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 — *United States v. Arreola*, 446 F.3d 926 (9th Cir.), *superseded on denial of reh'g and reh'g en banc*, 467 F.3d 1153 (9th Cir. 2006), *cert.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 (2007).

Congress enacted 18 U.S.C. § 924(c)(1) in part "to combat the 'dangerous combination' of 'drugs and guns.'"[1] Section 924(c)(1)(A) enhances the sentence of one who, "during and in relation to any . . . drug trafficking crime . . . uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm."[2] Congress added the "possesses" clause in response to the Supreme Court's restrictive interpretation of the "uses" prong of the "uses or carries" clause.[3] Since then, several courts have held the two clauses to define distinct offenses that must be charged separately to protect, among other things, a defendant's right to a unanimous jury verdict.[4] Recently, in *United States v. Arreola*,[5] the Ninth Circuit split from these courts by holding that the clauses define alternative means of committing a single offense. In doing so, the court misapplied the rule of lenity and overlooked an important precedent of its own. It also neglected to consider the tension between two different types of lenity: one favoring particular defendants, the other favoring defendants in general. Which type applies when, and whether either settles *Arreola*, is unclear. Until the Supreme Court clarifies the rule or Congress makes its intentions manifest, this important statute will remain obscured.

Jose Arreola was arrested in April 2001 after offering to sell heroin to an undercover police officer.[6] A search incident to the arrest revealed a loaded handgun in the glove compartment of his vehicle and an extra magazine clip in his pocket.[7] The government charged Arreola with, inter alia, one count of using and carrying a firearm during and in relation to, and possessing the same firearm in furtherance of, a

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[1] Muscarello v. United States, 524 U.S. 125, 132 (1998) (quoting Smith v. United States, 508 U.S. 223, 240 (1993)).

[2] 18 U.S.C. § 924(c)(1)(A) (2000).

[3] *See* 144 CONG. REC. 26,608 (1998) (statement of Sen. Mike DeWine) (describing the legislation as a direct response to Bailey v. United States, 516 U.S. 137 (1995)).

[4] *See* United States v. Combs, 369 F.3d 925 (6th Cir. 2004); United States v. Pleasant, 125 F. Supp. 2d 173 (E.D. Va. 2000); *cf.* United States v. Gamboa, 439 F.3d 796 (8th Cir. 2006) (holding that the two clauses define separate offenses for double jeopardy purposes).

[5] 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 (2007).

[6] *Arreola*, 467 F.3d at 1155.

[7] *Id.* During the attempted deal, Arreola had been sitting in the second of three rows of seats, from which he could have accessed the glove compartment with some difficulty. *Id.* He told officers that he "carr[ied] the gun for protection" from "gang members." *Id.*

drug trafficking crime.[8] He was convicted and sentenced to 190 months in prison.[9] On appeal, Arreola argued that his indictment had been duplicitous,[10] thereby depriving him of his right to a unanimous jury verdict.[11] He claimed that § 924(c)(1)(A) defined *two* offenses — using or carrying a firearm during and in relation to a drug trafficking crime, and possessing a firearm in furtherance of such a crime — and that by charging him with both offenses in a single count, the indictment had made it possible for the jury to convict him without agreeing unanimously on which offense he had committed.[12]

The Ninth Circuit affirmed. Writing for the panel, Judge Thomas conducted a four-factor analysis to determine how many offenses the statute defined.[13] The first factor was "the language of the statute."[14] Judge Thomas acknowledged that the two clauses described "separate acts,"[15] but found it unclear that these acts constituted separate offenses, noting Congress's decision to list the two acts in the same sentence and to assign a single penalty to both of them.[16]

The second factor was the statute's legislative history.[17] Congress added the "possession in furtherance" clause in 1998,[18] after the Supreme Court held that the "use" prong required "*active employment* of the firearm by the defendant."[19] Congress contemplated several "possession" clauses aimed at broadening the statute, finally adopting one with what it deemed to be a stronger participation requirement.[20] Judge Thomas saw the amendment not as a clear attempt to bring a new offense within the scope of § 924(c), but as an attempt to broaden that scope while assuring worried members of Congress that it would not cover gun possession that was incidental to the underlying crime.[21]

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[8] *Id.* at 1155–56.

[9] *Id.* at 1156. This included 130 months for the underlying drug trafficking crime — possessing heroin with intent to distribute, in violation of 21 U.S.C. § 841(a)(1) — and 60 months for the § 924(c) violation. *See* Appellant's Opening Brief at 2–4, *Arreola*, 467 F.3d 1153 (No. 04-10504), 2005 WL 3755662.

[10] "Duplicity is the joining in a single count of two or more distinct and separate offenses." United States v. UCO Oil Co., 546 F.2d 833, 835 (9th Cir. 1976).

[11] *See* Appellant's Opening Brief, *supra* note 9, at 10–11.

[12] *See id.* at 16–25.

[13] *See Arreola*, 467 F.3d at 1157–61 (following *UCO Oil*, 546 F.2d at 836–38).

[14] *Id.* at 1157.

[15] *Id.* (citing United States v. Combs, 369 F.3d 925, 931 (6th Cir. 2004)).

[16] *Id.* at 1157–58 (citing United States v. Street, 66 F.3d 969, 974 (8th Cir. 1995), for the proposition that such decisions indicate a lack of congressional intent to create more than one offense).

[17] *See id.* at 1158–59.

[18] *See* Act of Nov. 13, 1998, Pub. L. No. 105-386, § 1(a)(1), 112 Stat. 3469.

[19] Bailey v. United States, 516 U.S. 137, 143 (1995).

[20] *See* H.R. REP. NO. 105-344, at 11–12 (1997) (explaining that "'in furtherance of' is a slightly higher standard" that "encompasses the 'during and in relation to' language"); *cf. Arreola*, 467 F.3d at 1159 (describing "in furtherance of" as a "more stringent" requirement).

[21] *Arreola*, 467 F.3d at 1159.

The third factor was whether the two clauses proscribed sufficiently different kinds of conduct.[22] Here Judge Thomas compared the elements needed to prove a violation of each clause. On the one hand, "using" required active employment and "carrying" required knowing possession and conveyance.[23] Under Ninth Circuit precedent, these actions qualified as "in relation to" an underlying crime if the firearm "facilitated or had a role in the crime."[24] On the other hand, possession "in furtherance" required possession "to promote or facilitate the underlying crime."[25] Judge Thomas concluded that these elements were "not so dissimilar as to indicate that Congress intended to create two separate offenses."[26]

The fourth and final factor was the "appropriateness of multiple punishment for the conduct charged in the indictment."[27] Judge Thomas cited *Bell v. United States*,[28] in which the Supreme Court had derived from the rule of lenity a presumption against "construing statutes in a way that would lead to multiple punishment."[29] He pointed to the apparent absurdity of punishing a defendant twice for violating both clauses — something he assumed would be permissible under a two-offense reading — and inferred that such could not have been Congress's intent when it amended the statute.[30] Weighing the factors together, he concluded that § 924(c)(1)(A) defined a single offense, and hence that the indictment had not been duplicitous and had not violated Arreola's right to a unanimous verdict.[31]

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[22] *Id.*

[23] *See id.* at 1159–60.

[24] *Id.* (quoting United States v. Streit, 962 F.2d 894, 899 (9th Cir. 1992)) (internal quotation marks omitted).

[25] *Id.* (quoting United States v. Krouse, 370 F.3d 965, 967 (9th Cir. 2004)).

[26] *Id.* at 1161.

[27] *Id.* at 1160 (quoting United States v. UCO Oil Co., 546 F.2d 833, 837 (9th Cir. 1976)) (internal quotation marks omitted).

[28] 349 U.S. 81 (1955).

[29] *Arreola*, 467 F.3d at 1160. The *Bell* Court characterized lenity as entailing "a presupposition . . . to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment" and stated that "if Congress does not fix the punishment for a federal offense clearly and without ambiguity, doubt will be resolved against turning a single transaction into multiple offenses." *Bell*, 349 U.S. at 83–84.

[30] *See Arreola*, 467 F.3d at 1160.

[31] *Id.* at 1161. One issue raised in the briefs but not discussed by the court was whether the Supreme Court had already decided how many offenses the statute defined. In *Harris v. United States*, 536 U.S. 545 (2002), the Court concluded that "as a matter of statutory interpretation, § 924(c)(1)(A) defines a single offense." *Id.* at 556. Arreola argued that this statement was mere dictum, because *his* "offense-counting" issue was not before the *Harris* Court. *See* Appellant's Reply Brief at 3–6, *Arreola*, 467 F.3d 1153 (No. 04-10504), 2006 WL 2365383. Clauses (ii) and (iii) of § 924(c)(1)(A) specify additional punishments that apply if the firearm in question is "brandished" or "discharged," respectively. Directly at issue in *Harris* was whether brandishing and discharging are sentencing factors to be found by a judge, or offense elements to be found by a jury. But Harris argued that § 924(c)(1)(A) defines *three* offenses: one for the main body of the

The Ninth Circuit plausibly showed the first three *Arreola* factors to be inconclusive, whether or not it recognized as much.[32] Its analysis of the fourth factor was conclusive, but flawed, because it misapplied the rule of lenity and overlooked a Ninth Circuit precedent that would have rendered the fourth factor less conclusive. The court could have invoked lenity properly but would then have faced a question of how to apply the rule when the interests of a particular defendant diverge from, or fail to align clearly with, those of other, similarly situated defendants. The Supreme Court has yet to answer this question definitively. Until it does, or until Congress clarifies its intentions, courts will lack definitive guidance in counting offenses under § 924(c)(1)(A).

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section and one for each of clauses (ii) and (iii) (adding brandishing and discharging, respectively, to the elements specified in the main body). *See Harris*, 536 U.S. at 552. This may explain why the Court felt it necessary to specify the number of offenses defined. However, while holding that the section defines only *one* offense was *sufficient* to dispose of Harris's argument, it was not *necessary*. It would have been enough to hold that clauses (ii) and (iii) *do not add to* the number of offenses defined by § 924(c)(1)(A), *whatever* the latter number may be. Still, it is not clear that a mere lack of necessity for disposition suffices to turn a statement into nonbinding dictum. *See generally* Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953 (2005).

[32] Although Judge Thomas stated early in his opinion that the factors "clear[ly]" supported a one-offense reading, *Arreola*, 467 F.3d at 1157, his subsequent discussion belied that claim, at least with respect to the first three factors. Indeed, the Sixth Circuit found the same three factors to support a two-offense reading in *United States v. Combs*, 369 F.3d 925 (6th Cir. 2004). Most decisive in its analysis was its finding that the two clauses required different proof. The court pointed first to the elements of "using or carrying" that went beyond mere possession, and then to the elements of possession "in furtherance" that went beyond possession "during and in relation," concluding that each clause lacked an element of the other and that they therefore defined separate offenses. *See id.* at 932–33; *cf.* Blockburger v. United States, 284 U.S. 299, 304 (1932) ("[W]here the same act . . . constitutes a violation of two distinct statutory provisions, the test . . . to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not."). Other courts have taken the same test to show that § 924(c)(1)(A) defines two offenses. *See* United States v. Gamboa, 439 F.3d 796, 809–10 (8th Cir. 2006); United States v. Pleasant, 125 F. Supp. 2d 173, 182 (E.D. Va. 2000).

These two-offense courts may have misapplied the different proof test, however, because they failed to compare the relevant clauses in full. Instead, they compared the clauses piecemeal, inferring from the sufficient lack of overlap between "uses or carries" and "possesses" on the one hand, and between "during and in relation" and "in furtherance" on the other, that there was a sufficient lack of overlap between "uses or carries during and in relation" and "possesses in furtherance." *See Gamboa*, 439 F.3d at 810; *Combs*, 369 F.3d at 932–33; *Pleasant*, 125 F. Supp. 2d at 182. But it is precisely these last two clauses that need comparing. Even if "in furtherance" is a stronger participation requirement than "during and in relation," the greater strength of "uses or carries" relative to "possesses" may narrow the gap between the full clauses. For example, in *United States v. Ceballos-Torres*, 218 F.3d 409 (5th Cir. 2000), the Fifth Circuit concluded that "using or carrying during and in relation" implies "possessing in furtherance," thereby rendering the first clause superfluous. *See id.* at 412–15. The court reasoned that the "active employment" required under "use" would ensure "possession that furthers or advances the enterprise," and that because "carrying a firearm always serves to protect the holder," carrying one "during and in relation to" an underlying crime would also constitute possession that furthers or advances that crime. *Id.* at 413. Whether or not its construction is sound, *Ceballos-Torres* illustrates the additional complexity involved in a *comprehensive* comparison of the two clauses, and the potential for such a comparison to favor a single-offense reading.

The *Arreola* court's analysis of the fourth factor was faulty for two reasons. First, it applied the rule of lenity too early. The Supreme Court has made clear that the rule of lenity applies only after a court has exhausted all other means of disambiguating a statute.[33] The Ninth Circuit therefore should not have applied *Bell*'s lenity-based presumption against multiple punishment in its analysis of the fourth factor; it was permitted to apply lenity only in the event that its analysis of all four factors left Congress's intent unclear. Second, the court wrongly assumed that a two-offense reading would expose defendants to multiple punishment, for the Ninth Circuit had previously held — most recently in *United States v. Franklin*[34] — that each conviction under § 924(c)(1) must be based on a separate predicate offense.[35] Under this rule, a defendant cannot be punished both for using or carrying a firearm during and in relation to a given crime and for possessing a firearm in furtherance of that same crime.[36]

Whether and how the court should have weighed the fourth factor is unclear. The *Franklin* rule may stem from a finding that multiple punishment under the two clauses of the statute would be inappropriate. Or it may simply be a black box that renders the appropriateness of multiple punishment irrelevant to the number of offenses. As it happens, the rule derives from a line of cases that do not elaborate on its basis.[37] Without more, it would seem to render the fourth factor irrelevant, leaving the court with three inconclusive factors to weigh. But even if the *Franklin* rule reflected an active rejection of multiple punishment, there would remain a question of how to weigh the fourth factor against the others. The answer would depend on why one was counting offenses in the first place. Arreola was primarily concerned with his right to a unanimous verdict, but that is not the only value implicated by a duplicitous indictment. Duplicity can also lead to "improper notice of the charges" as well as "prejudice in the shaping of

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[33] *See* Smith v. United States, 508 U.S. 223, 239 (1993); Callanan v. United States, 364 U.S. 587, 596 (1961). *But see* United States v. R.L.C., 503 U.S. 291, 307–11 (1992) (Scalia, J., concurring in part and concurring in the judgment) (arguing that a statute need not have ambiguous *legislative history* in order to trigger the rule of lenity).

[34] 321 F.3d 1231 (9th Cir. 2003).

[35] *See id.* at 1241.

[36] Under the *Franklin* rule, lenity does not require *Bell*'s presumption against multiple offenses, because multiplying offenses does not mean multiplying potential punishments. However, the *Franklin* rule derives from a line of cases ending in 1993, five years before Congress added the "possession" clause to § 924(c)(1)(A). *See* United States v. Martinez, 7 F.3d 146, 148 (9th Cir. 1993); United States v. Smith, 924 F.2d 889, 894 (9th Cir. 1991).

The Fourth and Sixth Circuits, in which § 924(c)(1)(A) has been found to define two offenses, have similar pre-amendment bans on multiple punishments for violations of § 924(c)(1) relating to a single predicate offense. *See* United States v. Dunford, 148 F.3d 385, 390 (4th Cir. 1998); United States v. Sims, 975 F.2d 1225, 1235 (6th Cir. 1992).

[37] *See Franklin*, 321 F.3d at 1241; *Martinez*, 7 F.3d at 147–48; *Smith*, 924 F.2d at 894.

evidentiary rulings, in sentencing, in limiting review on appeal, [and] in exposure to double jeopardy."[38] Whether the *Arreola* court was counting offenses for all of these purposes or solely for the purpose of protecting Arreola's right to a unanimous verdict, the proper weight of the fourth factor depends on the degree to which the relevant interests aim at minimizing undue punishment. Without an authoritative account of punishment's relation to these interests, it is unclear which reading the fourth factor favors, and to what extent.

Given the inconclusiveness of the factors it considered, the Ninth Circuit could have found sufficient ambiguity to trigger the rule of lenity. However, the rule as it stands would not have settled *Arreola* decisively, because it leaves open what to do when the interests of a particular defendant diverge from those of defendants in general. Taken literally, one standard formulation of the rule suggests simply resolving ambiguity in favor of the defendant before the court. Call it *case-specific lenity*: "[W]here there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant."[39] The Ninth Circuit, however, has explicitly treated lenity as favoring defendants in general (call this *generic lenity*).[40] The Supreme Court's position is unsettled. In *Johnson v. United States*,[41] the Court refused to apply the rule in favor of a particular interpretation on the ground that it was unclear whether that interpretation would "generally" provide more lenience.[42] In *United States v. Granderson*,[43] however, faced with an ambiguous sentencing statute, the Court acknowledged that the rule of lenity would support conflicting interpretations in different cases, depending on which would yield "a shorter sentence" for each defendant.[44] In ef-

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[38] United States v. Duncan, 850 F.2d 1104, 1108 n.4 (6th Cir. 1988), *abrogated on other grounds by* Schad v. Arizona, 501 U.S. 624 (1991).

[39] Adamo Wrecking Co. v. United States, 434 U.S. 275, 285 (1978) (quoting United States v. Bass, 404 U.S. 336, 348 (1971)) (internal quotation marks omitted).

[40] *See* United States v. Olvera-Cervantes, 960 F.2d 101, 103 (9th Cir. 1992) ("[T]he rule of lenity . . . is of little use here because we do not know whether the defendant's interpretation . . . would end up benefitting defendants in general."); *cf.* United States v. O'Neil, 11 F.3d 292, 301 n.10 (1st Cir. 1993) ("Depending on the facts of any particular defendant's situation, a generous reading of the . . . provision can produce either a harsher or a more lenient result than a cramped reading will produce. Thus, we regard the interpretive struggle over the . . . provision as lenity-neutral.").

[41] 529 U.S. 694 (2000).

[42] *See id.* at 713 n.13 ("[T]he rule of lenity would be Delphic in this case. There is simply no way to tell whether sentencing courts given the option of supervised release will generally be more or less lenient in fixing the second prison sentence.").

[43] 511 U.S. 39 (1994).

[44] *See id.* at 57 n.15; *cf.* United States v. Harrison, 815 F. Supp. 494, 499 (D.D.C. 1993) (holding that if the sentencing statute in question were to trigger lenity, the defendant's interpretation would have to be rejected in favor of the one most lenient in his circumstances). *But see* Note, *The New Rule of Lenity*, 119 HARV. L. REV. 2420, 2431 n.80 (2006) (arguing that *Granderson* "is best read as a case of ordinary statutory construction," and not as relying on lenity).

fect, the *Granderson* Court allowed that lenity could result in different interpretations depending on a defendant's circumstances.[45]

Even if the tension between generic and case-specific lenity had somehow been resolved, the rule of lenity may not have provided a clear answer to the interpretive question presented in *Arreola*. Generic lenity may not have favored either interpretation over the other. Unlike Arreola, many defendants charged under § 924(c)(1)(A) do not stand to benefit from a two-offense reading of the statute; however, given the *Franklin* rule, they do not stand to suffer additional punishment under such a reading either.[46] Case-specific lenity may have fared no better, because it is not obvious that a two-offense reading would have been any more lenient for Arreola. Because he had failed to object to his indictment before trial, his duplicity claim, even if it had merit, would have been reviewable only for plain error.[47] And it is doubtful that the mere *chance* that an interpretation could lead to lesser punishment is enough to warrant case-specific lenity.

What the rule of lenity demands in a given case should depend on the purposes it serves there. But lenity's traditional purposes do not mandate a particular interpretation of § 924(c)(1)(A). The rule of lenity is often invoked to facilitate fair notice and the separation of powers,[48] but neither of these rationales decisively supports one reading of the statute. Both readings criminalize the same conduct, so neither gives superior notice on that score. Even if a court sought to provide defendants with notice of how harshly the law penalizes firearm involvement in drug trafficking crimes,[49] the *Franklin* rule would leave the two readings on a par. Similarly, a single-offense reading would lessen the risk of judicial crime creation, and thereby promote the separation

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[45] During oral argument, one Justice expressed puzzlement over just this issue: "[H]ow does the Rule of Lenity work? . . . Would [it] give us a constant interpretation of this statute, depending upon what kind of a situation first comes before us, or rather, would we interpret the statute leniently to the first defendant and then also leniently to the second defendant, depending upon which interpretation works case by case?" Transcript of Oral Argument at 50–51, *Granderson*, 511 U.S. 39 (No. 92-1662), 1994 WL 663486.

[46] Given *Franklin*, however, generic lenity may favor a two-offense reading insofar as such a reading would force prosecutors to charge the two clauses of the statute in separate counts, enabling defendants to guarantee acquittal by instilling reasonable doubt in the mind of at least one juror with respect to each count.

[47] *See Arreola*, 467 F.3d at 1161.

[48] *See* Note, *supra* note 44, at 2424–27 (identifying and questioning these rationales).

[49] Whether fairness requires notice of punishment is disputed. *Compare* 3 NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 59.03, at 103 (5th ed. 1992) ("The purpose behind the more lenient interpretation is to place the burden . . . on the legislature to clearly . . . warn people as to what actions would expose one to liability for penalties *and what the penalties would be*." (emphasis added)), *with* Phillip M. Spector, *The Sentencing Rule of Lenity*, 33 U. TOL. L. REV. 511, 533 n.126, 551–53 (2002) (arguing that the Due Process Clause, which underlies the notice-based rationale for lenity, does not require "that a criminal defendant be given notice of the precise *consequences* that accompany his criminal activity").

of powers, only if "crime creation" included not just extending criminalization of conduct, but also increasing the number of separately indictable offenses. Punishment aside, however, lenity is largely blind to how many offenses there are.

This much is clear: lenity should be generic to the extent that it is used to settle the interpretation of a statute for future cases.[50] Otherwise, permanent interpretations would be fixed arbitrarily, depending on the circumstances of the first defendant who happened to bring the ambiguity before a court. Supreme Court Justices have suggested, not surprisingly, that the interpretations resulting from the Court's applications of lenity are binding on subsequent courts.[51] If the Sixth Circuit's reliance on its two-offense reading is any indication,[52] the Ninth Circuit's interpretation in *Arreola* will soon achieve similar status. To the extent that its invocation of the rule of lenity was proper, the court will then have been right to have tried to favor the generic defendant. Still, a case like *Granderson*, in which lenity appears to apply *without* permanently fixing the interpretation of the relevant provision, gives ground for pause. The Court may there have signaled a willingness to apply case-specific lenity in areas where there is no sufficiently generic defendant to protect. To identify such areas, courts will need a way to determine when there is a sufficiently unified class of defendants whose lenity interests may trump those of the defendant at hand.[53]

Section 924(c)(1)(A) is an oft-used provision, and as things stand there will be persistent conflict over how to charge its suspected violators: defendants will claim duplicity when charged with one count (citing the two-offense circuits) and multiplicity when charged with two (citing *Arreola*). Given *Arreola*'s procedural posture, it is understandable that the Supreme Court did not use it to confront this circuit split. But courts have limited guides to legislative intent, and Congress's past efforts to clarify the statute have had mixed results. In the short run, a refined rule of lenity may be the price of resolution.

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[50] *See, e.g.*, United States v. Kozminski, 487 U.S. 931, 951–52 (1988) (applying the rule of lenity to fix the meaning of "involuntary servitude" under 18 U.S.C. §§ 241 and 1584).

[51] *See, e.g.*, United States v. Granderson, 511 U.S. 39, 68 (1994) (Kennedy, J., concurring in the judgment); United States v. Thompson/Ctr. Arms Co., 504 U.S. 505, 519 (1992) (Scalia, J., concurring in the judgment).

[52] *See, e.g.*, United States v. Savoires, 430 F.3d 376, 379–80 (6th Cir. 2005).

[53] This inquiry might begin with two questions. First, who are the relevant defendants? Are they those who perform the same act and appear in the same court as the instant defendant? Second, what counts as a generic representative of the class? It could be a *mode* of some kind — that is, a type of defendant sufficiently common in terms of some relevant characteristic such as potential sentence length. Or it could be an *average* of some kind, although averaging would require a way of "adding" the relevant characteristics, which will be impossible if some of them are incommensurable. Alternatively, lenity might operate to minimize the total amount of potential punishment inflicted pursuant to the statute, so that it would favor an interpretation that is slightly less lenient to most defendants but that sufficiently reduces the penalties for a minority of them.