necessarily depends on whether judges will see a scheme as overly burdensome.

Even those who zealously support constitutional review of statutes as a means to protect political minorities[73] might read *Dada* in wonder: how could the Court create an affirmative right and a way out of statutory obligation without support from either the unambiguous statute or the Constitution? The Court applied a form of the absurdity doctrine, but its remarkable remedy for "untenable conflict" suggests that this was no typical absurdity case. *Dada* thus offers hope for marginalized groups facing troubling laws: if Congress has not spoken with particular resolve, courts may cite *Dada* to mitigate what they perceive to be an unfair statutory scheme.

D. Money Laundering

Rule of Lenity. — The rule of lenity is a necessary safety valve in an adversarial system of justice that strives to provide due process to participants.[1] Lenity, a rule that states that, when a statute is irreconcilably ambiguous, the tie goes to the defendant, has long been a staple of the American justice system.[2] Though lenity was a robust doctrine for much of this country's legal development, in recent decades lenity has been disfavored, a deciding factor in only a limited subset of cases if at all.[3] Many modern judges and scholars either write off lenity as a dormant doctrine or theorize that its scope has gradually condensed to preventing only the criminalization of innocent conduct.[4] Last Term, in *United States v. Santos*,[5] the Supreme Court began reversing that trend. Considering "whether the term 'proceeds' in the federal money-laundering statute . . . means 'receipts' or 'profits,'"[6] the Court found that the term was ambiguous and applied the rule of lenity to hold that the more defendant-friendly "profits" definition was the correct interpretation.[7] By turning to lenity as its first point of analysis and strictly construing a statutory term whose broader construction could only have added additional penalties to a preexisting conviction, the

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[73] *See, e.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST 135–80 (1980).

[1] *See, e.g.*, Ellsworth A. Van Graafeiland, *RICO and the Rule of Lenity*, 9 N. ILL. U. L. REV. 331, 340–41 (1989).

[2] *See, e.g.*, United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95–96 (1820) (applying strict construction to a penal statute).

[3] *See* Zachary Price, *The Rule of Lenity As a Rule of Structure*, 72 FORDHAM L. REV. 885, 885–86 (2004).

[4] *See* Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345, 347; *cf.* Price, *supra* note 3, at 885–86; Note, *The New Rule of Lenity*, 119 HARV. L. REV. 2420, 2420–21 (2006).

[5] 128 S. Ct. 2020 (2008).

[6] *Id.* at 2022 (citation omitted).

[7] *Id.* at 2025.

Court began reversing the contraction of lenity and revitalizing a crucial protection for defendants.

In 1997, a federal jury convicted Efrain Santos,[8] the ringleader of an illegal lottery,[9] of money laundering under the "promotion" prong of 18 U.S.C. § 1956, which criminalizes using the "proceeds" of criminal activities to promote the continuation of an enterprise.[10] Participants in the lottery would turn over cash bets to "runners," who would take a cut and pass the remainder on to "collectors," who gave the money to Santos. Santos used some of that money to pay the collectors and give bettors their winnings.[11] After losing his direct appeals, Santos moved to vacate his sentence under 28 U.S.C. § 2255. Santos argued that the federal money laundering statute's use of "proceeds" was ambiguous and that he should receive the benefit of that ambiguity.[12] The district court applied the recently decided *United States v. Scialabba*,[13] which held that "proceeds" refers to "profits," not to "receipts."[14] Thus, the court vacated the conviction, concluding that "there exists the distinct possibility that Santos stands convicted of acts that the law does not make criminal."[15]

The Seventh Circuit affirmed.[16] Noting that the underlying facts of the case were not in dispute, the court moved quickly to the government's "frontal assault on *Scialabba*."[17] *Scialabba*, the court held, was decided "relying on the rule of lenity and seeking to avoid 'convict[ing] a person of multiple offenses when the transactions that vio-

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[8] Santos had various co-defendants, including Roberto Febus. The first appeal listed Febus as the named defendant-appellant. United States v. Febus, 218 F.3d 784 (7th Cir. 2000), *cert. denied sub nom.* Santos v. United States, 531 U.S. 1021 (2000) (mem.).

[9] United States v. Santos, 342 F. Supp. 2d 781, 784 (N.D. Ind. 2004).

[10] "Whoever, knowing that the property involved in a financial transaction represents the *proceeds* of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the *proceeds* of specified unlawful activity . . . with the intent to promote the carrying on of specified unlawful activity . . . shall be sentenced to . . . imprisonment for not more than twenty years." 18 U.S.C. § 1956(a)(1) (2006) (emphases added). Santos was also found guilty of conspiracy to run an illegal gambling business, running an illegal gambling business, and conspiracy to launder money. *Santos*, 128 S. Ct. at 2023.

[11] *See Santos*, 128 S. Ct. at 2023.

[12] *See Santos*, 342 F. Supp. 2d at 795.

[13] 282 F.3d 475 (7th Cir. 2002). Given facts that were "[s]trikingly similar" to those in Santos's case, Santos v. United States, 461 F.3d 886, 890 (7th Cir. 2006), the court in *Scialabba* relied on the rule of lenity to hold that the word "proceeds" referred only to "profits" for the purposes of the federal money laundering statute. *Scialabba*, 282 F.3d at 477–78; *see also Santos*, 461 F.3d at 890.

[14] *Santos*, 342 F. Supp. 2d at 794–99.

[15] *Id.* at 798–99. The court ruled on Santos's other post-conviction arguments as well, but the dispositive issue was the definition of "proceeds." *Id.* at 799.

[16] *Santos*, 461 F.3d at 888. The primary issue at the appellate level was not the definition of proceeds, as *Scialabba* had decided precisely that. Instead, the court focused on whether *Scialabba* had been properly decided and whether it applied to Santos's situation; it held that *Scialabba* was both correct and applicable. *Id.* at 888; *Santos*, 342 F. Supp. 2d at 798.

[17] *Santos*, 461 F.3d at 889.

late one statute necessarily violate another.'"[18] The court acknowledged the government's concerns that *Scialabba* "eviscerat[ed] § 1956(a)(1)'s promotional subsection"[19] and that "serious evidentiary problems result,"[20] but noted that at best the government demonstrated that Congress's intended definition of proceeds was "debatable."[21] The court called on Congress or the Supreme Court to resolve the matter,[22] upheld *Scialabba*, and affirmed the district court's opinion.[23]

In a divided decision, the Supreme Court affirmed. Writing for the plurality,[24] Justice Scalia held that the term "proceeds" in the context of the federal money laundering statute was to be taken as "profits," not "gross receipts."[25] As a matter of statutory interpretation, Justice Scalia noted, the Court must give an undefined term "its ordinary meaning."[26] Justice Scalia found no clear "ordinary meaning" of "proceeds" in either dictionaries or the federal criminal code;[27] thus he turned to the statute itself. Observing that "context gives meaning,"[28] he looked to the way the statute uses the term, but again found no clear meaning.[29] Given this ambiguity, Justice Scalia concluded that the narrower meaning was the proper one, writing that "[t]he rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them."[30] Not only is this result consistent with the Court's long-standing lenity jurisprudence in the face of ambiguity,[31] Justice Scalia explained, 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."[32]

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[18] *Id.* at 890 (alteration in original) (footnote omitted) (quoting *Scialabba*, 282 F.2d at 477).

[19] *Id.* at 892.

[20] *Id.* at 893. In describing the evidentiary problems raised by the government, the court wrote, "[t]his is a solid policy point[,] which the government may wish to present to Congress." *Id.* (internal punctuation omitted).

[21] *Id.*

[22] "Rather than vacillate over Congress's intent, it is better for our circuit . . . to stay the course at this juncture, for only Congress or the Supreme Court can definitively resolve the debate over this ambiguous term." *Id.* at 894 (footnote omitted).

[23] *Id.*

[24] Justice Scalia was joined by Justices Souter and Ginsburg, as well as by Justice Thomas for all but Part IV of the opinion.

[25] *Santos*, 128 S. Ct. at 2025.

[26] *Id.* at 2024.

[27] Justice Scalia referenced three different dictionaries, as well as the Code, none of which unambiguously defined "proceeds." *See id.* at 2024.

[28] *Id.*

[29] *Id.* at 2025.

[30] *Id.*

[31] *See, e.g.*, United States v. Bass, 404 U.S. 336 (1971); Bell v. United States, 349 U.S. 81 (1955).

[32] *Santos*, 128 S. Ct. at 2025.

Justice Scalia next turned to the government's chief concern: the ruling's effect on future prosecutions of money laundering offenses.[33] While noting that "the Government . . . argues for the 'receipts' interpretation because . . . it is easier to prosecute,"[34] Justice Scalia determined that the government's concerns were overstated: the prosecution "needs to show only that a single instance of specified unlawful activity was profitable," and "the Government . . . can select the instances for which the profitability is clearest."[35] The "receipts" definition, according to Justice Scalia, might give the prosecutor far more power than Congress had intended: "If 'proceeds' meant 'receipts,' nearly every violation of the illegal-lottery statute would also be a violation of the money-laundering statute."[36] This interpretation would create a "merger problem" — running an illegal lottery would almost necessarily entail the more serious crime of money laundering — and hand the prosecutor an immensely strong tool for inducing a plea bargain to the lesser crime.[37] In such a case, the rule of lenity must be applied in order to avoid infringing upon both the defendant's rights and the separation of powers.

Justice Stevens concurred, disagreeing with the plurality's definitional analysis and arguing that "[w]e have previously recognized that the same word can have different meanings in the same statute."[38] He looked to the legislative history of the money laundering statute and found that it too could bear multiple definitions of "proceeds."[39] Calling the consequences of a "gross receipts" definition "so perverse that I cannot believe they were contemplated by Congress"[40] and "tantamount to double jeopardy,"[41] he concluded that, though other areas of the statute clearly required the "receipts" definition, in the section at issue in *Santos* he was bound to use "profits."[42] Thus, he argued, the meaning of "proceeds" could change at different points in order to

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[33] *Id.* at 2025–29.

[34] *Id.* at 2028.

[35] *Id.* at 2029.

[36] *Id.* at 2026. Justice Scalia continued: "The Government suggests no explanation for why Congress would have wanted a transaction that is a normal part of a crime it had duly considered and appropriately punished elsewhere in the Criminal Code to radically increase the sentence for that crime." *Id.* at 2027.

[37] *Id.* at 2026. Justice Scalia focused on the problem of merger when he discussed the prosecution's arguments. *Id.* Lenity, said Justice Scalia, was the way to prevent money laundering from merging with its predicate crimes: since profits necessarily exclude the ordinary expenses of illegal activity, proving money laundering would require proof of more criminality than just the underlying illegal lottery. *Id.* at 2027–28.

[38] *Id.* at 2032 (Stevens, J., concurring in the judgment).

[39] *Id.* at 2032–33.

[40] *Id.* at 2032.

[41] *Id.* at 2033.

[42] *Id.* at 2033–34.

avoid those perverse consequences — and in this case, the "profits" definition "dovetail[ed] with what common sense and the rule of lenity would require."[43]

Justice Breyer dissented briefly, focusing primarily on the merger issue.[44] Though Justice Breyer found merger to be a serious problem, he would not have looked to the text of the statute for his solution.[45] Instead, he suggested alternative solutions, none of which would have required the detailed explication and interpretation of the statute engaged in by the plurality.[46]

Justice Alito[47] wrote the primary dissent, explaining that he would define "proceeds" as "receipts."[48] Paralleling Justice Scalia, Justice Alito began his dissent by discussing the dictionary definition of "proceeds."[49] Accusing the plurality of making "no serious effort to interpret this important statutory term . . . [and being] quick to . . . invoke the rule of lenity,"[50] Justice Alito would have considered "the context in which the term is used, the problems that the money laundering statute was enacted to address, and the obvious practical considerations that [the drafters] almost certainly had in mind."[51] Instead of preventing the judiciary and the executive from usurping the role of the legislature, Justice Alito argued, "the plurality opinion[] . . . would frustrate Congress' intent and maim a statute that was enacted as an important defense against organized criminal enterprises."[52]

There is a fundamental tension inherent in an adversarial system of criminal justice.[53] On the one hand, prosecutors need to be able to combat a broad range of criminal activity, especially in such cases as

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[43] *Id.* at 2033. No other Justice accepted Justice Stevens's contention that the meaning of "proceeds" can fluctuate within a statute. *See id.* at 2030 (plurality opinion); *id.* at 2035–36 (Alito, J., dissenting). Justice Scalia noted that Justice Stevens's flexible definition would "render every statute a chameleon," *id.* at 2030 (plurality opinion) (internal quotation marks omitted) (quoting Clark v. Martinez, 543 U.S. 371, 382 (2005)), and noted that this "dangerous principle" was contrary to the rule of lenity, *id.* (quoting *Clark*, 543 U.S. at 382).

[44] *Id.* at 2034 (Breyer, J., dissenting).

[45] *Id.* at 2034 (Breyer, J., dissenting).

[46] Justice Breyer suggested several alternatives: a judicially imposed requirement that the predicate crime be separate from the money laundering offense itself, use of the promotion prong to prevent prosecution where "only one instance of that underlying activity is at issue," and reliance upon the Federal Sentencing Commission to address the problem by altering the Federal Sentencing Guidelines. *Id.* at 2035.

[47] Justice Alito was joined by the Chief Justice, as well as Justices Kennedy and Breyer.

[48] *Santos*, 128 S. Ct. at 2044 (Alito, J., dissenting).

[49] *Id.* at 2035.

[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] *See, e.g.*, Rachael Simonoff, Note, Ratzlaf v. United States*: The Meaning of "Willful" and the Demands of Due Process*, 28 COLUM. J.L. & SOC. PROBS. 397, 410 (1995) ("The criminal law system must perform two often conflicting tasks: It must protect and preserve social order, and it must safeguard individuals from arbitrary and undeserved deprivations of liberty.").

Santos, where Congress has expressed a clear desire to punish continuing enterprise crime as an additional transgression on top of the predicate crimes. On the other hand, power this broad can be dangerous in a justice system built upon due process and fair notice for potential defendants.[54] Lenity has played an important role in the United States' attempts to resolve this tension, preventing convictions under statutes that did not adequately provide fair notice of their criminal prohibitions. However, over the past four decades the doctrine has become increasingly limited, both in scope and application.[55] Before *Santos*, scholars deemed the doctrine dead, dying, or restricted to protecting innocent conduct.[56] By applying lenity to a case in which the conduct at issue was clearly not innocent, and by resting its entire analysis on the effect of lenity rather than noting its support in passing,[57] the *Santos* Court began to reverse the contraction of the rule. In doing so, *Santos* did not resolve the tension between prosecutorial power and defendants' rights, but it did provide an important tool that courts will be able to use going forward.

In modern federal criminal law, with the increasing use of enterprise crime statutes to combat criminal activity, those who would resolve the tension between enforcement and due process face increasing challenges. Enterprise crimes are meta-crimes deriving from a series of predicate crimes.[58] Enterprise crime statutes criminalize the perpetuation of crime; thus, conviction of an enterprise crime is meant to impose punishment above and beyond the conviction for the predicate crimes. In other words, the enterprise crime is itself an "umbrella" charge.[59] Enterprise crime statutes are necessarily broad, as they must

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[54] *Cf.* Kahan, *supra* note 4, at 345–46.

[55] *See* Note, *supra* note 4, at 2420–21.

[56] *See id.* The innocent conduct explanation theorizes that lenity is now employed only to protect conduct that is either *malum prohibitum* (illegal only because it is prohibited) or a strict liability offense — that is, the actor would be innocent but for the court's interpretation of the ambiguous statute. *See id.* at 2421. The act of conviction in *Santos* is, instead, an act that becomes a crime only after the defendant is convicted of the underlying predicate crimes. Thus, the *Santos* Court was not protecting an otherwise innocent man, but was instead preventing an additional penalty from being added to Santos's sentence without the government having to prove any bad acts other than the predicate crimes.

[57] For cases that exemplify the reversal of the pre-*Santos* marginalization of lenity, see cases cited *infra* note 68.

[58] Enterprise crimes include money laundering, 18 U.S.C. § 1956 (2006), Racketeer Influenced and Corrupt Organizations Act (RICO) violations, 18 U.S.C. §§ 1961–1968 (2006), and Continuing Enterprise Crimes, 21 U.S.C. § 848 (2006), among others. Enterprise crime statutes began appearing widely in the 1970s, but only really became regularly used by prosecutors in the 1980s. *See* Susan W. Brenner, *RICO, CCE, and Other Complex Crimes: The Transformation of American Criminal Law?*, 2 WM. & MARY BILL RTS. J. 239, 240 (1993).

[59] A similar impetus drives other areas of criminal prosecution. *See, e.g.*, Lockyer v. Andrade, 538 U.S. 63 (2003) (upholding California's "three strikes law" which added an extra penalty for the crime of having become a thrice-convicted felon).

keep prosecutors one step ahead of quick-thinking criminals.[60] However, because a broad statute will often employ terms that could be interpreted in two or three different ways, such breadth can raise serious ambiguity concerns.[61] For this reason, judges must be especially alert to guard against overly aggressive interpretations.

Perhaps even more importantly, with great breadth come serious concerns about the extension of an enterprise crime statute into areas that it was not meant to cover, or even areas to which it does not facially seem to apply. Though enterprise crimes are an example of where Congress has already considered a particular type of criminal behavior and may have left the criminal statute intentionally ambiguous in order to capture all incarnations of that behavior,[62] the more lasting impact of *Santos* may be in areas about which Congress has simply not yet spoken. Particularly in a world where use (and abuse) of the Internet is rampant, individuals seem to find new ways to commit crimes faster than the legislature can keep up.[63] Often these are highly publicized cases — cases society strongly desires to prosecute but simply does not have a statute with which to do so.[64] Judges' responsibility to oversee the criminal process and prevent prosecutorial overreaching is rarely as strong as when new crimes, and thus new criminal designations, are at stake.[65]

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[60] *Cf.* Brenner, *supra* note 58, at 296 ("RICO and its progeny let prosecutors define almost any conduct as organized crime and pursue it as such.").

[61] The money laundering statute in *Santos* is a perfect example of such ambiguity. Indeed, the Seventh Circuit had already had the opportunity to use lenity to restrict the scope of the money laundering statute in an earlier incarnation of Santos's case. *See* United States v. Febus, 218 F.3d 784 (7th Cir. 2000); *see supra* pp. 476–77 (discussing the Seventh Circuit's treatment of *Scialabba* and *Febus*). The fact that the court decided *Scialabba* so soon after denying the same claim in *Febus* may demonstrate decreasing reluctance to apply lenity.

[62] *See, e.g.*, Price, *supra* note 3, at 886 (noting that "narrow construction may in fact thwart legislative desires more than it advances them"). For example, 18 U.S.C. § 1346, which specifically criminalized honest services fraud, was passed in reaction to *McNally v. United States*, 483 U.S. 350 (1987), which limited the broadly worded mail fraud statute, 18 U.S.C. § 1341, to tangible fraud. *McNally*, 483 U.S. at 360. The passage of this clarifying statute makes it clear that Congress wants honest services fraud to be criminalized. *See* Ellen S. Podgor, *Do We Need a "Beanie Baby" Fraud Statute*, 49 AM. U. L. REV. 1031, 1034–35 (2000).

[63] *See, e.g.*, Podgor, *supra* note 62, at 1033–34 (noting that, rather than Congress preemptively passing specific legislation, "[t]he mail fraud statute . . . historically serves as a 'stop-gap device' used until the legislature has the opportunity to pass 'particularized legislation'").

[64] See, for example, the controversial "MySpace suicide case," in which Lori Drew, a local mother who abused a MySpace site to create a false profile that led to a teenage neighbor's suicide, was charged with violating the Computer Fraud and Abuse Act (CFAA), 18 U.S.C. § 1030 — a statute that was enacted to punish computer hackers. *See* Bennet Kelley, *Federal Legislative Update*, J. INTERNET L., Aug. 2008, at 17, 17–18 (noting the introduction of legislation to "make such cyberbullying a federal felony").

[65] Some argue that notice is largely a pretextual justification for the rule of lenity. *See, e.g.*, Note, *supra* note 4, at 2424–25. However, the Drew case is illustrative of precisely the importance of the notice rationale: whereas Drew could have anticipated harassment charges or a civil suit, she could not reasonably have anticipated prosecution under CFAA. Even in *Santos*, the notice

As the plurality realized in *Santos*, lenity provides an ideal solution to the problem of equity balancing under overly broad or ambiguous statutes. Historically though, as enterprise crimes became more and more commonly charged, it became clear that courts would not subject the government's statutory interpretation to rigorous due process scrutiny.[66] Lenity as a method of monitoring the just application of criminal statutes had fallen by the wayside by the time enterprise crime statutes came into broad usage.[67] However, although lenity has arguably become a secondary canon of construction,[68] the *Santos* Court, by reaching the ambiguity as its first and decisive point of discussion, indicated that the lenity inquiry should become a more prominent and an earlier part of judges' analyses.[69] An earlier test for ambiguity (perhaps even during pre-trial proceedings) would inform the prosecutor that his interpretation of the statute would be independently evaluated by the judge and could spare the defendant the experience of trial for potentially noncriminal actions. *Santos* certainly does not encourage judges to employ lenity without first finding the "grievous ambiguity" required by such lenity-limiting cases as *Chapman v. United States*;[70] however, it does indicate that judges should not be as reluctant to reach ambiguity, or to use lenity as the primary reason for decision, as they have been in the last few decades. By sending this signal, *Santos* returns lenity from a limited doctrine protecting innocent conduct[71] to a doctrine that protects even the guilty: enterprise crimes are predicated on the perpetrator having already been found guilty of

argument is plausible: though Santos clearly knew that conducting a lottery was illegal, he may well not have known that the mere act of paying his collectors with the ill-gotten receipts would subject him to additional penalties. Application of lenity is a crucial preventative measure to protect against misuse of statutory authority.

66 *See* Van Graafeiland, *supra* note 1, at 344 n.68 (collecting cases).

67 Scholars posit various reasons for this drop in the use of lenity. *See, e.g.*, Kahan, *supra* note 4, at 347 (construing lenity as similar to the nondelegation doctrine in administrative law, and equally dormant); Price, *supra* note 3, at 886 (arguing reduction in use of lenity indicates confusion as to its purpose).

68 *See, e.g.*, Caron v. United States, 524 U.S. 308, 316 (1998); Dunn v. United States, 442 U.S. 100, 112 (1979); Rewis v. United States, 401 U.S. 808, 812 (1971); *see also* Price, *supra* note 3, at 886; Sarah Newland, Note, *The Mercy of Scalia: Statutory Construction and the Rule of Lenity*, 29 HARV. C.R.-C.L. L. REV. 197, 198 (1994). Lenity was fairly frequently mentioned in dissents, however. *See, e.g.*, Holloway v. United States, 526 U.S. 1, 20–21 (1999) (Scalia, J., dissenting); *Caron*, 524 U.S. at 319 (Thomas, J., dissenting).

69 Some opponents of a more robust lenity doctrine may raise concerns that such a doctrine would encourage "activist judging." However, it does nothing of the sort: applying lenity is not judicial activism, but a necessary action by judges committed to the institutional legitimacy of the criminal justice system. Ambiguous criminal statutes are inherently illegitimate, and thus judges who decline to enforce them are not acting outside the range of their powers. *See, e.g.*, United States v. Santos, 342 F. Supp. 2d 781, 799 (N.D. Ind. 2004) (holding that *Scialabba* applied and that, thus, "Santos is currently imprisoned for acts that are not now, nor ever have been crimes").

70 500 U.S. 453 (1991) (delineating formulaic steps for a lenity application).

71 *See* Note, *supra* note 4, at 2421.

other crimes, but lenity here prevents additional punishment of behavior that was already proven criminal, unless Congress speaks clearly.[72] Because Congress needs to be free to pursue goals such as those driving the expansion of enterprise crime, passing broad statutes and granting prosecutors broad powers in the process, defendants' protections must grow in coequal proportions to the power of prosecutors. The legitimacy of the adversarial justice system depends upon such proportional growth, and a robust rule of lenity is a crucial power available to the courts to ensure that such growth occurs.

The Court's ready invocation of lenity in *Santos* served another important purpose as well, signaling its reluctance to continue granting the government the benefit of an ambiguous wording. By interpreting ambiguous portions of the criminal code with a maximum of deference to the defendant, the Court placed the burden of clarity where it belongs: squarely in the halls of Congress.[73] Far from "fail[ing] to give the federal money-laundering statute its proper scope and . . . hinder[ing] effective enforcement of the law,"[74] as the government warned, the *Santos* decision merely began leveling the playing field for defendants faced with incredibly powerful enterprise statutes. As the Seventh Circuit urged in its *Santos* opinion, Congress now has the opportunity to clarify its intended definition of "proceeds"[75] if it disagrees with the Court's interpretation. Indeed, Congressional reaction in the face of a Supreme Court decision is not an uncommon occurrence — the Court's decisions have frequently triggered legislative action.[76]

As the *Santos* plurality noted, when interpreting an ambiguous criminal statute, "the tie must go to the defendant."[77] Under lenity, when a statute is ambiguous, the narrower construction is preferred,[78] allowing courts to avoid convicting defendants of crimes they did not

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[72] Lenity originally had this effect, before its contraction in recent decades. *See* Ladner v. United States, 358 U.S. 169, 178 (1958) ("[L]enity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended.").

[73] *See, e.g.*, Podgor, *supra* note 62, at 1042 ("When the Rule of Lenity needs to be employed, Congress is on notice that it needs to modify the statute if the court's statutory interpretation is contrary to Congress's intent.").

[74] *Santos*, 128 S. Ct. at 2025.

[75] Santos v. United States, 461 F.3d 886, 894 (7th Cir. 2006).

[76] One prime example is the mail fraud statute discussed in *McNally v. United States*, 483 U.S. 350 (1987). *See supra* note 62.

[77] *Santos*, 128 S. Ct. at 2025.

[78] *See* United States v. R.L.C., 503 U.S. 291, 307–08 (1992) (Scalia, J., concurring in part and concurring in the judgment); *see also* United States v. Rodriquez, 128 S. Ct. 1783, 1800 (2008) (Souter, J., dissenting) (explaining that lenity "applies where . . . we have 'seiz[ed] every thing from which aid can be derived,' but are 'left with an ambiguous statute'" (alteration in original) (quoting United States v. Bass, 404 U.S. 336, 347 (1971))). In fact, the narrowness required by lenity has been described as criminal law's version of strict constructionism. *See* Price, *supra* note 3, at 885.

know they were committing.[79] Though judges are often reluctant to employ lenity as an independent point of analysis,[80] the doctrine is a crucial tool in a criminal justice system that prides itself on providing notice to potential defendants that their conduct goes outside the bounds of law — and doing so *before* those defendants engage in the illegal activity.[81] Indeed, the rule of lenity was in large part incorporated into American jurisprudence by cases in which the law was unclear at the time of conviction, but for which a conviction would have constituted some sort of miscarriage of justice.[82]

Santos represents an expansion of the rule of lenity, and with it a narrowing of the power of prosecutors to charge enterprise crimes. The Court actively engaged in the balancing act of modern criminal prosecution, weighing the rights of defendants against prosecutors' ability to combat crime. Regardless of the difficulties that a narrow interpretation raises for the prosecution, said the *Santos* Court, if Congress wishes to criminalize the conduct of individuals such as Santos at the higher penalty level of a money laundering charge, it must be specific about it. Indeed, the prosecution's concern that the Court had impermissibly narrowed a statute meant by Congress to be broad was not enough to "overcome[] the rule of lenity."[83] *Santos* further serves as an invitation to Congress to be proactive about providing the executive with the power to prosecute previously noncriminal actions, and to make clear statements delineating the activities that it does deem criminal. Thus, the import of *Santos*, in the end, may not be in its clarification of the meaning of "proceeds," despite the impact that that clarification will have on ongoing prosecutions. Instead, *Santos*'s longest-lasting effect will be its signaling of the expansion of lenity.

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[79] Of course, the use of statutes in this manner also implicates the "void for vagueness" doctrine. *See, e.g.*, City of Chicago v. Morales, 527 U.S. 41, 56 (1999) (opinion of Stevens, J.) ("Vagueness may invalidate a criminal law for either of two independent reasons. First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement."). Though lenity, which is based on ambiguity (that is, a single phrase with multiple, but finite, definitions), is distinct from vagueness (that is, a statute that can apply to any of a vast number of situations), similar principles of due process apply. A full discussion of vagueness is outside the scope of this comment; however, vagueness concerns must also be overcome by prosecutors seeking to use existing statutes to criminalize arguably legal (if antisocial) behavior. *See generally* Robert Batey, *Vagueness and the Construction of Criminal Statutes—Balancing Acts*, 5 VA. J. SOC. POL'Y. & L. 1 (1997). Because statutes are sometimes ambiguous but not vague, a robust rule of lenity to complement the vagueness canon is a necessary component of a just criminal law.

[80] *See* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 563–64 (2001).

[81] *See, e.g.*, Liparota v. United States, 471 U.S. 419, 427 (1985) ("[T]he rule of lenity ensures that criminal statutes will provide fair warning concerning conduct rendered illegal.").

[82] *See* Note, *supra* note 4, at 2421–23.

[83] *Santos*, 128 S. Ct. at 2025.