CRIMINAL LAW: EVIDENCING AMBIGUITY

##### A. *Tempering Federal Overcriminalization*

The build-up of federal criminal law is excessive and inappropriate.<sup>76</sup> This excess requires some counter, lest the government become too invasive with the growing number of unfair applications of federal criminal law.<sup>77</sup> A defendant is subject to double punishment for the same act without double jeopardy protections.<sup>78</sup> Federal criminal law's expanded scope increases the likelihood that a defendant will be double-charged.<sup>79</sup> Due to this overlap of federal law over state law, states' rights have been smothered.<sup>80</sup> Federal criminal law even overlaps itself, allowing federal prosecutors to punish a defendant for a broad array of crimes.<sup>81</sup> These laws are often ambiguous, and this ambiguity allows federal prosecutors to broaden the law's scope and charge crimes normally charged in state court.<sup>82</sup>

In applying federal criminal law against defendants, prosecutors are first to interpret a statute.<sup>83</sup> Ironically, prosecutors are the first line of defense for a defendant: They can interpret the statute narrowly to favor a defendant, or broadly, thereby increasing the likelihood that a defendant's action would be encompassed by the law, and thus that a defendant would

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in *In re Southern Star Foods* is a bankruptcy law, not a criminal law. *Id.* at 713. The method the Tenth Circuit used to decipher the statute's meaning and application, however, is similar to the statutory construction analysis a court uses to determine the meaning of a criminal statute. *See id.* at 715-16 (analyzing legislative history when statutory language proves ambiguous).

<sup>76</sup> *See supra* notes 1-3, 24-28 and accompanying text (criticizing excess of and explaining detriments caused by expanded federal criminal law).

<sup>77</sup> *See supra* notes 5-6 and accompanying text (determining need for relief from pervasive federal criminal law).

<sup>78</sup> *See supra* notes 30-32 and accompanying text (detailing dual sovereign doctrine); *see also* Fusco, *supra* note 2, at 283 (explaining lack of double jeopardy protections in dual sovereign doctrine).

<sup>79</sup> *See supra* notes 30-33 and accompanying text (decrying potential for increased prosecutions through combination of dual sovereignty and increased federal criminal law). "The increase in the scope of federal criminal law . . . has greatly expanded the likelihood of successive prosecutions." *United States v. Angleton*, 221 F. Supp. 2d 696, 712 (S.D. Tex. 2002).

<sup>80</sup> *See supra* notes 27-29 (criticizing anti-federalism effect of increased federal criminal law).

<sup>81</sup> *See supra* notes 4, 28 and accompanying text (discussing increase in prosecutorial power due to increase in federal criminal law).

<sup>82</sup> *See supra* notes 4, 25-26, 28 and accompanying text (discussing increase in prosecutorial power due to ambiguity in federal criminal law).

<sup>83</sup> *See Hester, supra* note 4, at 514 (noting prosecutors are first to interpret criminal statutes).

be convicted.<sup>84</sup> Prosecutors, like courts, should use canons of statutory construction to ultimately favor a defendant if the statute is ambiguous.<sup>85</sup> Prosecutors may not, for whatever reason, choose to use canons of statutory construction, but courts must.<sup>86</sup>

After courts employ canons of statutory construction, and if the law is still ambiguous as to its meaning and possible applications, the court should construe the statute more favorably toward the defendant.<sup>87</sup> The policy decisions behind lenity consist of the fair notice doctrine and the notion that courts should not make law, especially criminal law because liberty is at stake, but should merely interpret the statute's language as written by the legislature.<sup>88</sup> If a court finds a statute ambiguous, it should not try to construe the statute against a defendant, but rather favor a defendant in its application, if it can be applied at all.<sup>89</sup> Lenity, then, helps provide a fair outcome when a court determines a particular criminal statute is ambiguous.<sup>90</sup>

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<sup>84</sup> See *id.* (predicting potential for prosecutorial abuse from prosecutors' ability to interpret laws).

<sup>85</sup> See *id.* (proposing prosecutorial use of lenity, particularly when courts in same jurisdiction do not use it); see also *supra* notes 41, 51 (providing various methods of statutory construction and their various uses).

<sup>86</sup> See *United States v. Santos*, 553 U.S. 507, 512 (2008) (plurality opinion) (suggesting benefit from applying lenity).

This venerable rule [of lenity] not only vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed. It also places the weight of inertia upon the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress's stead.

*Id.* The Court in *Santos* explicitly adopted the more defendant-friendly interpretation of the statute in question. See *id.* at 518-19; see also note 51 and accompanying text (providing canons of statutory construction ending in lenity application).

<sup>87</sup> See *supra* notes 42-44, 46 and accompanying text (detailing uses and rationale of lenity).

<sup>88</sup> See *supra* notes 43 and 45 (stating courts should merely interpret law and apply lenity when statute is ambiguous); *supra* note 46 (interpreting fair warning as backbone of lenity, requiring fair notification of statute's meaning before application).

<sup>89</sup> See *supra* notes 43-44 and accompanying text (discussing benefits of lenity). Courts should carefully apply statutes against defendants by refusing to broaden the statute's scope without specific congressional direction. See *Bouie v. City of Columbia*, 378 U.S. 347, 353 (1964). "[J]udicial decisions can indeed change the practical meaning of statutory law." *Morrison*, *supra* note 40, at 467.

<sup>90</sup> See *supra* note 46 and accompanying text (arguing fairness of lenity). The fairness of lenity arises under the distinction between general versus specific intent standards: Without straightforward direction from the statute's language, a court should apply lenity to the ambiguous mental state requirement and apply a specific intent standard. See *Abate & Mancuso*, *supra* note 6, at 335. A specific intent standard requires a higher degree of knowledge before violation, namely that the defendant must have knowingly violated the statute, versus the general intent standard where the defendant must merely have knowledge of their acts that ultimately

Courts have cut away at the applicability of lenity, which has unfortunately been concurrent with the overcriminalizing of federal law.<sup>91</sup> Courts that do still apply lenity do so most often as a last resort.<sup>92</sup> Before applying lenity, courts apply definitive methods of statutory construction when they find statutes ambiguous.<sup>93</sup> But when a court interprets a statute, if it finds that a criminal law remains ambiguous after using the traditional methods of construction, it should construe the statute more favorably toward the defendant.<sup>94</sup> In whatever way a court chooses to do it, a court should construe an ambiguous statute in the defendant's favor to promote fairness and constitutional integrity.<sup>95</sup>

### *B. Courts Should Look to Other Courts*

Federal circuits sometimes split on the interpretation of criminal law.<sup>96</sup> These courts may look to other courts to determine the common-law meaning of a statutory term, which may cause a defendant-favorable

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violated the ambiguous statute. *See id.* (“In the context of [the statute], interpretation of the term ‘knowingly violates’ has created a conflict between application of the specific and general intent standards.”). Assuming a statute is ambiguous, lenity requires application of a specific intent standard when the statute does not provide clear direction. *See id.* (“[L]enity must be applied and the ‘less severe interpretation’ would prevail; specifically, that interpretation which endorses the specific intent standard for knowing violation cases.”).

<sup>91</sup> *See supra* note 49 and accompanying text (cautioning against scale back in use of lenity); *see also supra* note 20 and accompanying text (reproving recent build-up of federal criminal law). “Because the meaning of language is inherently contextual, we have declined to deem a statute ‘ambiguous’ for purposes of lenity merely because it was *possible* to articulate a construction more narrow than that urged by the Government.” *Moskal v. United States*, 498 U.S. 103, 108 (1990) (citation omitted). “The simple existence of some statutory ambiguity . . . is not sufficient to warrant application of [lenity], for most statutes are ambiguous to some degree . . . . To invoke the rule, we must conclude that there is a “‘grievous ambiguity or uncertainty’ in the statute.” *Muscarello v. United States*, 524 U.S. 125, 138-39 (1998) (quoting *Staples v. United States*, 511 U.S. 600, 619 n.17 (1994) (quoting *Chapman v. United States*, 500 U.S. 453, 463 (1991))).

<sup>92</sup> *See United States v. Dauray*, 215 F.3d 257, 262-64 (2d Cir. 2000) (outlining methods of statutory construction ending with consideration of lenity).

<sup>93</sup> *See supra* note 51 and accompanying text (providing statutory construction analysis as sufficient without applying lenity to resolve statutory ambiguity).

<sup>94</sup> *See supra* notes 43-46 and accompanying text (making case for applying lenity); *see also Mac Nally, supra* note 51, at 740-41 (exemplifying how lenity can resolve circuit split “tension” caused by varying definitions of “crack cocaine”).

<sup>95</sup> *See supra* note 43 and accompanying text (detailing federal court’s responsibility to merely interpret congressional language); cases cited *supra* note 46 (providing case law exemplifying fairness of lenity); *supra* note 29 (lofting federalism as protection against infringement of liberty); *see also United States v. Santos*, 553 U.S. 507, 512 (2008) (plurality opinion) (“[L]enity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them.”).

<sup>96</sup> *See supra* Part II (discussing circuit splits in federal criminal law).

interpretation.<sup>97</sup> Circuit courts may also look to other circuit courts to help their analyses of interpretation even while also recognizing a circuit split in its interpretation.<sup>98</sup> For example, a circuit court may take a split into account when determining whether a defendant had fair warning.<sup>99</sup> In those circumstances, circuit splits can leave the statute's meaning "insufficiently certain."<sup>100</sup>

A circuit court may apply a statute against a defendant despite a circuit split on its interpretation.<sup>101</sup> Similarly, a court may not find plain error as to a court's interpretation of a statute simply because various courts reach divergent conclusions as to its meaning.<sup>102</sup> This argument essentially

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<sup>97</sup> See *supra* notes 54, 56 and accompanying text (describing method by which courts exhume common-law meanings and construe them in practice).

<sup>98</sup> See *supra* notes 69-75 (discussing courts' varying treatment of circuit splits); see also *Moskal v. United States*, 498 U.S. 103, 116-17 (1990) (examining vague statutory language and varying interpretations among circuits). The *Moskal* Court noted that courts sometimes give varying interpretations to a statute's term, but refuse to give effect to one merely because it was the most common interpretation:

Where . . . no fixed usage [of a word] exist[s] at common law, we think it more appropriate to inquire which of the common-law readings of the term best accords with the overall purposes of the statute rather than to simply assume, for example, that Congress adopted the reading that was followed by the largest number of common-law courts.

*Id.*

<sup>99</sup> See *United States v. Lanier*, 520 U.S. 259, 269 (1997) (interpreting statute leniently where a circuit split gave no clear indication of meaning).

Although the Sixth Circuit was concerned, and rightly so, that disparate decisions in various Circuits might leave the law insufficiently certain even on a point widely considered, such a circumstance may be taken into account in deciding whether the warning is fair enough, without any need for a categorical rule that decisions of the Courts of Appeals and other courts are inadequate as a matter of law to provide it.

*Id.*

<sup>100</sup> *Id.*

<sup>101</sup> See *United States v. Lesure*, 262 F. App'x 135, 142-43 (11th Cir. 2008) (noting circuit split on statutory interpretation but applying law against defendant despite split). "[W]hen neither the Supreme Court nor [we have] resolved an issue, and other circuits are split on it, there can be no plain error in regard to that issue." *Id.* at 142 (internal quotations omitted) (citation omitted). The *Lesure* court actually used the circuit split against the defendant—though the circuits were split as to an issue of interpretation, the court did not allow the defendant to cite plain error as a defense. *Id.*

<sup>102</sup> See *United States v. Moriarty*, 429 F.3d 1012, 1019 (11th Cir. 2005) (detailing court's review of plain error). The defendant bears the burden under plain error review, and when the circuits are split on the issue of interpretation, the split itself does not necessarily lend credence to the statute's ambiguous nature. *Id.* The court determined that if another court interprets the statute a certain way, the deciding court's interpretation cannot be plainly erroneous simply because other courts have also interpreted it that way. *Id.*



follows from the fact that separate federal circuit courts interpret legislative language and that more than one interpretation may exist.<sup>103</sup> Alternatively, a circuit court may create a split, but instead of creating ambiguity, the circuit's disparate interpretation could simply be wrong.<sup>104</sup>

However dissimilar another circuit's interpretation, a court should not ignore "plausible alternative readings"—for which the ultimate evidence consists of a circuit split—when determining the meaning of a particular criminal statute.<sup>105</sup> This would be contrary to the fair notice doctrine, which lenity enhances, thus putting a defendant on notice, not of a statute's ambiguity, but of the possibility of prosecution.<sup>106</sup> This effect of a circuit split causes inequity against which lenity seeks to protect, and courts should not construe a law against a defendant because of a circuit split.<sup>107</sup> Courts should account for circuit splits by using them as evidence of ambiguity, and should account for ambiguity by construing the statute favorably for the defendant.<sup>108</sup>

### C. Circuit Splits in Federal Criminal Law: Evidence of Ambiguity

Circuit splits can profoundly affect a court's interpretation of federal criminal law.<sup>109</sup> Circuit splits can affect the Supreme Court by

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<sup>103</sup> See sources cited *supra* note 65 (discussing lack of importance given circuit splits in plain error analysis); see also *Moriarty*, 429 F.3d at 1019 (circuit splits do not affect plain error analysis).

<sup>104</sup> See *United States v. Johnson*, 529 U.S. 53, 56 (2000) (expanding upon circuit split of statute's interpretation). "The rule of lenity does not alter the analysis. Absent ambiguity, the rule of lenity is not applicable to guide statutory interpretation." *Id.* at 59 (citation omitted). The *Johnson* Court would not find statutory ambiguity as evidenced by a circuit split, but rather found that one side of the split incorrectly interpreted the statute. See *id.* ("The Court of Appeals was mistaken . . . [because] the text of [the statute] cannot accommodate the rule the Court of Appeals derived.").

<sup>105</sup> See *Biddle*, *supra* note 73, at 103-04 (arguing circuit splits create ambiguity).

<sup>106</sup> See *United States v. Rodgers*, 466 U.S. 475, 484 (1984) ("[A]ny argument by respondent against retroactive application . . . even if he could establish reliance upon [an] earlier . . . decision, would be unavailing since the existence of conflicting cases from other Courts of Appeals made review of that issue by this Court and decision against the position of the respondent reasonably foreseeable."). The Court in *Rodgers* determined that the circuit split on the statute in question gave the defendant notice that the Eighth Circuit's interpretation could be wrong. See *id.* But see *supra* note 74 and accompanying text (arguing multiple interpretations of law create uncertainty as to its meaning); cf. *supra* note 47 and accompanying text (reasoning defendant should have fair warning of law before courts apply it).

<sup>107</sup> See *supra* notes 43-44 and accompanying text (discussing benefits of applying lenity).

<sup>108</sup> See *Biddle*, *supra* note 73, at 103-04 (suggesting "plausible alternative reading" of statute provides evidence of imprecise congressional purpose and statutory language). A "plausible alternative reading" can be evidenced by a circuit split on the interpretation of the statute's language and is therefore evidence of statutory ambiguity. See *id.*

<sup>109</sup> See *supra* notes 69-75 (discussing courts' varying treatment of circuit splits).

providing a reason to take certiorari, or can simply exist without much consequential treatment by the Court.<sup>110</sup> Circuit splits can affect the federal circuit courts when they choose to acknowledge a split, ignore it, or even refuse to cause one.<sup>111</sup> But more than simply affecting courts in various ways, circuit splits can significantly affect individual criminal defendants when the split causes a court to pause before construing a statute against a defendant.<sup>112</sup>

Criminal defendants comprise the group most intimately affected by law, and are rightly a special and highly protected litigant class.<sup>113</sup> The federal government forces criminal defendants into court to defend their liberty and prejudices them through the charge itself, but must prove their guilt before they can be convicted.<sup>114</sup> Yet the federal government's burden has improperly lessened because the amount of criminal statutes has burgeoned.<sup>115</sup> This dangerous inverse relationship affronts ideals inherent within the American system of government while subjecting criminal defendants to greater jeopardy.<sup>116</sup> Worse still, many statutes' correct interpretations and meanings are insufficiently certain, which allows further

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<sup>110</sup> See *supra* notes 62, 66-67 and accompanying text (providing varying effects of circuit splits on the Supreme Court).

<sup>111</sup> See *supra* notes 65, 69-73, and accompanying text (describing varying effects of circuit splits on federal circuit courts).

<sup>112</sup> See *supra* notes 65, 74 (noting specific effects of circuit splits on defendants despite proposition that splits are inconsequential); cf. *Bousley v. United States*, 523 U.S. 614, 625-26 (1998) (Stevens, J., concurring in part and dissenting in part) (warning effects on prior defendants when Court resolves splits). A circuit split resolution harms past defendants on the losing side of the split, that is, those courts whose interpretation of the criminal law in question has been overturned in favor of another interpretation. See *Bousley*, 523 U.S. at 625-26 (Stevens, J., concurring in part and dissenting in part). Justice Stevens noted that a Supreme Court ruling on a particular federal criminal law essentially creates a retroactive application of what the law meant since it took effect. See *id.* If the defendant against whom the law was applied was instead tried under the new Supreme Court interpretation, the law would not have been applied against that defendant. See *id.* This discrepancy is unfair. See *id.*

<sup>113</sup> See *United States v. Bass*, 404 U.S. 336, 348 (1971) (setting forth vulnerability of defendants and reasons to apply lenity); see also Clymer, *supra* note 5, at 647 (describing litany of defendant-faced tribulations).

<sup>114</sup> See *supra* note 113 and accompanying text (highlighting defendants' vulnerability). Criminal penalties are serious and "usually represent[] the moral condemnation of the community." *Bass*, 404 U.S. at 348.

<sup>115</sup> See sources cited *supra* notes 20, 24-26 (detailing growth of federal criminal laws and consequently expanded prosecutorial power).

<sup>116</sup> See *supra* notes 29, 113 and accompanying text (providing vulnerability of defendants when protections of federalism lessen); *supra* text accompanying note 27 (criticizing decreased federalism where federal criminal laws' tread on states' criminal laws); see also sources cited *supra* note 5 (exemplifying extreme disparity between federal and state criminal law for same acts).

ability to convict defendants in federal court.<sup>117</sup>

But American jurisprudence adapted a remedy to the evils spawned from politics: Courts will not apply an ambiguous statute against a defendant.<sup>118</sup> Evidence of ambiguity via a circuit split does not necessarily have to be a canon of statutory construction, but rather, could lead to it.<sup>119</sup> Circuit splits provide *prima facie* evidence of ambiguity, and a court, in fairness, should consider the circuit split when deciding whether to apply a criminal statute against a defendant.<sup>120</sup>

## V. CONCLUSION

Courts, the last defenders of liberty, can dispel harmful effects of ambiguous laws. The mere legal reality that different circuit courts interpret a law in disparate ways is perhaps the best evidence of a law's ambiguity. Courts must responsibly interpret laws, not make them, and thus must not construe an ambiguous statute against a defendant. Courts should use the evidence of ambiguity inherent within circuit splits to determine whether to apply federal criminal statutes against defendants.

*Julian W. Smith*

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<sup>117</sup> See *supra* notes 4, 25 and accompanying text (discussing increase of prosecutorial power resulting from broad interpretations of ambiguous laws).

<sup>118</sup> See sources cited *supra* notes 43-44 (discussing benefits of lenity); *supra* note 21 and accompanying text (reasoning federal criminal law expanded due to politics); see also *supra* notes 22-33 and accompanying text (attending need to dispel federalized criminal law regardless of cause because of its negative effects).

<sup>119</sup> See *supra* note 75 (recognizing circuit splits in statutory interpretation can lead to use of statutory construction analysis); *supra* notes 41, 51 and accompanying text (describing use of canons of statutory construction, sometimes ending in application of lenity); see also Brenner, *supra* note 51, at 1066 (discussing advantage of applying lenity throughout statutory construction). But see *Moskal v. United States*, 498 U.S. 103, 108 (1990) (“[The Court never] deemed a division of judicial authority automatically sufficient to trigger lenity.”). The *Moskal* Court was concerned that “one court’s unduly narrow reading of a criminal statute would become binding on all other courts.” *Id.* A circuit split should not necessarily be binding authority, but it should be a practical consideration, that is, a legal reality that a defendant should be permitted to present to a deciding court to help it reach its legal conclusion on the interpretation of a federal criminal law. See *supra* notes 73-75 (presenting circuit split as evidence of ambiguity to question whether to construe statute against defendant).

<sup>120</sup> See *United States v. Bass*, 404 U.S. 336, 348 (1971) (“[L]egislatures and not courts should define criminal activity.”); *supra* note 113 and accompanying text (outlining criminal defendants’ vulnerability); *supra* notes 43-44, 46, 74-75 and accompanying text (advocating fairness of lenity); *supra* notes 107-08 and accompanying text (noting “plausible alternative reading” is evidence of ambiguity); *supra* notes 74, 105 and accompanying text (presenting circuit splits as evidence of alternative interpretations).