

## COMMENT

### Fair Notice About Fair Notice

The rule of lenity requires the courts to construe ambiguous criminal statutes in favor of the defendant.<sup>1</sup> The rule is intended, among other things, to guarantee that no criminal defendant will be caught off guard by a broader reading of a statute than he anticipated; it reflects our collective “instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should.”<sup>2</sup> At the same time, the lenity canon serves to ensure that a statute will not be interpreted more broadly than the legislature intended.<sup>3</sup> But what would happen if a legislature passed a statute telling courts that they could not rely on the rule of lenity any longer, thereby limiting the courts’ ability to preserve the fair-notice values that underpin the canon?

As it turns out, most state legislatures appear to have done just that.<sup>4</sup> Eleven have explicitly barred the courts from using the rule of lenity, enacting laws requiring, for example, that the courts construe a criminal statute “according to the fair meaning of [its] terms” or “to promote justice and effect

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1. See *McNally v. United States*, 483 U.S. 350, 359-60 (1987) (“The Court has often stated that when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language.”).
  2. *United States v. Bass*, 404 U.S. 336, 348 (1971) (quoting Henry J. Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, reprinted in HENRY J. FRIENDLY, *BENCHMARKS* 196, 209 (1967)); see also *McBoyle v. United States*, 283 U.S. 25, 27 (1931) (noting that the rule of lenity ensures that “a fair warning . . . [is] given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed”); Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 *HARV. L. REV.* 2085, 2094 (2002) (“The rule of lenity ensures that criminal statutes are sufficiently clear to satisfy due-process notice.”).
  3. See Zachary Price, *The Rule of Lenity as a Rule of Structure*, 72 *FORDHAM L. REV.* 885, 887 (2004).
  4. See Einer Elhauge, *Preference-Eliciting Statutory Default Rules*, 102 *COLUM. L. REV.* 2162, 2203 (2002).

the objects of the law” rather than reading the statute in favor of the defendant.<sup>5</sup> Others have been more circumspect, directing the courts to construe criminal statutes “liberally”<sup>6</sup> or to “depart[] from literal construction” when doing so would better promote the intent of the legislature.<sup>7</sup> Still others have enacted general rules of interpretation that could be read to bar the use of the lenity canon.<sup>8</sup>

Nonetheless, state courts have not always followed these lenity-displacing statutes. Rather, most state supreme courts seem to be invoking lenity when it suits their fancy.<sup>9</sup> In doing so, though, they have not been clear about why they should be allowed to reject the legislature’s will, why they are choosing to invoke lenity, or even whether they are relying on the lenity canon at all.

To be sure, the state courts’ reluctance to follow these legislated rules is understandable. One might think that individuals have a right to know what conduct is and is not criminal—a right that the legislature cannot take away. It is also understandable that state judges might be reluctant to say outright that they will disregard the legislature’s will; for one thing, judges who directly challenge the political branches and whose decisions can be construed as “pro-criminal” are vulnerable to backlash.<sup>10</sup> But as this Comment shows, state

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5. See Price, *supra* note 3, at 902-03 & n.111. For examples of state laws using variants of the “promote justice” formulation, see ARIZ. REV. STAT. ANN. § 13-104 (2010); DEL. CODE ANN. tit. 11, § 203 (2007); MICH. COMP. LAWS § 750.2 (2004); MONT. CODE ANN. § 45-1-102(2) (2011); N.H. REV. STAT. ANN. § 625:3 (2007); OR. REV. STAT. § 161.025(2) (2011); S.D. CODIFIED LAWS § 22-1-1 (2006); TEX. PENAL CODE ANN. § 1.05(a) (West 2011); and UTAH CODE ANN. § 76-1-106 (LexisNexis 2003). I am indebted to Price, *supra* note 3, which drew my attention to many of the examples cited in this Comment.
  6. Price, *supra* note 3, at 903. Statutes requiring liberal construction include IDAHO CODE § 73-102(1) (2011); KY. REV. STAT. ANN. § 500.030 (LexisNexis 2008); and N.D. CENT. CODE § 1-02-01 (2008).
  7. N.Y. STAT. LAW § 111 (McKinney 2011).
  8. See, e.g., ALA. CODE § 13A-1-6 (2011). Price notes that the commentary to the Alabama statute supports the notion that the provision is intended to abrogate the lenity canon. Price, *supra* note 3, at 903 & n.116; see also ALA. CODE § 13A-1-6 cmt. (noting that “[t]he original draft expressly abolished the common law rule that penal laws are to be strictly construed,” but that “the old rule of strict construction is practically meaningless as it is seldom cited [by Alabama courts] and then only to support a conclusion already reached by reference to the fair meaning of the words and phrases used in the statute and a consideration of the legislature’s intent”).
  9. See *infra* Part II.
  10. The decision of California voters to remove state supreme court Chief Justice Rose Bird, at least in part because of her opposition to the death penalty, provides perhaps the best example of this phenomenon. See Robert Lindsey, *Deukmejian and Cranston Win as 3 Judges Are Ousted*, N.Y. TIMES, Nov. 6, 1986, <http://www.nytimes.com/1986/11/06/us/elections>

judges cannot have it both ways. If judges try to construe laws to be consistent with the lenity canon's notice-giving values while avoiding an outright clash with the state legislature, they undermine the very same values that they seek to preserve.<sup>11</sup>

## I. STATE COURT PRACTICE

Although the U.S. Supreme Court has cited the rule of lenity relatively infrequently of late,<sup>12</sup> the question of legislative override of lenity is a live one in the states. In fact, several state displacement statutes have been cited—not always approvingly—more than ten times per year over the past two decades.<sup>13</sup> Indeed, while some state supreme courts have chosen to follow their legislatures' interpretive rules, most have instead limited the force of those requirements.<sup>14</sup> Some courts have explicitly employed the rule of lenity despite clear legislation barring such a move,<sup>15</sup> but others have come down somewhere in between—neither disclaiming the rule of lenity entirely nor employing it

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-story-some-key-states-deukmejian-cranston-win-3-judges-are-ousted.html (describing a high-profile campaign to oust Bird that focused on her opposition to the death penalty).

11. See *infra* Part II.
12. See Price, *supra* note 3, at 885-86. The rule has also fallen out of favor among academics. See, e.g., John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 189 (1985) (“I believe that the rule of strict construction—at least as it is conventionally understood—is, and probably should be, defunct.”); Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345, 348 (“The time has come . . . formally to dispatch the [rule of lenity] . . .”).
13. For example, a search of the “Citing References” tab on the Westlaw Next page for California’s liberal construction statute, CAL. PENAL CODE § 4 (West 2012), returned 213 citations in federal and state opinions between January 1, 1992 and January 1, 2012.
14. Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as “Law” and the Erie Doctrine*, 120 YALE L.J. 1898, 1919-20 (2011) (citing *Hayes v. Cont’l Ins. Co.*, 872 P.2d 668, 676-78 (Ariz. 1994); *Brodie v. Workers’ Comp. Appeals Bd.*, 156 P.3d 1100, 1107 (Cal. 2007); *Thomson v. City of Lewiston*, 50 P.3d 488, 493 (Idaho 2002); *State v. Dullard*, 668 N.W.2d 585, 595 (Iowa 2003); *Sunburst Sch. Dist. No. 2 v. Texaco, Inc.*, 165 P.3d 1079, 1091 (Mont. 2007); *Burke v. Webb Boats, Inc.*, 37 P.3d 811, 814 (Okla. 2001); *Everhart v. PMA Ins. Grp.*, 938 A.2d 301, 307 (Pa. 2007)).
15. See, e.g., *State v. Pena*, 683 P.2d 744, 748-49 (Ariz. Ct. App. 1983) (“A.R.S. § 13-104 abolishes the general rule that penal statutes are to be strictly construed; nevertheless, where the statute itself is susceptible to more than one interpretation, the rule of lenity dictates that any doubt should be resolved in favor of the defendant.”), *aff’d*, 683 P.2d 743 (Ariz. 1984); see also *Reinesto v. Superior Court*, 894 P.2d 733, 735 (Ariz. Ct. App. 1995); *State v. Barnes*, 859 P.2d 1387, 1388 (Idaho 1993); *State v. Richard*, 786 A.2d 876, 879 (N.H. 2001); *State v. Laib*, 644 N.W.2d 878, 882-83 (N.D. 2002).

explicitly.<sup>16</sup> Often, though, the courts have been either vague or contradictory in their reasoning.<sup>17</sup> As a result, the case law provides neither a clear rationale for following or dismissing a legislated rule, nor even any guidance about whether the courts are following or dismissing the rule in the first place.

Consider the experience of California. The state's code includes a provision barring use of the lenity canon: "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."<sup>18</sup> The case of *Keeler v. Superior Court*<sup>19</sup> forced the state supreme court to confront the legislature's anti-lenity mandate, although the high court did its best to dodge the question. In *Keeler*, the court had to decide whether the state's murder statute, which prohibited the "killing of a human being," covered the intentional killing of a viable fetus that the mother wished to carry to term.<sup>20</sup> The defendant, a divorcé who learned that his ex-wife was pregnant by another man, responded to the news by attacking her violently. In particular, he said he would "stomp [the fetus] out" of her and then kneed her in the stomach, ultimately fracturing the fetus's skull.<sup>21</sup> The statutory text did not resolve the case: no court had interpreted the term "human being" either to include or to exclude a viable fetus that the mother wished to carry to term, and the common law was of no help. Moreover, while the salience of the abortion issue made it unclear what the legislature would have done if faced with precisely this question, it seems unlikely—given the horrific nature of the crime—that it would have intended to create a law that would let the defendant off on the lesser charge of assault.<sup>22</sup>

And yet, ultimately, the *Keeler* court interpreted the ambiguous murder statute to exclude the defendant's actions. In doing so, the court seemed to rely

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16. For example, in *State v. Legg*, 9 S.W.3d 111, 116 (Tenn. 1999), the Tennessee Supreme Court cites the state law requiring interpretation "according to the fair import of [the substantive criminal statute's] terms," TENN. CODE ANN. § 39-11-104 (1997), but holds open the possibility of strict construction in certain (poorly articulated) circumstances.

17. See *supra* notes 13-16 and accompanying text.

18. CAL. PENAL CODE § 4 (West 2012).

19. 470 P.2d 617 (Cal. 1970). While California's large population makes it an important case study for any discussion of lenity, other state courts have issued similar decisions. See, e.g., *State v. Alford*, 970 S.W.2d 944, 947 (Tenn. 1998) (applying "the rule of statutory construction which requires that criminal statutes be strictly construed in favor of the defendant," despite the fact that Tennessee has passed a lenity-displacing statute).

20. *Keeler*, 470 P.2d at 618-19; see also Elhauge, *supra* note 4, at 2195.

21. *Keeler*, 470 P.2d at 618.

22. See Elhauge, *supra* note 4, at 2195.

on the California anti-lenity statute while simultaneously invoking lenity-like concerns to acquit the defendant of murder. First, the majority took notice of the anti-lenity statute, observing that “the Penal Code commands us to construe its provisions ‘according to the fair import of their terms, with a view to effect its objects and to promote justice.’”<sup>23</sup> Next, the majority swore allegiance to the plain meaning rule, promising to follow all of the typical textualist methods of statutory interpretation.<sup>24</sup> The court nevertheless concluded by invoking concerns of notice and due process, declining to apply the murder statute to the defendant. After all, the court noted, “[t]he first essential of due process is fair warning of the act which is made punishable as a crime.”<sup>25</sup> In fact, just one page after admitting that the legislature had prohibited it from applying the lenity canon to criminal cases, the court found that “[t]he terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties.”<sup>26</sup> This formulation echoes decisions explicitly invoking the rule of lenity in dozens of jurisdictions around the country.<sup>27</sup>

## II. THE COSTS OF INDECISION

*Keeler* is just one of many cases in which state courts dealing with anti-lenity statutes have vacillated between adhering to the legislature’s will and

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23. *Keeler*, 470 P.2d at 625 (quoting CAL. PENAL CODE § 4 (West 2012)).

24. *Id.*

25. *Id.* at 626.

26. *Id.* at 626 (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926)).

27. Though the California Supreme Court attempted to explain away *Keeler*’s apparent inconsistencies some thirty years later in *People v. Avery*, 38 P.3d 1 (Cal. 2002), the rationalization seems to me unavailing. In *Avery*, the court suggested that its lenity jurisprudence is “fully consistent with section 4.” *Id.* at 6. After all, the court noted, “although true ambiguities are resolved in a defendant’s favor, an appellate court should not strain to interpret a penal statute in defendant’s favor if it can fairly discern a contrary legislative intent.” *Id.* However, *Avery* fails to fully reconcile these two lines of authority. California courts have invoked the lenity-like principle of *Avery* even before concluding that they could “do no more than guess” at a statute’s meaning. *See id.* There is a vast gap between construing a criminal statute strictly and construing it according to the fair import of its terms but then siding with the defendant when all else fails. By suggesting that the “susceptible of two reasonable interpretations” standard is consistent with the anti-lenity statute, *see id.* at 5, *Avery* failed to resolve the critical question of whether the courts should put a thumb on the scale anytime a statute is susceptible of two reasonable interpretations or only when they can do no more than guess as to the statute’s meaning. Thus, *Keeler*’s lack of clarity persists.

following the common law rule of lenity. My purpose here is to show that there are costs to such indecision, and to propose what I call a “second-order clear statement rule” – a clear statement rule for judges interpreting a legislature’s first-order pronouncements. The courts’ refusal (or inability) to be clear about their own views on the anti-lenity statutes – and to justify whatever decisions they make – undermines the goals that lenity is meant to serve in the first place. After all, if the rule of lenity is meant (at least in part) to ensure that potential criminal defendants are put on notice about the illegality of their actions,<sup>28</sup> then if the courts are not clear about the interpretive method they are using, criminal defendants risk being left in the dark not only about the meaning of a state’s substantive laws, but also about how the courts will *decide how to decide* what the law means. Arguably, a person who does not know how his state’s courts will construe a criminal statute is even more in the dark than a person who *does* know that his state’s courts will construe the criminal statute broadly without reference to the rule of lenity. A rule of lenity whose application is uncertain may be just as problematic from a fair-notice perspective as having no rule of lenity at all.<sup>29</sup>

Moreover, because these objectives are enshrined in the Fourteenth Amendment<sup>30</sup> as well as in every state constitution,<sup>31</sup> the displacement statutes must be interpreted clearly, with an eye toward providing adequate notice to potential defendants not about what the substantive law means, but about how the courts will *interpret* that substantive law. This is true no matter what one believes about the substantive advisability of narrow judicial construction. Indeed, where a legislature has passed a lenity-displacing statute, judges must clearly apply (or reject) the statute so as to achieve the fundamental goals that

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28. See, e.g., Kahan, *supra* note 12, at 345 (“Narrow construction of criminal statutes, it is proclaimed, assures citizens fair notice of what the law proscribes . . .”). *But cf. id.* at 364 (stating that in the author’s opinion, the fair-notice justification for lenity based on rule-of-law values is a “rank fiction”). One might also characterize the notice concern as one of Fourteenth Amendment due process. Rosenkranz, *supra* note 2, at 2094 (“The rule of lenity ensures that criminal statutes are sufficiently clear to satisfy [5th and 14th Amendment] due-process notice.”).
  29. This argument will certainly have particular force in situations in which the crime alleged was of a regulatory nature – *malum prohibitum*, rather than *malum in se*. Thus, while *Keeler*’s treatment of California’s section 4 provides a particularly stark example of a court whose approach to lenity was inscrutable, there are no doubt other examples that may be more appropriate substantively. See *infra* note 40 and accompanying text.
  30. U.S. CONST. amend. XIV, § 1 (“No state shall . . . deprive any person of life, liberty, or property without due process of law.”).
  31. For a representative example of a state constitutional due process provision, see CAL. CONST. art. I, § 7, which provides that “[a] person may not be deprived of life, liberty, or property without due process of law.”

lenity is intended to serve in the first place: fair notice and due process for the defendant.<sup>32</sup>

Admittedly, due process and fair notice are not the only reasons to invoke the rule of lenity. Scholars and jurists have also argued that the rule serves (1) to ensure that the legislative will is vindicated;<sup>33</sup> (2) to channel criminal lawmaking into the political process;<sup>34</sup> (3) to protect against overcriminalization;<sup>35</sup> (4) to impel Congress to draft clearer statutes;<sup>36</sup> and (5) to ensure that the politically powerless are given a fair shake.<sup>37</sup> However, as long as one believes that the rule of lenity is motivated at least in part by constitutional concerns of fair notice and due process, the availability of other arguments to support the use of lenity does not undermine the fundamental point that a lack of second-order clarity is a serious problem for the courts and potential criminal defendants.

Moreover, the dilemma remains whether or not one believes courts should be able to ignore the legislature's desire to displace the lenity canon.<sup>38</sup> Indeed, for those who think that constitutional concerns counsel against allowing legislative rejection of the lenity canon, the result is obvious: the same concerns that animate courts' decisions to embrace lenity in the face of legislative

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32. One might argue that the "promote justice" formulation of statutes like California's allows courts enough leeway to read statutes as they like without actually invoking the rule of lenity. But this argument confuses first-order clarity with the second-order concerns I have identified here. For while a statute requiring the courts to interpret statutes to promote justice might be clear on its face, muddled judicial opinions addressing the statute could still cause confusion among potential criminal defendants.
  33. See *United States v. Bass*, 404 U.S. 336, 348 (1971).
  34. See Price, *supra* note 3, at 887.
  35. See Stephen F. Smith, *Proportionality and Federalization*, 91 VA. L. REV. 879, 939 (2005).
  36. William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 600 (1992).
  37. See WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, *LEGISLATION AND STATUTORY INTERPRETATION* 357 (2d ed. 2006) (suggesting that the rule of lenity "might reflect a commonsense notion that potential criminal defendants are virtually impossible to organize" against an adverse legal decision, whereas "prosecutors are easily organized to propose such an amendment and have great legitimacy in making such a case to a legislature").
  38. For a range of views on that question, see Rosenkranz, *supra* note 2, at 2094-98, which discusses whether lenity is a 'starting-point rule' that may be altered by the legislature or whether it is a 'constitutional' rule that cannot be overridden; Elhauge, *supra* note 4, at 2203, which observes that, as a first principle, "the rule of lenity is merely a default rule, and like all default rules this one should operate only if the relevant actor does not opt out of it"; and Jacob Scott, *Codified Canons and the Common Law of Interpretation*, 98 GEO. L.J. 341, 344 (2010), which argues that "[b]ecause the canons are nothing more than common law, legislative enactments that repudiate or ratify canons should not only be included in any conversation about the canons, but should be considered important and controlling."

disapproval require that courts be clear about how they are using lenity and interpreting the relevant interpretive statutes. And for those who believe that a legislature should have the power to abrogate the rule of lenity, judicial opacity and indecision are suboptimal. Even if one were to concede that a legislature could abrogate the lenity canon itself, a mere statute could not override the separate, constitutional due process right that is lost when potential criminal defendants are left to guess how the law will be applied: the right to a *process* of adjudication that provides adequate notice. The constitutional concerns would remain, and the courts would still have to be clear about the bases for their decisions in order to provide the required notice.

Several counterarguments are apparent. First, one might respond that individuals are unlikely to be familiar with or to understand the criminal law at all, let alone the substantive canons of interpretation. While nonlawyers are unlikely to read criminal statutes that establish primary offenses,<sup>39</sup> they are even less likely to read the rules of statutory interpretation that legislatures promulgate or the judicial decisions construing those statutes. Thus, it is implausible that anyone (except perhaps a lawyer or law student) is burdened in any meaningful way by the uncertainty that exists in states whose highest courts have issued ambivalent rulings with respect to displacement statutes. Second, and similarly, the argument in favor of lenity would seem to be weaker when the crime in question is committed in the heat of passion; in that case, we usually assume that the offender could not help but commit the crime, and so no amount of statutory clarity could have helped. Third, insofar as individuals *do* read statutes like California's lenity-displacing law, then displacement does not necessarily violate notice and due process: individuals are on notice that courts might construe criminal statutes broadly.

However, none of these points is fatal to my argument. If the first counterargument holds true—that is, if substantive canons are too complex, and displacement statutes too obscure, to expect nonlawyers to be aware of their existence or to be able to understand their reach—then the third counterargument crumbles, and codified anti-lenity becomes a fair notice/due process violation. Moreover, while we might not expect the typical offender to be attuned to the minutiae of the criminal code—either because he is

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39. See, e.g., Price, *supra* note 3, at 886 (“The [notice] theory is flawed because criminals do not read statutes . . . .”); cf. Jeffries, *supra* note 12, at 220 (“[A] court should avoid interpretations that threaten unfair surprise. This concern should not be measured by the hypothetical construct of ‘lawyer’s notice,’ which applies, albeit artificially, to a vast range of cases, but by the narrower and more focused inquiry . . . : Would an ordinarily law-abiding person in the actor’s situation have had reason to behave differently? In the unusual case where that question would be answered ‘no,’ imposition of penal sanctions threatens genuine unfairness and must be avoided.”).



unsophisticated or because he acted in the heat of passion—there is no doubt that at least some sophisticated actors are aware of such details, most notably those who face high legal stakes and who can afford the best lawyers.<sup>40</sup>

On the other hand, if the third counterargument is accurate—that is, if nonlawyers really are aware of the existence of and well versed in the scope of lenity-displacing statutes, and if they modulate their behavior accordingly—then my concern about the clarity of judicial decisions applying those statutes is even more salient. After all, knowing about such a statute would be entirely unhelpful if judges do not apply it consistently. In states whose high courts speak to the question obliquely, uncertainty as to the (non)application of the rule of lenity is problematic. And while it is possible that such inconsistency would favor defendants on average—judges would presumably only depart from an anti-lenity statute to treat defendants more leniently than the statute suggests they would—that does not change the fact that defendants will not know how they will be treated in a particular case. Due process is not concerned with average results, but with fairness in each individual case.<sup>41</sup>

## CONCLUSION

These observations make it clear that the state courts must rethink their approach to lenity and legislated interpretive rules. Indeed, so long as one accepts that individuals should be able to discern what conduct is criminal and what conduct is not, it follows that the courts ought to be clear about whether they will apply state statutes displacing the rule of lenity. If, on the other hand, courts choose to disregard these statutes, they should make their reasons known.

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40. The force of this argument suggests that the case for lenity, and thus the argument for second-order clarity, is strongest for criminal statutes that create offenses that are *malum prohibitum*, rather than *malum in se*. See WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 886 (4th ed. 2007). In this sense, my argument mirrors the case for the similar void-for-vagueness doctrine. See generally *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926). *But cf.* [Anthony G. Amsterdam], Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 73-74 (1960) (arguing that the void-for-vagueness doctrine is applied “inconsistently with the ‘warning’ rationale,” and that the doctrine “has been used by the Supreme Court almost invariably for the creation of an insulating buffer zone of protection at the peripheries of several of the Bill of Rights freedoms”).

41. *Cf. Furman v. Georgia*, 408 U.S. 238, 241-43 (1972) (Douglas, J., concurring) (concluding that the death penalty had been imposed arbitrarily, even where the baseline was death and certain defendants were given more lenient sentences).