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Statutory Inflation and Institutional Choice

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STATUTORY INFLATION AND INSTITUTIONAL CHOICE

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INTRODUCTION

Statutes that contain both civil remedies and criminal penalties are typical in the modern regulatory state. Among them are RICO,[1] the antitrust laws,[2] the securities laws,[3] environmental laws such as the Clean Water Act,[4] various tax statutes,[5] the Copyright Act,[6] and the Bankruptcy Code.[7] These statutes most often regulate business affairs and provide for criminal penalties to punish willful violators. The Sarbanes-Oxley Act of 2002,[8] the statute enacted in response to the financial scandals of Enron, WorldCom, and other major corporations, provides a recent example of this remedial scheme, which remains popular with lawmakers.

This Article argues that the standard array of interpretive tools employed by judges and academics does not adequately account for important irregularities in the ways that courts construe these dual-remedy statutes, especially in criminal cases. Most of the literature focuses on two institutions: the legislature and the courts. To the extent that administrative agencies become part of the mix, the main issue addressed is how much deference courts should give to the interpretation of a statute by the agency that has been charged with enforcing it. This Article, in contrast, suggests that the institutional setting in which a statute is enforced has a profound effect on how courts construe the statute over time. Although deference doctrines play a role, judicial decisions also reflect the resources committed to litigation by governmental institutions in civil and criminal cases.

Even on the surface, this kind of legislative scheme creates complex interpretive problems. Deeply entrenched in our system of

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1. 18 U.S.C. § 1962 (2000) (criminal); *id.* § 1964 (civil).
2. 15 U.S.C. §§ 1-7 (2000) (criminal); *id.* § 15 (civil).
3. *Id.* §§ 77e, 77q (civil); *id.* § 78ff(a) (criminal).
4. 33 U.S.C. § 1319(c)(2) (2000) (criminal); *id.* § 1319(b) (civil).
5. *See* 26 U.S.C. §§ 5861, 5871 (2000) (indicating the prohibited acts and criminal penalties for firearm tax evasion); *id.* § 5849 (civil) (taxing certain firearms); *see also id.* § 7201 (criminalizing tax evasion).
6. 17 U.S.C. § 504 (2000) (criminal and civil).
7. 18 U.S.C. §§ 152-157 (2000) (criminal); 11 U.S.C. §§ 101-1330 (2000) (civil).
8. Pub. L. No. 107-204, 116 Stat. 745 (2002).

statutory jurisprudence are two complementary canons of construction: Remedial statutes are interpreted liberally; penal statutes are interpreted narrowly.[9] The former reflects concern about public health and welfare, the latter the due process rights of those accused of committing crimes. Should courts interpret these dual-remedy statutes narrowly in criminal cases, but broadly in civil cases, thus creating two different readings of each statute? Should they interpret the statute narrowly in both kinds of cases to be fair to criminal defendants without creating multiple interpretations of the same language? Should they interpret the statute broadly in both criminal and civil cases, forsaking the value of lenity in order to promote both uniformity and aggressive regulation in civil cases? Should they sometimes interpret a statute broadly in criminal cases but narrowly in civil cases, perhaps to limit private litigation when the statute is basically a criminal one? Each of these possible solutions requires the courts to weigh values that would be noncontroversial were they not in conflict with one another. Institutional choices that determine the ways these statutes are enforced influence the weight that courts ultimately give in different statutory settings.

Table 1 shows the four interpretive possibilities for dual-remedy statutes which I have named the standard model, the inflationary model, the lenity model, and the law enforcement model.

Table 1: The Four Interpretive Approaches to Dual-remedy Statutes

Model	Remedial	Criminal
Standard	Broad	Narrow
Inflationary	Broad	Broad
Lenity	Narrow	Narrow
Law Enforcement	Narrow	Broad

9. This second canon is the rule of lenity.

Much of this Article will be devoted to examining the inflationary model. When courts interpret a statute broadly enough in civil cases to further its regulatory goals, the broad interpretations sometimes spill over to criminal cases, causing an increase in criminal liability. Conduct that was not criminal in the past has become criminal without any legislative action.[10] I call this phenomenon "statutory inflation."

To illustrate with an example that will be discussed in more detail later, courts do not generally apply statutes extraterritorially.[11] Yet, for perfectly good reasons, the Supreme Court held in *Hartford Fire Insurance Co. v. California*,[12] that the antitrust statutes should be applied extraterritorially when their violation has an effect in the United States.[13] If it were otherwise, companies could legally conspire to gain monopoly power in the United States simply by meeting abroad. Thus, the decision is consistent with the notion that remedial statutes are to be interpreted broadly.

Prior to *Hartford Fire*, it would have been unlikely for a court to apply United States antitrust laws internationally in a criminal case. Criminal statutes are generally interpreted narrowly, and nothing in the antitrust laws says that Congress intended any exception to the extraterritoriality rule. But once the courts interpret a statute broadly in a civil case, the ruling becomes part of the meaning of the statute for subsequent judicial analysis.[14] Over the years, antitrust regulators and the antitrust bar have absorbed the notion that extraterritorial conspiracies are

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10. The legislature is usually thought to be the only governmental institution with power to define criminal activity. *See* United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 105 (1820) (Marshall, C.J.) ("We can conceive no reason why other crimes, which are not comprehended in this act, should not be punished. But Congress has not made them punishable, and this court cannot enlarge the statute.").

11. *See* Am. Banana Co. v. United Fruit Co., 213 U.S. 347, 348 (1909).

12. 509 U.S. 764, 795-96 (1993).

13. *Id.* at 795-96.

14. In this context, Ronald Dworkin's metaphor for statutory interpretation is useful. Dworkin argues that courts should regard themselves as the author of the next chapter in a chain novel, in which each chapter is written by a different author. Judges have considerable discretion as to what they say, but they must write a chapter that is as tightly woven as possible with what has been said before. *See* RONALD DWORKIN, LAW'S EMPIRE 228-38 (1986).

unacceptable. As a result, the First Circuit recently refused to apply the rule of lenity in a criminal antitrust case involving extra-territorial conduct.[15]

Statutory inflation will most likely occur when both an administrative agency and a division or bureau of the Department of Justice push for expansive interpretation of a statutory scheme. One informal, but important device that serves to limit the expansion of criminal liability is prosecutorial discretion. With heavy caseloads and the chance of losing a case that rests on uncertain legal grounds, prosecutors have an incentive to devote most of their resources to clear instances of criminal wrongdoing.[16] That cost-benefit analysis changes when an agency contains an enforcement division whose only job is to bring civil actions under either a single statute or a small set of related statutes, and the Department of Justice has a bureau whose only job is to bring criminal cases, largely those that the agency refers for prosecution. Together, they are more likely to pursue more marginal cases, and to ask courts to interpret the law expansively.

Moreover, when an agency interprets a statute through a formal process, its interpretation is ordinarily reviewed deferentially under the *Chevron* doctrine, according to which courts defer to the agency's interpretation of an ambiguous statute, as long it is reasonable.[17] As a result, agencies are free to promulgate rules that might be much broader than Congress intended when it delegated authority to them. Although the application of the *Chevron* doctrine is consistent with the broad interpretation of remedial statutes, if Congress also decides to criminalize the willful violation of regulations, statutory inflation is likely to occur.[18]

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15. United States v. Nippon Paper Indus. Co., 109 F.3d 1, 7-8 (1st Cir. 1997).

16. *See* Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 444-46 (2001) (arguing that budgetary constraints are not always successful in curbing abuse from prosecutorial zeal); Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717 (1996) (advocating that prosecutorial discretion be reviewed and linked to such economic matters as prison resources).

17. *See* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865 (1984).

18. *See infra* Parts I.B.1, I.B.3 (discussing this issue in connection with securities and environmental statutes).

Significantly, statutory inflation occurs even when courts believe that they are applying the standard model. It is by and large an unnoticed by-product of the architecture of legal institutions empowered to enforce the laws. Beyond that, inflationary pressure is increased because courts are reluctant to maintain two separate sets of readings for multiple-remedy statutes: a narrow reading for criminal cases and a broad reading for civil cases. This reduces the appeal of the standard model, thereby increasing the need to seek alternatives.

Although the other two interpretive models—the lenity model and the law enforcement model—play less prominent roles, they are both very much alive. The lenity model calls for a statute to be interpreted narrowly in all cases, in order to protect against statutory inflation in criminal cases resulting from broad interpretation in civil ones.[19] It can result in underenforcement of remedial legislation. The Supreme Court has recently used this model to interpret a statute that taxes certain firearms,[20] and to interpret a statute that governs the conduct of former government officials after they leave public office.[21] Finally, the law enforcement model calls for broad interpretation of a statute in criminal cases, but narrow interpretation in civil cases. It is at odds with the standard model, and on its face inconsistent with basic principles of statutory interpretation. Yet courts use it occasionally. For example, courts are sometimes reluctant to give civil RICO plaintiffs the broad latitude that they give federal prosecutors when the predicate acts for RICO are multiple mail fraud offenses.[22]

Part I of this Article describes the four models in more detail and illustrates their application. Although courts' descriptions of their interpretive decisions seem to suggest that they randomly apply conflicting canons of statutory construction, this rhetoric masks important institutional considerations that drive the array of decisions. The likelihood of statutory inflation is largely a function of the institutional setting in which the statute is enforced. Thus, substantial inflation has occurred in the interpretation of antitrust,

19. *See infra* notes 65-73 and accompanying text.
20. United States v. Thompson/Center Arms Co., 504 U.S. 505, 518 (1992).
21. Crandon v. United States, 494 U.S. 152, 168 (1989).
22. *See infra* Part I.D.1.

environmental, and securities laws. In contrast, there has been little inflation in criminal cases interpreting the Copyright Act or the Bankruptcy Code, which are basically interpreted according to a weaker version of the standard model. The Bankruptcy Code is especially interesting because the judiciary is concerned about underenforcement, and has been moving in recent years to increase prosecutions for bankruptcy crimes. To the extent that institutions are created or expanded to carry out this program, statutory inflation may occur in the future. Use of the other two models is more idiosyncratic, and reflects judicial attitudes toward particular statutes.

Part II first asks whether statutory inflation should be controlled. In some instances, it is the law's way of responding to behavioral changes over time. At other times, however, statutory inflation in criminal cases raises serious due process concerns. This is especially so when legal norms have not yet become firmly rooted through litigation that resolves disputes over the validity of administrative rulemaking. In any event, legislatures should be aware of the interpretive consequences of the enforcement schemes they enact.

Part II continues by relating the phenomenon of statutory inflation to dynamic models of statutory interpretation.[23] It then considers the prospect of controlling statutory inflation by imposing strong mens rea requirements in criminal cases, legislating rules of interpretation within the statute itself, or modifying the *Chevron* doctrine when applied to rules that are the subject of criminal sanctions. Legal scholars have debated whether agency rulemaking should be exempt from the *Chevron* doctrine in criminal cases.[24] If

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23. *See, e.g.*, GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982); WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION (1994). For recent discussion relating dynamic interpretation to the structure of the administrative state, consistent with the views taken in this Article, see Edward L. Rubin, *Dynamic Statutory Interpretation in the Administrative State*, *in* ISSUES IN LEGAL SCHOLARSHIP, DYNAMIC STATUTORY INTERPRETATION (2002): Article 2, *at* http://www.bepress.com/ils/iss3/art2 (last visited Apr. 5, 2003).

24. *See, e.g.*, Sanford N. Caust-Ellenbogen, *Blank Checks: Restoring the Balance of Powers in the Post-*Chevron *Era*, 32 B.C. L. REV. 757 (1991); Sanford N. Greenberg, *Who Says It's a Crime?:* Chevron *Deference to Agency Interpretations of Regulatory Statutes that Create Criminal Liability*, 58 U. PITT. L. REV. 1 (1996); Cass R. Sunstein, *Law and Administration After* Chevron, 90 COLUM. L. REV. 2071, 2097 (1990); Mark D. Alexander, Note, *Increased*

it were, courts would use standard methods of statutory interpretation to uphold prosecutions for violation of a regulation only when the regulation is both permitted under the statute and actually within the contemplation of the Congress that enacted the statute. Courts would continue to give *Chevron* deference in civil cases involving regulations. This method of dual interpretation would restore the standard model and undermine the inflationary model. Whether the *Chevron* doctrine was a good idea in the first place, however, courts cannot realistically be expected to hold the same regulation valid for regulatory purposes, but void for criminal ones. In fact, the Supreme Court has already rejected that proposition.[25] Nonetheless, I argue that some modification of the *Chevron* doctrine in cases involving novel prosecutions for regulatory crimes is feasible and would help allay concerns about statutory inflation without adequate democratic process.

Part III relates the findings of this Article to recent literature on institutional choice,[26] using the Sarbanes-Oxley Act of 2002 as a model. That statute introduces new inflationary pressures into the securities laws, but also contains provisions that tend to reduce inflation, such as interpretive directives within the statute itself. The Article concludes that in deciding which institutions are appropriate for the enforcement of a regulatory scheme, Congress should keep in mind that the choice of institutions will have predictable effects on the conduct of the courts as the scheme matures.

Judicial Scrutiny for the Administrative Crime, 77 CORNELL L. REV. 612 (1992).

25. *See* Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 704 n.18 (1995).

26. *See, e.g.*, NEIL K. KOMESAR, LAW'S LIMITS (2001); Dan M. Kahan, *Is* Chevron *Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469 (1996); Neil K. Komesar, *Exploring the Darkness: Law, Economics, and Institutional Choice*, 1997 WIS. L. REV. 465; Spencer Weber Waller, *Prosecution by Regulation: The Changing Nature of Antitrust Enforcement*, 77 OR. L. REV. 1383 (1998).

I. FOUR MODELS FOR INTERPRETING STATUTES WITH CIVIL AND CRIMINAL REMEDIES

A. The Standard Model

The standard canons of statutory interpretation assume that remedial and criminal laws are embodied in different statutes. Remedial statutes are interpreted broadly, criminal statutes narrowly. Although it is occasionally difficult to determine whether a statute should be considered penal or remedial,[27] these rules have lived side-by-side for centuries. The standard model calls for courts to construe dual-remedy statutes in keeping with these default values. Courts, however, do not impose two separate interpretations on the same words, depending on whether the case is civil or criminal. In fact, a recent article by Professor Sachs refers to unified interpretation of dual-remedy statutes as the "core principle."[28] Yet the system routinely preserves the values of the standard model when different institutions in government cooperate in such a way as to simulate its results. To accomplish this goal, courts frequently interpret a statute liberally in civil cases, while prosecutors pursue only the clearest and most egregious violations of the statute for criminal sanctions. Only occasionally does the issue of lenity arise at all. This Part first discusses the two principles that underlie the standard model, and then illustrates the model's application in the prosecution of copyright and bankruptcy crimes.

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27. *See, e.g.*, Chase v. Curtis, 113 U.S. 452, 463-64 (1885) (holding that a statute imposing liability on directors for corporate debts under certain circumstances is penal in nature, and therefore, must be strictly construed).

28. Margaret V. Sachs, *Harmonizing Civil and Criminal Enforcement of Federal Regulatory Statutes: The Case of The Securities Exchange Act of 1934*, 2001 U. ILL. L. REV. 1025, 1029.

1. Two Basic Principles

a. Broad Interpretation of Remedial Statutes

Congress did not begin to enact large numbers of regulatory statutes until the end of the nineteenth century. Yet the rule that remedial statutes are to be interpreted broadly in order to combat the evil that the legislature had identified is much older than that. Blackstone wrote of remedial statutes: "[I]t is the business of the judges so to construe the act, as to suppress the mischief and advance the remedy."[29]

In the United States, the canon was argued in the Supreme Court as early as 1804,[30] and appeared in various state and federal court decisions throughout the nineteenth century. For example, in 1843, Justice Story, sitting as circuit justice, applied the canon to hold a member of a corporation subject to personal liability in a patent dispute.[31] A Massachusetts statute imposed personal liability on a member of a manufacturing corporation "in his individual capacity for all debts contracted during the time of his continuing a member of such corporation."[32] The question was whether an unliquidated claim for patent infringement should count as a "debt contracted" under the statute.[33] Applying the rule governing the interpretation of remedial statutes, Story held that it should.[34] He noted that Massachusetts courts had construed the term broadly.[35] He further commented:

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29. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND § 3, at 87 (David S. Berkowitz & Samuel E. Thorne eds., Garland Publishing 1978) (1783).

30. Ogden v. Blackledge, 6 U.S. (2 Cranch) 272 (1804). The issue was whether the word "administrator" in a North Carolina statute repealing a statute of limitations also incorporated executors. *Id.* at 275. Counsel argued:

> Even the statute of treasons, 25 Ed. 3. Stat. 5, c. 2. in which it is declared to be petit treason "where a servant slayeth his master," has always been construed to comprehend a servant who kills his mistress, or his master's wife; a fortiori in a remedial statute shall the term administrator include executor.

Id.

31. Carver v. Braintree Mfg. Co., 5 F. Cas. 235 (C.C.D. Mass. 1843) (No. 2,485) (Story, Circuit Justice).

32. *Id.* at 240.

33. *Id.*

34. *Id.* at 242.

35. *Id.* at 241-42.

> I agree that it is no part of the duty or functions of courts of justice, to supply the deficiencies of legislation, or to correct mischiefs which they have left unprovided for. That is not the question here. But the question is, whether, if the words of a statute admit of two interpretations, one of which makes the legislation incomplete for its apparent object, and the other of which will cover and redress all the mischiefs, that should be adopted, in a statute confessedly remedial, which is the most narrow, rather than that which is the most comprehensive, for the reason only, that the latter will create an obligation or duty, beyond what is imposed by the common law? It seems clear, that in common parlance, as well as in law, the term is in an enlarged sense sometimes used to denote any kind of a just demand.[36]

Nineteenth century opinions expressed this sentiment repeatedly. For example, Justice Swayne, construing a New York statute governing the right of a corporation to mortgage property, commented: "A thing may be within a statute but not within its letter, or within the letter and yet not within the statute. The intent of the law-maker is the law."[37] Justice Brewer famously echoed this remark in *Church of the Holy Trinity v. United States*: "It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers."[38] Almost a half century earlier Justice Wayne had noted, "[a] thing which is within the intention of the makers of the statute, is as much within the statute, as if it were within the letter."[39]

Furthermore, there is not much limit to the kinds of laws that courts consider "remedial," as long as they are not criminal. Nearly every statute is remedial in some sense. Thus, nineteenth-century

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36. *Id.* at 241.

37. Jones v. N.Y. Guar. & Indem. Co., 101 U.S. 622, 626 (1879).

38. 143 U.S. 457, 459 (1892). For recent debate about this case, see Carol Chomsky, *Unlocking the Mysteries of* Holy Trinity*: Spirit, Letter, and History in Statutory Interpretation*, 100 COLUM. L. REV. 901 (2000); Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of* Holy Trinity Church, 50 STAN. L. REV. 1833 (1998).

39. United States v. Freeman, 44 U.S. (3 How.) 556, 565 (1845).

courts used the canon to interpret statutes dealing with wills,[40] civil procedure,[41] the liability of railroads,[42] and various obligations in commercial settings.[43] In more recent times, courts have deemed statutes as diverse as the Bankruptcy Code,[44] the Social Security Act,[45] securities,[46] environmental,[47] and antitrust laws,[48] and even the Copyright Act[49] to be remedial in nature and subject to broad interpretation.

A good example of the rule construing remedial statutes broadly as applied in the regulatory state is *Tennessee Coal, Iron & Road*

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40. *See, e.g.*, Ogden v. Blackledge, 6 U.S. (2 Cranch) 272 (1804) (repealing a statute of limitations that would have barred estate from bringing claim); Bayley v. Bailey, 59 Mass. (5 Cush.) 245 (1849) (interpreting the definition of a will broadly); Morse v. Thompson, 58 Mass. (4 Cush.) 562 (1849) (upholding the right of a woman to execute a will).

41. *See, e.g.*, Texas v. Chiles, 88 U.S. (21 Wall.) 488, 491 (1874) (interpreting a statute that disallowed exclusion of interested-party testimony broadly); Stewart v. Kahn, 78 U.S. (11 Wall.) 493, 504 (1870) (permitting tolling of the statute of limitations during the Civil War); Mears v. Garretson, 2 Greene 316, 317 (Iowa 1849) (interpreting broadly a statute permitting court to enter judgment in favor of judgment creditor); Hoffman v. Dawson, 11 Grant 280 (Pa. 1849) (interpreting a jurisdictional statute broadly because court was useful in settling small controversies and disputes).

42. *See, e. g.*, St. Louis & S.F. Ry. Co. v. Matthews, 165 U.S. 1 (1897); Grand Trunk Ry. Co. v. Richardson, 91 U.S. 454, 472 (1875).

43. *See, e.g.*, Tracy v. Truffly, 134 U.S. 206, 223 (1890) (broadly interpreting Texas law governing assignment of benefits to creditors); White v. Cotzhausen, 129 U.S. 329, 341 (1889) (construing Illinois Voluntary Assignment Act); Jones v. N.Y. Guar. & Indem. Co., 101 U.S. 622, 626 (1879) (interpreting New York law defining mortgages for corporations).

44. *In re* Caron, 82 F.3d 7, 10 (1st Cir. 1996); *In re* Boone, 236 B.R. 275, 279 (M.D. Fla. 1999) ("The discharge provisions of the Bankruptcy Code have been traditionally construed to be remedial and courts have uniformly held that it shall be liberally construed in favor of the Debtor and strictly construed against a creditor who challenged the Debtor's right to a discharge.").

45. Combs v. Gardner, 382 F.2d 949, 956 (6th Cir. 1967).

46. There is a long tradition of civil cases asserting that the securities laws are to be interpreted broadly. *See, e.g.*, Harrison v. Dean Witter Reynolds, Inc., 974 F.2d 873 (7th Cir. 1992).

47. Cases abound in which provisions of environmental statutes are construed broadly in keeping with congressional intent. *See, e.g.*, Good Samaritan Hosp. v. Shalala, 508 U.S. 402 (1993); United States v. Riverside Bayview Homes, 474 U.S. 121, 133 (1985); Leslie Salt Co. v. United States, 55 F.3d 1388 (9th Cir. 1995).

48. *See, e.g.*, ASME, Inc. v. Hydrolevel Corp., 456 U.S. 556, 572 (1982).

49. *See, e.g.*, Video Views, Inc. v. Studio 21, Ltd., 925 F.2d 1010, 1022 (7th Cir. 1991) (interpreting provision awarding attorney fees to defendants narrowly: "In order not to disserve the remedial purposes underlying the Copyright Act, a prevailing defendant should not be awarded its costs or fees unless it can also demonstrate that the copyright owner brought the action in bad faith or that the action was frivolous.").

Co. v. Muscoda Local No. 123,[50] a case interpreting the Fair Labor Standards Act. The Act required that employees receive time and a half for any overtime work, but the statute did not define "work."[51] Mine owners claimed that the time it took the workers to travel within the mines to the working faces was not "work" within the meaning of the statute.[52] The Supreme Court disagreed:

> [T]hese provisions, like the other portions of the Fair Labor Standards Act, are remedial and humanitarian in purpose. We are not here dealing with mere chattels or articles of trade but with the rights of those who toil, of those who sacrifice a full measure of their freedom and talents to the use and profit of others. Those are the rights that Congress has specially legislated to protect. Such a statute must not be interpreted or applied in a narrow, grudging manner.[53]

One might expect this canon to be out of vogue today. For one thing, Justice Scalia's textualism, which has been influential on the Supreme Court, focuses heavily on statutory language.[54] It would be surprising to see a statement like Justice Wayne's today.[55] More in keeping with textualist philosophy is Justice Scalia's statement that "the purpose of a statute includes not only what it sets out to change, but also what it resolves to leave alone."[56] Combined with this approach to statutory interpretation is a current skepticism about New Deal regulatory legislation, the type that most often evokes the rule. Whether driven by Justice Scalia's textualism or by hostility toward aggressive government regulation, the current Supreme Court occasionally has gone out of its way to interpret remedial statutes narrowly, as it did in a series of decisions

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50. 321 U.S. 590 (1944).

51. *Id.* at 597.

52. *Id.* at 592 n.2.

53. *Id.* at 597.

54. *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION (1997). There is now a very large literature discussing Justice Scalia's approach to statutes. *See, e.g.*, William N. Eskridge, *Textualism, the Unknown Deal?*, 96 MICH. L. REV. 1509 (1998). For my views, see Lawrence M. Solan, *Learning Our Limits: The Decline of Textualism in Statutory Cases*, 1997 WIS. L. REV. 235.

55. *See supra* text accompanying note 39.

56. W. Va. Univ. Hosp., Inc. v. Casey, 499 U.S. 83, 98 (1991).

interpreting the Civil Rights Act of 1964,[57] which led Congress to override the Court by enacting the Civil Rights Act of 1991.[58]

Notwithstanding these intuitions, federal courts apply the canon no less frequently today than they did fifty years ago. In fact, the United States courts of appeals are making reference to it more than ever.[59] Even when it is not mentioned, courts routinely state that their goal is to interpret the statute in such a way as to carry out the will of the legislature.[60] When a legislature enacts a statute to install a broad mechanism for combating a perceived evil such as water pollution or antitrust violations, courts are bound to interpret the statute more broadly whether or not they announce their intention to do so.

At times, disagreements have arisen about whether a statute is remedial or penal. For example, in 1885, the Supreme Court interpreted a New York statute similar to the one construed by Justice Story some forty years earlier, but came to the opposite conclusion. *Chase v. Curtis*[61] concerned the scope of a statute imposing personal liability on corporate officials for debts the corporation failed to report in annual publications as required by law. The Court relied on New York cases that regarded the statute as penal in nature.[62] Other cases question whether a statute should

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57. *Id.* at 102 (holding that expenses for expert witnesses are not part of "attorney's fees" for purposes of interpreting statute that shifts the cost of attorney's fees to the government when a plaintiff has demonstrated a violation of federal rights); Ward Cove Packing Co., Inc. v. Atonio, 490 U.S. 642, 656-58 (1989) (setting forth standards for proving employment discrimination based on disparate impact).

58. 42 U.S.C. § 2000e-5(k) (2000) (providing for "expert fees" in fee-shifting provision as added by the Civil Rights Act of 1991 overriding W. Va. Univ. Hosp. v. Casey, 499 U.S. 83 (1991)); Civil Rights Act of 1991, Congressional Findings, Pub. L. No. 102-166, § 2, 105 Stat. 1071 ("The Congress finds that ... the Decision of the Supreme Court in Wards Cove Packing Co., Inc. v. Atonio, 490 U.S. 642 (1989), has weakened the scope and effectiveness of Federal civil rights protections.").

59. A LEXIS search of "remedial statute w/8 (broad! or liberal!)" in the library containing courts of appeals cases yielded 120 hits for the 1990s, 101 hits for the 1980s, 41 hits for the 1970s, 20 hits for the 1960s and 19 hits for the 1950s. The Supreme Court during this period made mention of the canon only occasionally, with no decrease in frequency during the 1990s (5 hits).

60. *See, e.g.*, Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 115 (2001) ("The phrase 'affecting commerce' indicates Congress' intent to regulate to the outer limits of its authority under the Commerce Clause.").

61. 113 U.S. 452 (1885).

62. *Id.* at 457. None of the cases on which the Court relied were decided before 1860.

be construed broadly because it is remedial, or narrowly because it is in derogation of the common law.[63]

These cases illustrate the point Karl Llewellyn made fifty years ago: Courts sometimes create an illusion of rational decision making by choosing among conflicting canons of construction.[64] Yet there has never been a period in American legal history in which the canon calling for liberal interpretation of remedial statutes was abandoned. Although the canon does not accurately predict results in individual cases, it nonetheless is entrenched deeply in the courts' arsenal of rhetorical weapons. We will see below that its application is more predictable than it may seem at first glance.

b. The Rule of Lenity

The rule of lenity, about which Blackstone also wrote,[65] has been part of the statutory jurisprudence in this country from the beginning. The primary justifications for the rule are fair notice to defendants and separation of powers. Chief Justice John Marshall articulated the rule in an 1821 case, *United States v. Wiltberger*,[66] in which the Supreme Court held that a statute granting federal jurisdiction over cases involving manslaughter committed on an American vessel in the high seas did not apply to a vessel docked on a river in China. Marshall stated:

> The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature,

63. *See, e.g.*, Bowditch v. City of Boston, 101 U.S. 16, 19 (1879) (interpreting narrowly a statute defining fire emergency actions).

64. Karl Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes are to be Construed*, 3 VAND. L. REV. 395, 395-96 (1950); *see also* Richard A. Posner, *Statutory Interpretation—In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800 (1983).

65. BLACKSTONE, *supra* note 29, § 3, at 88.

66. 18 U.S. (5 Wheat.) 76 (1820). I discuss this case, and the rule of lenity more generally in Lawrence M. Solan, *Law, Language, and Lenity*, 40 WM. & MARY L. REV. 57 (1998). I will outline the rule's use and history only briefly here.

> not the Court, which is to define a crime, and ordain its punishment.[67]

The rule of lenity continues to be part of American jurisprudence, although commentators have criticized it both for its erratic application and because it can be used to justify unnaturally narrow interpretations of criminal statutes.[68] During the past fifty years, however, the predominant version of the rule has been a narrow one, applied only if other methods of statutory interpretation fail to provide sufficient certainty about the legislature's intention. Justice Frankfurter's opinion in *Callanan v. United States*[69] contains the seminal explanation of this position:

> [T]hat "rule," [the rule of lenity] as is true of any guide to statutory construction, only serves as an aid for resolving an ambiguity; it is not to be used to beget one. "To rest upon a formula is a slumber that, prolonged, means death." Mr. Justice Holmes in Collected Legal Papers, p. 306. The rule comes into operation at the end of the process of constructing what Congress has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers. That is not the function of the judiciary.[70]

Frankfurter's vision of lenity departs from Marshall's more textually-oriented approach. Marshall places a heavier burden on the legislature to enact clear rules. The Frankfurter version of the rule, in contrast, acts more like a tie-breaker when detailed analysis provides no satisfactory answer. For the most part, it is Frankfurter's version of the rule that predominates today, although those members of the Supreme Court who are more loyal to the

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67. *Wiltberger*, 18 U.S. at 95.

68. *See* John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 198-201 (1985); Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345; *see also* Livingston Hall, *Strict or Liberal Construction of Penal Statutes*, 48 HARV. L. REV. 748 (1935) (articulating his classic and still widely-cited views). For an opposing view that supports a narrow version of the rule of lenity, see Solan, *supra* note 66.

69. 364 U.S. 587 (1961).

70. *Id.* at 596.

statute's text, especially Justice Scalia, would apply the rule of lenity more broadly in keeping with Marshall's model.[71]

Although there is rarely consensus among Supreme Court Justices about the rule's application in any particular case, no Supreme Court Justice has ever argued that the rule of lenity should be abandoned, even when the composition of the Court has been conservative. Scholars have taken this position, but their arguments have not influenced the judiciary.[72] And although some state legislatures repealed the rule by statute more than one hundred years ago, judges in those states continue to apply it in cases that leave them with no principled means for deciding how the legislature intended a particular criminal statute to be interpreted.[73] It is only fair to conclude that although the rule of lenity is not applied uniformly, it is a principle that courts routinely consider in deciding cases that involve disputes about the applicability of criminal statutes.

2. Application of the Standard Model: Two Examples

The standard model calls for courts to interpret a dual-remedy statute broadly in remedial contexts, narrowly in criminal contexts. As noted above, however, courts do not act according to the standard model. For many statutes afforded liberal interpretation in civil cases, the question of lenity in criminal cases rarely arises. There are two reasons for this. The first is prosecutorial discretion. When enforcement of a criminal statute is not considered a matter of high priority, perhaps in part because civil remedies for the same conduct are considered adequate, prosecutors will tend to pursue only the most egregious violations.[74] This has the effect of simulating lenity without judicial intervention: Criminal liability attaches only when there has been a clear violation of the law.

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71. The debate between Justices Thurgood Marshall and Scalia in *Moskal v. United States*, 498 U.S. 103 (1990), illustrates the two views. Marshall, writing for the majority, found the statute sufficiently clear and refused to apply the rule of lenity. In doing so, he relied in large part on the legislative history of the statute in question. *Id.* at 107-10. Justice Scalia dissented. Not anxious to make too much of the legislative history, he found the statute ambiguous and argued that lenity should apply. *Id.* at 129-31 (Scalia, J., dissenting).

72. *See supra* note 68.

73. *See* Solan, *supra* note 66, at 123-28 (discussing this situation and citing cases).

74. *See supra* note 16 and accompanying text.

Second, most dual-remedy statutes contain an elevated mens rea requirement for criminal prosecution. It is easiest to infer willfulness, for example, from clear violations of a statute. Thus, for statutes that are not typically the subject of criminal prosecution, the system tends to simulate the standard model without engaging in separate interpretations. Prosecutions under the Copyright Act and of bankruptcy crimes illustrate this dynamic.

a. The Copyright Act

The Copyright Act provides a good example of the standard model at work. Courts do not engage in separate interpretations of the Copyright Act depending on whether the case is civil or criminal. Yet courts sometimes refer to the Copyright Act as "remedial" in civil cases, typically when they are justifying implementation of the Act's broad civil remedies.[75] Moreover, although a great deal of civil litigation is brought under the copyright laws, criminal charges are brought only rarely. A recent survey indicates that of 3300 published copyright opinions from 1948 through 1997, only sixty-eight (two percent) involved criminal cases.[76] When they are brought, the cases are typically clear cut, at least from a statutory perspective. Disputes are resolved in favor of lenity.

For example, in *Dowling v. United States,*[77] the government had indicted Dowling for violating the Stolen Property Act[78] by shipping bootleg recordings of Elvis Presley in commerce without the permission of the copyright owners.[79] The question was whether materials that were not physically stolen, but which were shipped in violation of the Copyright Act, should be considered "stolen" under the statute.[80] The district court convicted Dowling after a bench trial, and the Ninth Circuit affirmed.[81] The Supreme Court

75. *See* Video Views, Inc. v. Studio 21, Ltd., 925 F.2d 1010, 1022 (7th Cir. 1991).

76. Ting Ting Wu, *The New Criminal Copyright Sanctions: A Toothless Tiger?*, 39 IDEA 527, 529 (1999).

77. 473 U.S. 207 (1985).

78. 18 U.S.C. § 2314 (2000). The statute makes it a crime to "transport ... in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud."

79. *Dowling*, 473 U.S. at 209.

80. *Id.*

81. United States v. Dowling, 739 F.2d 1445 (9th Cir. 1984).

reversed the conviction, relying heavily on the rule of lenity.[82] Justice Blackmun wrote for the majority that the defendant's conduct did not fit plainly within the language of the statute.[83] Perhaps more significantly, the crux of the accusations involved copyright violations. The Copyright Act itself contains criminal penalties under certain circumstances, which were not present. The Court held that the government should not be permitted to use the Stolen Property Act as a means for expanding criminal copyright liability beyond the rather narrow limits that Congress legislated.[84] Blackmun wrote in this regard:

> Thus, the history of the criminal infringement provisions of the Copyright Act reveals a good deal of care on Congress' part before subjecting copyright infringement to serious criminal penalties. First, Congress hesitated long before imposing felony sanctions on copyright infringers. Second, when it did so, it carefully chose those areas of infringement that required severe response—specifically, sound recordings and motion pictures—and studiously graded penalties even in those areas of heightened concern. This step-by-step, carefully considered approach is consistent with Congress' traditional sensitivity to the special concerns implicated by the copyright laws.[85]

Such rebuffs are not needed often. Published opinions sometimes show prosecutors bringing criminal charges for fairly minor copyright infringements,[86] but not cases in which the legal status of the alleged infringement is seriously in dispute. In contrast, many other federal statutes with both civil and criminal remedies, such as the Clean Water Act, RICO, and the Securities Exchange Act, are the source of constant litigation about what should constitute a crime.[87] Why should these differences occur?

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82. *Dowling*, 473 U.S. at 214-18.

83. *Id.* at 218.

84. *Id.* at 220-21.

85. *Id.* at 225.

86. *See, e.g.*, United States v. Moran, 757 F. Supp. 1046 (D. Neb. 1991). For further discussion, see Lydia Pallas Loren, *Digitization, Commodification, Criminalization: The Evolution of Criminal Copyright Infringement and the Importance of the Willfulness Requirement*, 77 WASH. U. L.Q. 835, 870 (1999).

87. The Clean Water Act and the Securities Exchange Act are discussed in Part I.B (the inflationary model). RICO is discussed in Part I.D (the law enforcement model).

Part of the explanation involves the statutes themselves. The Copyright Act requires proof of "willful" violation in criminal cases,[88] and contains substantive statutory defenses that the government must overcome.[89] Courts do not agree on the meaning of "willful," and Congress has not defined the term.[90] The majority position, however, seems to be reflected in *United States v. Moran*,[91] in which Magistrate Judge Kopf noted that:

> "[W]illfully" means that in order to be criminal the infringement must have been a "voluntary, intentional violation of a known legal duty." I am so persuaded because I believe that in using the word "willful" Congress intended to soften the impact of the common-law presumption that ignorance of the law or mistake of the law is no defense to a criminal prosecution by making specific intent to violate the law an element of federal criminal copyright offenses.[92]

Simply put, it is not easy for a federal prosecutor to win a criminal copyright prosecution unless the case is a clear, intentional violation of the statute.

The other part of the explanation involves institutional choices. There is no Copyright Enforcement Commission, or other such administrative agency. Thus, there are no regulations that receive *Chevron* deference in criminal cases. Nor are there government lawyers attempting to convince the courts to interpret the Copyright Act even more expansively in civil cases for the common good. And because there is no Copyright Bureau in the Department of Justice whose only job it is to prosecute copyright cases, criminal copyright cases fall on the United States Attorneys' offices, which must use discretion in deciding how much of their limited resources they should devote to them.

This point is important in light of Congress' 1997 expansion of criminal liability for copyright infringement in the No Electronic

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88. 17 U.S.C. § 506(a) (2000).

89. Most significant are the defenses of fair use and first sale. *See* 17 U.S.C. § 107 (2000) (fair use); *id.* § 109 (first sale).

90. *See infra* Part II.B (analyzing the imposition of strong mens rea requirement).

91. 757 F. Supp. 1046 (D. Neb. 1991).

92. *Id.* at 1049 (quoting Cheek v. United States, 498 U.S. 192, 200 (1991)).

Theft (NET) Act.[93] NET expanded criminal copyright liability by making it possible, for the first time, for a person to be convicted without having infringed for commercial advantage or private financial gain.[94] NET amended the Copyright Act to make it a crime to infringe "by the reproduction or distribution, including by electronic means, during any 180-day period, of 1 or more copies or phonorecords of 1 or more copyrighted works, which have a total retail value of more than $1,000."[95]

Even supporters of NET in Congress expressed concern that this language might criminalize socially acceptable and rather minor infractions of the statute. As Professor Loren notes, the House Report states that "the Justice Department wanted the threshold lowered from the originally proposed 10 copies and retail value of $5,000 to the adopted level of one copy and retail value of $1,000 because it anticipated wanting to pursue smaller-scale infringers."[96] The bill's supporters recognized that the statute was overly broad as drafted. Senator Hatch expressed concern, but felt the "willfully" requirement would serve to prevent inappropriate prosecutions.[97]

It would be difficult to deny that reducing the government's burden of proof is likely to increase the number of criminal prosecutions. However, unless the Supreme Court decides that the "violation of a known legal duty" requirement articulated in *Moran* is more than the government must prove, the combination of the statute's mens rea requirements, the statutory defenses, and the lack of institutional incentives are likely to inhibit any serious changes in the way United States Attorneys view copyright prosecutions. The standard model will likely continue to control.

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93. Pub. L. No. 105-147, 111 Stat. 2678 (1997) [hereinafter NET] (codified as amended in scattered sections of 17 and 18 U.S.C.).

94. These are still grounds for criminal liability under 17 U.S.C. § 506(a)(1), but they are no longer the only grounds.

95. NET § 2(b) (codified at 17 U.S.C. § 506(a)(2)).

96. Loren, *supra* note 86, at 870 n.196 (citing H.R. REP. NO. 105-339, at 7 (1997)).

97. 143 CONG. REC. S12,689 (daily ed. Nov. 13, 1997) (statement of Sen. Hatch). For discussion of this statement and other salient legislative history, see Loren, *supra* note 86, at 888-90; Note, *The Criminalization of Copyright Infringement in the Digital Era*, 112 HARV. L. REV. 1705, 1716 (1999).

b. Bankruptcy Crimes

Crimes for violation of the United States Bankruptcy Code[98] are defined in §§ 151 through 157 of the federal Criminal Code.[99] The criminal provisions cover various species of fraud that are typically committed in bankruptcy proceedings. The types of conduct that may be prosecuted as bankruptcy crimes are the same as those that form the basis of a denial of discharge under § 727(a) of the Bankruptcy Code.[100] For example, under §§ 727(a)(3) and (4), a discharge should be denied if:

> (3) the debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case;
> (4) the debtor knowingly and fraudulently, in or in connection with the case—
> (A) made a false oath or account;
> (B) presented or used a false claim ....[101]

Correspondingly, the Criminal Code makes it a crime to:

> (1) knowingly and fraudulently conceal[] from a custodian, trustee, marshal, or other officer of the court charged with the control or custody of property, or, in connection with a case under title 11, from creditors or the United States Trustee, any property belonging to the estate of a debtor;
> (2) knowingly and fraudulently make[] a false oath or account in or in relation to any case under title 11;
> (3) knowingly and fraudulently make[] a false declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, in or in relation to any case under title 11 ....[102]

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98. 11 U.S.C. § 101 (2000).
99. 18 U.S.C. §§ 151-157 (2000).
100. 11 U.S.C. § 727(a) (2000).
101. *Id.* § 727(3)-(4). There are ten subsections in total.
102. 18 U.S.C. § 152(1)-(3). There are nine subsections in total.

Conduct that violates one statute is nearly the same as conduct that violates the other. Yet, many petitioners are denied discharges although very few are convicted of bankruptcy crimes.[103]

The reasons for this disparity are a mixture of statutory interpretation and institutional choice. The Department of Justice has not devoted the resources to prosecuting bankruptcy crimes that it might.[104] As in the case of the Copyright Act, there is neither a bureau within the Department of Justice whose job it is to do so, nor an agency in charge of enforcement in civil cases with the power and resources to press federal prosecutors successfully. United States Attorneys' offices are likely to pursue only the most egregious cases of bankruptcy fraud, which means that the selection of cases simulates a system in which courts routinely apply lenity to ensure that only the clearest violations are considered crimes. At the same time, civil bankruptcy cases proceed under ordinary canons of construction designed to effectuate the legislative purpose.

In this context, when disputes arise over the applicability of criminal provisions, courts frequently *do* apply the rule of lenity in determining whether a bankruptcy crime has been committed. For example, in *United States v. Lee*,[105] the court applied the rule of lenity in dismissing a bankruptcy crime indictment, noting that the rule "directs us to resolve ambiguities in a criminal statute so as to apply it only to conduct the statute clearly covers."[106] A consent order that the defendant had filed in a bankruptcy case failed to disclose various earlier payments that might have been fraudulent. The government argued that this order constituted a violation of § 157(2), which makes it illegal to "file[] a document in a proceeding under title 11 ... for the purpose of executing or concealing ... a scheme or artifice [to defraud] ...."[107] The court rejected this theory on the ground that any fraud was already completed by the time the allegedly fraudulent filing occurred. On motion for reconsideration, the government argued that other statutes, such as the mail fraud

103. This point is made astutely by Tamara Ogier and Jack F. Williams in *Bankruptcy Crimes and Bankruptcy Practice*, 6 AM. BANKR. INST. L. REV. 317, 347 (1998).

104. *See infra* notes 126-31 and accompanying text.

105. 82 F. Supp. 2d 384 (E.D. Pa. 2000).

106. *Id.* at 387.

107. 18 U.S.C. § 157(2) (2000).

statute, had been interpreted broadly to include acts that may not have occurred until after the fraud had been completed and that the bankruptcy crime provisions should be interpreted similarly.[108] The court rejected this argument, in part on grounds of lenity:

> Similar though the language of the bankruptcy fraud statute is to that of the various other fraud statutes, we cannot, particularly as a matter of what appears to be first impression, import wholesale into the bankruptcy fraud statute the thick judicial gloss that has been applied over the years to these other statutes.[109]

The *Lee* court's holding is in accord with other cases that have held the rule of lenity to apply to bankruptcy crime prosecutions.[110] It is also in accord with a series of opinions reading a materiality requirement into the definition of a bankruptcy crime. Unlike the federal perjury statute, which makes it a crime to make false statements only with respect to a material issue,[111] the bankruptcy crime statutes contain no materiality requirement on their face.[112] Yet, it is universally accepted that a successful prosecution under § 152 requires proof that any false statement made was material.[113] This requirement makes sense. It would not advance the purposes of the statute if an offhand remark that had nothing to do with the

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108. *Lee*, 82 F. Supp. 2d at 393-94.

109. *Id.* at 392.

110. *See, e.g.*, United States v. Rowe, 144 F.3d 15, 21 (1st Cir. 1998); United States v. Brimberry, 779 F.2d 1339, 1348 (8th Cir. 1985).

111. The perjury statute states in relevant part:

> Whoever—
>
> (1) having taken an oath ... that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true ... is guilty of perjury and shall, except as otherwise expressly provided by law, be fined under this title or imprisoned not more than five years, or both ....

18 U.S.C. § 1621 (2000).

112. *See supra* text accompanying notes 101-02 (quoting the relevant parts of the statute).

113. *See, e.g.*, United States v. Key, 859 F.2d 1257, 1260 (7th Cir. 1988) ("[T]he essence of the offense under § 152 is the making of a materially false statement or oath with the intent to defraud the bankruptcy court ...."); United States v. Phillips, 606 F.2d 884, 887 (9th Cir. 1979).

bankruptcy proceedings later became the basis of a criminal prosecution.

This is not to say that materiality is itself construed narrowly. Numerous cases hold that materiality requires only that "the false oath or account relate to some significant aspect of the bankruptcy case or proceeding in which it was given, or that it pertain to the discovery of assets or to the debtor's financial transactions,"[114] rejecting arguments that the government must prove actual harm to a creditor as a result of the false statement.[115] Nonetheless, these holdings are still entirely consistent with the lenity approach to bankruptcy crime prosecutions. The fact that a judicially imposed restriction on the definition of a crime is not interpreted with maximum breadth does not mean that courts are interpreting the statute itself broadly.

In contrast, it is a constant refrain in civil bankruptcy cases that the statute should be construed liberally to give debtors the fresh start the statute envisions.[116] Although the Code's exceptions to discharge are interpreted narrowly,[117] occasionally by means of analogy to the rule of lenity itself,[118] the contrast between the approach to civil and criminal cases reflects an attitude toward the statutes consistent with the standard model: Civil cases are governed by an effort to effectuate the broader remedial purposes of the statute.[119] This may require interpreting some provisions broadly and others narrowly. Criminal cases are governed by the rule of lenity.

This assessment is in disagreement with some recent discussion. For example, Stephanie Wickouski's recent book on bankruptcy crimes makes the following observation:

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114. United States v. Gellene, 182 F.3d 578, 588 (7th Cir. 1999).

115. *See, e.g., id.*; United States v. Yagow, 953 F.2d 427, 432-33 (8th Cir. 1992); United States v. O'Donnell, 539 F.2d 1233, 1237 (9th Cir. 1976).

116. *See, e.g.*, Bernard v. Sheaffer (*In re* Bernard), 96 F.3d 1279, 1281 (9th Cir. 1996) ("In keeping with the 'fresh start' purposes behind the Bankruptcy Code, courts should construe § 727 liberally in favor of debtors and strictly against parties objecting to discharge.").

117. *See, e.g., In re* Scarlata, 127 B.R. 1004, 1009 (N.D. Ill. 1991).

118. *See* Tusco Grocers v. Coatney (*In re* Coatney), 185 B.R. 546, 550 (N.D. Ohio 1995).

119. There are many examples. *See, e.g.*, Checkers Drive-In Rests., Inc. v. Comm'r of Patents and Trademarks, 51 F.3d 1078, 1082 (D.C. Cir. 1995) (explaining the broad interpretation given to provisions granting automatic stay).

> In cases in which the conflicting terminology is the basis for a defense argument that no crime was committed, courts have generally interpreted the Bankruptcy Criminal Code broadly. This tendency would appear to fly in the face of the rule of lenity. One explanation for this departure is that due process and lenity arguments are rarely argued in such cases. Another explanation is the judicial view that a debtor's entry into the bankruptcy process provides fair warning of both the letter and the spirit of the law. This view appears to underlie many of the decisions which broadly construe Bankruptcy Criminal Code provisions. This approach, however, is not completely consistent with lenity.[120]

There is a grain of truth to this assessment, but it largely misses the mark. Consider, for example, the Second Circuit's decision in *Sabbeth v. United States*.[121] In contemplation of putting the corporation he owned into bankruptcy, Stephen Sabbeth first transferred corporate funds from the company to himself, and subsequently transferred those funds again to secret accounts in the names of various individuals, sometimes using phony social security numbers to open the accounts.[122] Sabbeth was indicted, tried, and convicted of concealing these corporate assets in violation of § 152(7) of the criminal code.[123] He argued, perhaps with some technical justification, that at the time he secreted the funds, they no longer belonged to the corporation. Rather, they belonged to him, since he had transferred the funds to himself. Granted, his title was voidable, because the funds were most likely preferences or fraudulent transfers under federal and state law, but title had shifted to him once the funds went into his account, and therefore, he could not have violated the statute by concealing corporate assets. The court rejected these arguments, holding that "'property

120. STEPHANIE WICKOUSKI, BANKRUPTCY CRIMES 18 (2000).

121. 262 F.3d 207 (2d Cir. 2001).

122. *Id.* at 211.

123. The section makes it a crime if a person

> in a personal capacity or as an agent or officer of any person or corporation, in contemplation of a case under title 11 by or against the person or any other person or corporation, or with intent to defeat the provisions of title 11, knowingly and fraudulently transfers or conceals any of his property or the property of such other person or corporation ....

18 U.S.C. § 152(7) (2000).

of ... [a] corporation' under Section 152(7) ... include[s] all property that would have belonged to the debtor but for a preferential or fraudulent transfer by the defendant."[124] The court called its interpretation "commonsensical" based on the purpose of the statute and its relationship to various provisions of the Bankruptcy Code.[125]

Cases like *Sabbeth* show that my characterization of how courts deal with bankruptcy crimes is not absolute. Courts will not always apply the rule of lenity mechanically in order to accept the narrowest possible interpretation of a bankruptcy crime. Yet as we saw above, the rule of lenity is very much alive and well in the courts' interpretation of criminal bankruptcy provisions.

Even more telling is the fact that there are so few prosecutions. Ogier and Williams have studied the number of criminal referrals from the United States Trustees and the number of convictions for bankruptcy crimes during most of the 1990s.[126] In 1990, there were 369 referrals, and a total of forty convictions.[127] By 1997, those numbers had grown to 712 referrals and eighty-seven convictions.[128] Ogier and Williams recognized that their statistics may underreport convictions. A study by Craig Peyton Gaumer suggests that they did, but that the numbers are still very small. According to Gaumer, the number of convictions was seventy in 1990, 130 in 1997, and reached a high of 176 in 1998.[129] During those years, the number of bankruptcy filings were 783,000, 1,404,000, and 1,443,000, respectively.[130] The overall picture shows such little enforcement that Gaumer found no prosecutions during a ten-year period in twenty-two federal districts.[131]

From time to time, the Attorney General has expressed concern about the underenforcement of criminal bankruptcy statutes. For example, during the Clinton Administration, Attorney General Reno initiated Operation Total Disclosure in 1996, leading to a

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124. *Sabbeth*, 262 F.3d at 216.

125. *Id.*

126. Ogier & Williams, *supra* note 103, at 348-53.

127. *Id.* at 351.

128. *Id.* at 353.

129. Craig Peyton Gaumer, *Policing the Bankruptcy System: An Informal Statistical Analysis of U.S. Bankruptcy Fraud Prosecutions*, 74 AM. BANKR. INST. J. 8, 8 (2000).

130. *Id.* at 8, 34.

131. *Id.* at 34.

significant increase in prosecutions.[132] Attorney General Barr, toward the end of the first Bush Administration in 1992, also engaged in an aggressive plan, which resulted in a step-up in criminal bankruptcy cases.[133] Nonetheless, it is self-evident that there is very little enforcement of these statutes, although public statements from the top of the Justice Department hierarchy seem to make a small difference. All commentators call for more effort from the Department of Justice, either by having routine audits of bankruptcy filings by United States Attorneys offices[134] or by appointing Assistant United States Attorneys on a regional basis to specialize in bankruptcy crime prosecutions.[135]

Absent from the discussion is the possible relationship between the institutional framework in which the law is enforced and the ways in which judges interpret the statutes. I suggest that the current balance of interpretation in the courts is at least in part a function of the current state of enforcement structures. If the Department of Justice forms the equivalent of a bankruptcy crimes bureau, sooner or later the team of prosecutors dedicated to eliminating bankruptcy fraud will take more aggressive positions with respect to the interpretation of the statutes. Ultimately, some courts are likely to accept these interpretations. Public choice theory suggests that institutions often conduct themselves in ways that will ensure their own status and longevity.[136] I am suggesting that this dynamic plays a role not only in the selection of cases that are prosecuted, but also in the development of the substantive law, because courts often respond to the heightened activity of large governmental enforcement efforts. To see how this dynamic works, we turn to the inflationary model in the next section.

B. The Inflationary Model

Even when the courts commit themselves to interpreting a statute broadly in civil cases and narrowly in criminal ones,

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132. *See* Ogier & Williams, *supra* note 103, at 325-26.

133. Gaumer, *supra* note 129, at 8.

134. Ogier & Williams, *supra* note 103, at 355-56.

135. Gaumer, *supra* note 129, at 34.

136. For an introduction to some of the major concepts of public choice theory, see DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION (1991).

contextual changes brought about by the history of interpretation make it impractical to carry out this plan, leading to broad interpretation in both contexts. But the issue of broad interpretation of criminal statutes arises in other contexts as well. Here we will look at examples of statutory inflation in three different statutory schemes: the Securities Exchange Act, the Sherman Act, and the Clean Water Act.

1. Insider Trading and Inflation of the Securities Laws

Perhaps the most dramatic example of statutory inflation lies in the area of securities law. Rule 10b-5, the principal antifraud regulation promulgated under the securities laws, says nothing about insider trading.[137] Rather, the rule addresses deceit and fraud generally. Nonetheless, the enforcement division of the Securities and Exchange Commission began charging corporate directors who traded on inside information with Rule 10b-5 violations in civil enforcement proceedings.[138] In 1968, the Second Circuit affirmed an SEC insider trading decision in *SEC v. Texas Gulf Sulphur Co.*[139] In so doing, it held that "the securities laws should be interpreted as an expansion of the common law both to effectuate the broad remedial design of Congress ... and to insure uniformity of enforcement ...."[140]

Subsequently, civil plaintiffs, using the implied private right of action under Rule 10b-5, began bringing successful actions against

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137. 17 C.F.R. § 240.10b-5 (2002). That rule states:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
>
> (a) To employ any device, scheme, or artifice to defraud, [or]
>
> ....
>
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

Id.

138. *See, e.g.*, *In re* Investors Mgmt. Co., 1971 SEC LEXIS 992 (July 29, 1971); *In re* Cady, Roberts & Co., 40 S.E.C. 907 (1961). The history discussed in this section is derived in large part from Roberta S. Karmel, *Outsider Trading on Confidential Information—A Breach in Search of a Duty*, 20 CARDOZO L. REV. 83, 87-91 (1998).

139. 401 F.2d 833 (2d Cir. 1968).

140. *Id.* at 855 (citations and footnotes omitted).

those who disseminated and traded on inside information. In *Shapiro v. Merrill Lynch, Inc.*,[141] the Second Circuit held that its reasoning in *Texas Gulf Sulphur* also applied in private lawsuits.[142] For support, it quoted the Supreme Court's admonition that the securities laws be construed broadly to effectuate their remedial purpose.[143] It also expanded insider trading doctrine further, by not requiring that the plaintiffs prove that the actual shares they purchased on the open market were the same shares that the defendants sold. Rather, the defendants had breached a duty to "all persons who during the same period purchased Douglas stock in the open market without knowledge of the material inside information which was in the possession of defendants."[144]

It was not until 1980 that the Supreme Court approved prosecution of insider trading as a criminal violation of Rule 10b-5. In *Chiarella v. United States*,[145] the Court reversed the conviction of an employee of a financial printer who bought stock based on information he had read in the course of printing announcements of corporate takeover bids that had not yet been made public.[146] Though the Court held that the employee owed no duty, it embraced the position that insider trading could constitute a violation of Rule 10b-5, and that prosecution for such violators was appropriate.[147] The Court relied on earlier administrative decisions and circuit court decisions in civil cases, including *Texas Gulf Sulphur*.[148] It did not mention the fact that *Chiarella* was a criminal case, whereas all the earlier ones were civil, and it certainly did not consider the rule of lenity.[149] Thus, criminal application of Rule 10b-5 in the context

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141. 495 F.2d 228 (2d Cir. 1974).

142. *Id.* at 236.

143. *Id.* at 235 ("Congress intended securities legislation enacted for the purpose of avoiding frauds to be construed 'not technically and restrictively, but flexibly to effectuate its remedial purposes.'") (quoting Affiliated Ute Citizens v. United States, 406 U.S. 128, 151 (1972)).

144. *Id.* at 237. Subsequently, the Supreme Court endorsed the "fraud on the market" theory of Rule 10b-5 liability. *See* Basic, Inc. v. Levinson, 485 U.S. 224 (1988).

145. 445 U.S. 222 (1980).

146. *Id.* at 224.

147. *Id.* at 227-28.

148. *Id.* at 229-30.

149. Roberta Karmel has recognized the tension between the broad interpretation of remedial statutes and the rule of lenity in the context of insider trading cases. *See* Transcript, *Roundtable on Insider Trading: Law, Policy, and Theory after* O'Hagan, 20

of insider trading grew out of the broad interpretation of the rule in civil cases, in part as the result of aggressive administrative enforcement actions brought earlier by the SEC.[150]

In 1997, a second inflationary event involving the law of insider trading occurred. In *United States v. O'Hagan*,[151] the Supreme Court endorsed the misappropriation theory of securities fraud.[152] The Court based its decision on civil precedents, two law review articles, an extremely narrow reading of the Court's earlier precedents, and the *Chevron* doctrine.

James O'Hagan was a Minneapolis lawyer whose firm represented Grand Metropolitan PLC, a company that was planning to make a tender offer to buy shares of Pillsbury Company. Before the merger was publicly announced, O'Hagan began buying shares and options of Pillsbury. Once the merger was announced, the price of Pillsbury shares shot up. O'Hagan sold and made more than four million dollars.

O'Hagan was indicted for securities fraud. The government first alleged that he had violated § 10 of the Securities Exchange Act of 1934[153] and Rule 10b-5. The prosecution was aggressive. In prototypical insider trading cases, the defendant takes material information from a company to which he has a fiduciary duty, and uses that information for improper personal gain. But O'Hagan's

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CARDOZO L. REV. 7, 15 (1998).

150. It is not unusual for civil and criminal cases to arise from the same set of circumstances, which may lead to complicated intragovernmental issues. *See* Thomas C. Newkirk & Ira L. Brandriss, *The Advantages of a Dual System: Parallel Streams of Civil and Criminal Enforcement of U.S. Securities Laws*, 2 INT'L & COMP. CORP. L.J. 29 (2000). For a thorough and insightful discussion of the history of insider trading doctrine, see WILLIAM K.S. WANG & MARC I. STEINBERG, INSIDER TRADING ch.4 (1996).

151. 521 U.S. 642 (1997).

152. *Id.* at 647.

153. 15 U.S.C. § 78j (2000). The statute reads:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange ....
>
> (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [Securities and Exchange] Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Id.

firm did not represent Pillsbury, the company whose stock he was trading. The alleged fraud was based on the theory that O'Hagan had misappropriated information from his law firm and had used that misappropriated information in the purchase and sale of securities without disclosing his activities. At the time of the trial, the Supreme Court had not passed on the misappropriation theory, and lower courts remained divided.[154] Second, the government alleged that O'Hagan had violated § 14(e) of the Exchange Act[155] and Rule 14e-3(a), promulgated thereunder by the SEC.[156] O'Hagan was convicted of securities fraud and other crimes. The Eighth Circuit reversed the convictions,[157] and the Supreme Court reversed again.[158]

The most difficult problem facing the government was that the Supreme Court had twice held in criminal cases that defendants who had no relationship with the company whose stock they were

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154. For discussion of the state of the law at that time, see *O'Hagan*, 521 U.S. at 649-50.

155. The Exchange Act provides:

> It shall be unlawful for any person ... to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer .... The [SEC] shall, for the purposes of this subsection, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative.

15 U.S.C. § 78n(e) (2000).

156. According to the rule:

> (a) If any person has taken a substantial step or steps to commence, or has commenced, a tender offer (the "offering person"), it shall constitute a fraudulent, deceptive or manipulative act or practice within the meaning of section 14(e) of the [Exchange] Act for any other person who is in possession of material information relating to such tender offer which information he knows or has reason to know is nonpublic and which he knows or has reason to know has been acquired directly or indirectly from:
>
> (1) The offering person,
>
> (2) The issuer of the securities sought or to be sought by such tender offer, or
>
> (3) Any officer, director, partner or employee or any other person acting on behalf of the offering person or such issuer, to purchase or sell or cause to be purchased or sold any of such securities or any securities convertible into or exchangeable for any such securities or any option or right to obtain or to dispose of any of the foregoing securities, unless within a reasonable time prior to any purchase or sale such information and its source are publicly disclosed by press release or otherwise.

17 C.F.R. § 240.14e-3(a) (2002).

157. United States v. O'Hagan, 92 F.3d 612 (8th Cir. 1996).

158. *O'Hagan*, 521 U.S. at 578.

trading could not be held liable for insider trading under the securities laws.[159] In *Chiarella*, the Court had held that the printer had no fiduciary duty to any of the parties, and therefore violated no legal duty.[160] The *O'Hagan* Court explained that *Chiarella* did not preclude future holdings that a fiduciary duty with another party could lead to criminal liability:

> *Chiarella* thus expressly left open the misappropriation theory before us today. Certain statements in *Chiarella*, however, led the Eighth Circuit in the instant case to conclude that § 10(b) liability hinges exclusively on a breach of duty owed to a purchaser or seller of securities. The Court said in *Chiarella* that § 10(b) liability "is premised upon a duty to disclose arising from a relationship of trust and confidence *between parties to a transaction*," (emphasis added), and observed that the printshop employee defendant in that case "was not a person in whom the sellers had placed their trust and confidence." These statements rejected the notion that § 10(b) stretches so far as to impose "a general duty between all participants in market transactions to forgo actions based on material, nonpublic information," and we confine them to that context. The statements highlighted by the Eighth Circuit, in short, appear in an opinion carefully leaving for future resolution the validity of the misappropriation theory, and therefore cannot be read to foreclose that theory.[161]

The Supreme Court had used similar language three years after *Chiarella* in *Dirks v. SEC*,[162] in which it held that a financial analyst who traded based on information he received from a former employee of a corporation did not violate § 10 in a civil case brought by the SEC.[163] The *O'Hagan* Court also indicated that it had left the door open in *Dirks* for application of the misappropriation theory of securities fraud.[164]

In *Carpenter v. United States*,[165] the Court unanimously upheld the mail fraud and wire fraud convictions of R. Foster Winans, a

159. *See id.* at 650 n.4.
160. *Chiarella*, 445 U.S. at 234-35.
161. *O'Hagan*, 521 U.S. at 662 (citations omitted).
162. 463 U.S. 646 (1983).
163. *Id.* at 665-67.
164. *O'Hagan*, 521 U.S. at 662-63.
165. 484 U.S. 19 (1987).

journalist for the *Wall Street Journal*, his roommate, David Carpenter, and various people at a brokerage house, for a scheme that involved the sale of information to the brokerage in advance of the "Heard on the Street" column's publication.[166] Although the Second Circuit had also affirmed convictions for securities fraud,[167] the Supreme Court was divided four-to-four on that issue, and affirmed the securities fraud conviction without opinion or discussion.[168]

Thus, by the time *O'Hagan* was decided, both the Justice Department and the SEC for many years had been attempting to expand liability for insider trading. They had failed twice before the Supreme Court, and had won an affirmance by an equally divided Court. *O'Hagan*, the government's fourth effort, was a success. This is not to say that the decision in *O'Hagan* cannot be justified. Among defendants Chiarella, Dirks, and O'Hagan, most people would agree that O'Hagan was the worst actor. Nonetheless, to the extent that criminal liability must be based on fair notice, O'Hagan did not have such notice and Justice Scalia made this point the basis of his brief dissent.[169]

On what authority did the Court base its decision? First, the Court relied on the language of Rule 10b-5, which makes it illegal "to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security."[170] The rule does not specify against whom the deceit must occur. This reading of the rule, though perfectly consistent with its language, is by no means necessary. One could easily understand the rule to apply only to

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166. *Id.* at 28.

167. United States v. Carpenter, 791 F.2d 1024 (2d Cir. 1987).

168. The traditional practice of the Supreme Court to refrain from issuing opinions when they are evenly split "may be designed to avoid having the opinion supporting the judgment of affirmance treated as precedent ..." Edward A. Hartnett, *Ties in the Supreme Court of the United States*, 44 WM. & MARY L. REV. 643, 662 n.77 (2002).

169. *O'Hagan*, 521 U.S. at 679 (Scalia, J., dissenting). According to Justice Scalia:

> In light of that principle [the rule of lenity], it seems to me that the unelaborated statutory language: "[t]o use or employ in connection with the purchase or sale of any security ... any manipulative or deceptive device or contrivance," § 10(b), must be construed to require the manipulation or deception of a party to a securities transaction.

Id. (alteration in original).

170. *Id.* at 651 (quoting 17 C.F.R. § 240.10b-5(c) (1996)).

frauds committed against the other party to the transaction, as Justice Scalia did in his dissent.[171] My point is not that the Court was wrong-minded; only that the Court used the broadest interpretation of the rule that its language permits.

Second, the Court relied heavily on two law review articles by Professor Aldave that criticized the Court's earlier insider trading jurisprudence and encouraged the adoption of the misappropriation theory.[172] In fact, the Court cited these articles seven times in the majority opinion. Finally, the Court noted that its decision was consistent with an earlier decision in a civil case brought under the securities statutes, in which the Court placed certain limits on Rule 10b-5 claims in the context of mergers.[173] The best explanation the Court could offer to reconcile *Chiarella* and *Dirks* was that those cases did not preclude the Court's later endorsement of the misappropriation theory.

The Court's decision to uphold O'Hagan's conviction under Rule 14e-3 is subject to similar analysis. Section 14(e) makes it illegal "to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer ...."[174] Rule 14e-3(a) makes it a fraudulent, deceptive or manipulative practice to use nonpublic information obtained from the offering party to trade in stock or options in the target company.[175] O'Hagan clearly did just that. The only question facing the Court was whether Rule 14e-3 was a valid exercise of the SEC's rulemaking authority. On that issue, the Court held:

> A prophylactic measure, because its mission is to prevent, typically encompasses more than the core activity prohibited. As we noted in *Schreiber*, § 14(e)'s rulemaking authorization gives the Commission "latitude," even in the context of a term of art like "manipulative," "to regulate nondeceptive activities as a 'reasonably designed' means of preventing manipulative acts,

171. *Id.* at 679 (Scalia, J., dissenting).

172. *Id.* at 650 n.4, 654 (citing Barbara Bader Aldave, *The Misappropriation Theory:* Carpenter *and Its Aftermath*, 49 OHIO ST. L.J. 373 (1988); Barbara Bader Aldave, *Misappropriation: A General Theory of Liability for Trading on Nonpublic Information*, 13 HOFSTRA L. REV. 101 (1984)).

173. *O'Hagan*, 521 U.S. at 644 (citing Santa Fe Indus. v. Green, 430 U.S. 462 (1977)).

174. 15 U.S.C. § 78n(e) (2000).

175. 17 C.F.R. § 240.14e-3(a) (2002).

> without suggesting any change in the meaning of the term 'manipulative' itself." 472 U.S. at 11, n.11. We hold, accordingly, that under § 14(e), the Commission may prohibit acts not themselves fraudulent under the common law or § 10(b), if the prohibition is "reasonably designed to prevent ... acts and practices [that] are fraudulent." 15 U.S.C. § 78n(e).
>
> Because Congress has authorized the Commission, in § 14(e), to prescribe legislative rules, we owe the Commission's judgment "more than mere deference or weight." *Batterton v. Francis*, 432 U.S. 416, 424-426 (1977). Therefore, in determining whether Rule 14e-3(a)'s "disclose or abstain from trading" requirement is reasonably designed to prevent fraudulent acts, we must accord the Commission's assessment "controlling weight unless [it is] arbitrary, capricious, or manifestly contrary to the statute." *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984). In this case, we conclude, the Commission's assessment is none of these.[176]

Under current doctrine, the Court was clearly correct. The *Chevron* doctrine, upon which the Court relied, requires courts to defer to agency rulemaking if the agency demonstrates a reasonable reading of the statute. But in this case, the agency's reading of the statute was clearly inflationary when the rule was applied criminally. The standard model requires that criminal statutes be applied narrowly to give fair notice and to ensure appropriate application of separation of powers principles. Here, in contrast, the SEC's reading was expansive and "prophylactic," consistent with the policy of interpreting remedial statutes broadly. The Court argued that defendants are protected notwithstanding such a broad reading because criminal convictions for securities fraud require proof of willful violation.[177] The truth of that statement depends in part on how courts interpret the willfulness requirement, an issue to which we return below.[178] In any event, it ignores the fact that this application of the *Chevron* doctrine turned lenity on its head.

To summarize, *O'Hagan* illustrates an expansive model of statutory interpretation in criminal cases. Contributing to the decision were factors such as: a history of aggressive litigation

176. *O'Hagan*, 521 U.S. at 672-73 (alterations in original) (footnotes omitted).
177. *Id.* at 666 (citing 15 U.S.C. § 78ff(a)).
178. *See infra* Part II.B.

by the SEC, a similar history of aggressive positions by the Department of Justice, scholarly work supporting the positions of the SEC and the Department of Justice, the *Chevron* doctrine, and private civil litigation brought under the statute. Some of these factors are doctrinal, some institutional, and some idiosyncratic.[179] It is this combination that drives the interpretation of these statutes to a far greater extent than the canons of construction on which the courts purport to rely.

2. Antitrust Laws

The enforcement history of the antitrust laws is far too complex to encapsulate within any of the four models discussed in this Article. The institutional roles are both complicated and somewhat unique as a matter of administrative law. As Spencer Waller describes in his article on the institutional arrangements involved in antitrust enforcement, the Antitrust Division of the Department of Justice, which has jurisdiction over both criminal and civil antitrust cases, early in its history focused on its role as a law enforcement agency.[180] The Division took aggressive positions in criminal prosecutions, and the courts went along. As a consequence, it would not be surprising to see a kind of "reverse inflation," in which criminal cases expand doctrine to be followed later in civil cases.

In fact, this inflationary dynamic has occurred. In 1940, the Supreme Court decided *United States v. Socony-Vacuum Oil Co.*,[181] in which a group of oil companies had agreed to buy surplus oil on the spot market to prevent prices from falling.[182] The question was whether this agreement was a per se violation of the Sherman Act as a form of price fixing, even though no particular prices were established.[183] At the time, broadening the definition of "agreement"

179. As William Wang has pointed out to me in personal communication, both *Carpenter* and *O'Hagan* further illustrate how aggressively the courts have been willing to interpret the mail fraud statute in criminal cases. *See infra* notes 254-56 and accompanying text.

180. Waller, *supra* note 26, at 1391-94. The Federal Trade Commission has jurisdiction only in civil cases, and has not influenced antitrust doctrine as much as, say, the SEC has influenced securities law doctrine.

181. 310 U.S. 150 (1940).

182. *Id.* at 166.

183. *Id.* at 224-25.

was seen as an expansion of antitrust liability.[184] Some forty years later, in *Catalano, Inc. v. Target Sales, Inc.*,[185] the Court relied on *Socony-Vacuum* when it held that an agreement between beer wholesalers not to supply credit to retailers buying their product was a per se violation.[186] By withdrawing the credit terms they had previously extended, the wholesalers essentially raised the present value of each transaction. The Court found this sufficient to constitute price fixing, a per se violation of the law.[187]

Perhaps this interpretive history would have unfolded differently had the Antitrust Division not enjoyed the prestige it did in 1940 under Thurmond Arnold.[188] Notwithstanding this idiosyncracy, it still resembles the inflationary history of the securities laws in an important respect: In both instances, aggressive enforcement efforts by institutions empowered to enforce the relevant statute led the way. In the securities law context, it was the SEC and the Department of Justice working in tandem. In the antitrust area, the Justice Department played both roles. Moreover, it is not difficult to find examples of statutory inflation in the antitrust context in which the expansive interpretation began in a civil case.

In *United States v. Nippon Paper Industries Co.*,[189] the district court dismissed a prosecution against Nippon on the ground that all of the alleged illegal activity had occurred outside the United States.[190] The traditional rule is that statutes are not interpreted to regulate conduct extraterritorially. But in earlier cases, including a 1993 Supreme Court decision,[191] courts had determined that the Sherman Act may be so construed in civil cases, where violations of the Act have significant ramifications within the United States. This, the First Circuit concluded, established a definitive interpretation of the Sherman Act, which should be applied universally to civil and criminal cases alike.[192] It therefore reversed the district

184. *Id.* at 224 n.59.

185. 446 U.S. 643 (1980).

186. *Id.* at 648-49.

187. *Id.* at 650. For further discussion of this body of law, see LEONARD ORLAND, CORPORATE CRIME AND PUNISHMENT (forthcoming).

188. *See* Waller, *supra* note 26, at 1391-94.

189. 944 F. Supp. 55 (D. Mass. 1996).

190. *Id.* at 66.

191. Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993).

192. United States v. Nippon Paper Indus. Co., 109 F.3d 1, 9 (1st Cir. 1997), *cert. denied*,

court and reinstated the case.[193] Having decided that the matter was clear cut, it rejected Nippon's lenity argument.[194]

The court's reasoning in *Nippon* is not terribly convincing. The operative facts occurred in 1990,[195] three years before the Supreme Court endorsed extraterritoriality in civil antitrust actions. Thus, the district court failed to address the serious question of whether Nippon was on adequate notice of the legal standards that would apply when it had choices to make about its business conduct. The more entrenched a broad statutory interpretation becomes as the result of interpretation in an earlier civil case, however, the less natural it would seem to interpret that statute narrowly in a subsequent criminal case. Once a statutory term has been construed, even if the construction occurred in the context of a civil case, that construction inevitably becomes part of the context in which subsequent interpretations occur.[196]

Ultimately, the strength of the *Nippon* opinion depends on how entrenched extraterritorial interpretation of the antitrust laws was at the time that the violations occurred. If opinions in civil cases had clearly established that courts would apply the antitrust laws extraterritorially in cases like *Nippon*, then it is hard to see what role lenity should play. If, in contrast, the issue was not firmly resolved until the Supreme Court's 1993 decision, as the First Circuit seemed to imply, then *Nippon* was wrongly decided. Whatever the right decision in *Nippon*, it is possible, as a general matter, to articulate a set of circumstances in which earlier broad interpretations in civil decisions carry the day in later criminal ones. The predictable result is the ironic expansion of criminal law over time, even in a system that applies lenity. The developments in the securities and antitrust laws illustrate how this can happen.

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522 U.S. 1044 (1998).

193. *Nippon*, 109 F.3d at 9.

194. *Id.* at 7-8.

195. *Id.* at 2.

196. This has been observed by many who focus on the role of context in judicial interpretation. *See, e.g.*, DWORKIN, *supra* note 14, at 337; Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993).

3. Environmental Law

A third area in which we see broad statutory interpretation in both civil and criminal cases is environmental law, especially cases interpreting the Clean Water Act. Here, broad interpretation in criminal cases seems to be part of the design of the statutory scheme. One device, to which we will return in Part II, is the use of lax mens rea standards. For example, a provision of the Clean Water Act criminalizes negligent discharge of oil into navigable waters of the United States.[197] In one case, an individual who negligently ruptured an oil pipe while driving a backhoe was convicted and sentenced to six months in prison, a result affirmed by the Ninth Circuit.[198]

Combining a lax mens rea requirement with the *Chevron* doctrine and broad statutory language ensures broad interpretation of environmental laws. To illustrate, consider *United States v. Mango*.[199] Louise Mango and others were indicted for violating the Clean Water Act in connection with a pipeline project between Ontario, Canada and Long Island, New York.[200] Iroquois, a company in which the defendants were involved, had applied to the Army Corps of Engineers and received a permit for the project, as required by law.[201] Attached to the permit were a series of conditions, including wetland construction and mitigation procedures, as well as erosion control.[202] In constructing the project, the defendants failed to abide by those conditions.[203]

The statute authorizes the Secretary of the Army, through the Chief of the Army Corps of Engineers, to issue permits for dredging and filling waterways and wetlands.[204] A regulation permits district

197. 33 U.S.C. § 1319(c)(1)(A) (2000).
198. United States v. Hanousek, 176 F.3d 1116 (9th Cir. 1999).
199. 199 F.3d 85 (2d Cir. 1999).
200. *Id.* at 88.
201. *Id.*
202. *Id.*
203. *Id.*
204. 33 U.S.C. § 1344 (2000). The statute reads:

> Permits for dredged or fill material
>
> (a) Discharge into navigable waters at specified disposal sites.
>
> The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites. Not later than the fifteenth day after the date an

engineers and their designees to exercise this authority on behalf of the Chief.[205] The first issue, decided under the *Chevron* doctrine, was whether this delegation violated the statute. The second issue, also decided under *Chevron*, concerned the substance of the permit. The statute authorizes the issuance of permits "for the discharge of dredged or fill material into the navigable waters at specified disposal sites."[206] Some of the conditions that were imposed in the permit related "indirectly" to protecting the waterways from the effects of the discharge of dredged or fill material. The question was how closely related the permit had to be to its statutorily authorized purpose.

The district court dismissed most of the indictment.[207] Applying the *Chevron* doctrine, the Second Circuit afforded much greater deference to the Army Corps of Engineers. Determining that the statute permitted delegation from the Chief to district engineers and their designees under *Chevron*, the court deferred to the agency's interpretation of its authority as reasonable.[208] The court also deferred to the agency concerning the substance of the permit: "The CWA is reasonably interpreted to allow the Secretary to consider the cumulative effect of a discharge on an entire ecosystem rather than confining him to consideration of the effects of the permitted discharge on the river into which it is discharged."[209] As the record was not adequate to judge the permit even under this deferential standard, the court remanded the case to the district court for further analysis.[210]

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applicant submits all the information required to complete an application for a permit under this subsection, the Secretary shall publish the notice required by this subsection.

Id.

205. 33 C.F.R. § 325.8(b) (2002). The regulation reads in part:

District engineers are authorized to issue or deny permits in accordance with these regulations.... It is essential to the legality of a permit that it contain the name of the district engineer as the issuing officer. However, the permit need not be signed by the district engineer in person but may be signed for and in behalf of him by whomever he designates.

Id.

206. 33 U.S.C. § 1344(a) (2000).

207. United States v. Mango, 997 F. Supp. 264 (N.D.N.Y. 1998).

208. *Mango*, 199 F.3d at 91-92.

209. *Id.* at 93.

210. *Id.* at 94.

I do not argue here that this decision is unjustifiable, but that it was unquestionably aggressive. The Clean Water Act authorizes the Chief of the Army Corps of Engineers to issue permits for "the discharge of dredged or fill material" and makes it a crime to violate the conditions of any such permit.[211] Here, criminal charges were brought, and by and large upheld, for violation of a permit that contained conditions indirectly related to any such discharge. This is indeed a broad interpretation.

Taken together, the environmental cases illustrate a great deal about what drives the inflationary model. First, they demonstrate that statutory inflation can be an effective tool for combating harmful conduct in a rapidly changing sector of society. The combination of lax mens rea requirements and the *Chevron* doctrine makes it easier to obtain convictions. Second, successful prosecutions in such cases imply that when Congress does not wish to trigger the inflationary model, it can reduce inflationary pressure by imposing more onerous state of mind requirements. Third, the heavy reliance on the *Chevron* doctrine suggests that we should see less inflationary interpretation when agencies are not involved. This should be true because there are no agency lawyers exploring the outer limits of the agency's statutory authority to regulate and building close working relationships with Justice Department lawyers, and because there are no agency interpretations to which courts may defer. Instead, courts must resort to such principles as legislative intent and the rule of lenity.

C. The Lenity Model

The rule of lenity has traditionally been applied only in criminal cases. As early as 1805, Chief Justice Marshall pronounced in *United States v. Fisher*[212] that the principle of strict construction should not apply to regulatory statutes, but only to those in which fundamental rights are at issue.[213] *Fisher* involved a dispute over the meaning of the bankruptcy laws, and the Court refused to construe the law narrowly. The lenity model, which calls for a

211. The statute imposes a maximum sentence of one year in prison for negligent violation of permit conditions, and three years for knowing violation. 33 U.S.C. § 1319(c) (2000). The *Mango* indictment contained thirty-one counts. *Mango*, 199 F.3d at 86.

212. 6 U.S. (2 Cranch) 358 (1805).

213. *Id.* at 389-90.

narrow construction in both civil and criminal cases, is somewhat at odds with the American legal tradition, and we should not expect courts to use it frequently.

Nonetheless, the Supreme Court has articulated, on occasion, support for a unified, narrow approach to interpretation of a given statute. For example, in *FCC v. American Broadcasting Co.*,[214] the Court rejected the FCC's broad construction of a statute prohibiting the broadcasting of lotteries to ban certain "give-aways" on radio and television.[215] In his opinion for the Court, Chief Justice Warren stated: "There cannot be one construction for the Federal Communications Commission and another for the Department of Justice. If we should give [the Act] the broad construction ... [that] would likewise apply in criminal cases ... it would do violence to the well-established principle that penal statutes are to be construed strictly."[216]

More recently, the Court has applied the rule of lenity in two civil cases precisely because the statutes in dispute involved statutes with criminal remedies.[217] In *Crandon v. United States*,[218] the Justice Department had brought a civil action against former Reagan Administration employees to recover lump sum payments made to them by their former private sector employers upon their resignations to enter government service.[219] The payments were "intended to mitigate the substantial financial loss each employee expected to suffer by reason of his change in employment."[220] Relying on common law principles, the government brought an action under § 209(a) of the Criminal Code,[221] which does not itself

214. 347 U.S. 284 (1954).

215. *Id.* at 292.

216. *Id.* at 296.

217. For discussion of these cases, and general discussion of the rule of lenity, see Bruce A. Markell, *Bankruptcy, Lenity, and the Statutory Interpretation of Cognate Civil and Criminal Statutes*, 69 IND. L.J. 335 (1994). Markell argues that criminal and civil considerations are sufficiently diverse, at least in the bankruptcy context, and that courts should not apply the rule of lenity in civil cases.

218. 494 U.S. 152 (1990).

219. *Id.* at 154.

220. *Id.*

221. 18 U.S.C. § 209(a) (2000). The statute reads:

> Whoever receives any salary, or any contribution to or supplementation of salary, as compensation for his services as an officer or employee of the executive branch of the United States government ... from any source other than the Government of the United States, ... [s]hall be subject to the penalties

authorize civil actions. In an opinion by Justice Stevens, the Court held that "because the governing standard is set forth in a criminal statute, it is appropriate to apply the rule of lenity in resolving any ambiguity in the ambit of the statute's coverage."[222] It found the statute unclear with respect to the payment of a lump sum prior to the commencement of government employment. The opinion focused on the need to ensure adequate notice and to avoid common law crimes.[223]

In *United States v. Thompson / Center Arms Co.*,[224] the Court took the same approach, applying the rule of lenity in a tax case.[225] The National Firearms Act levied a tax of $200 on manufacturers for each "firearm" that the manufacturer made.[226] Under the statute, short-barreled rifles are firearms; pistols and long-barreled rifles are not. Thompson/Center Arms sold a pistol packaged with a conversion kit that allowed the purchaser to convert it into either a long-barreled rifle or a short-barreled rifle.[227] The issue was whether the pistol with the kit constituted a "firearm" subject to the $200 tax. After finding the statute ambiguous, Justice Souter wrote in a plurality opinion:

> After applying the ordinary rules of statutory construction, then, we are left with an ambiguous statute. The key to resolving the ambiguity lies in recognizing that although it is a tax statute that we construe now in a civil setting, the NFA has criminal applications that carry no additional requirement of willfulness. Cf. *Cheek v. United States*, 498 U.S. 192, 200 (1991) ("Congress has ... softened the impact of the common-law presumption [that ignorance of the law is no defense to criminal prosecution] by making specific intent to violate the law an element of certain federal criminal tax offenses"); 26 U.S.C. §§ 7201, 7203 (criminalizing willful evasion of taxes and willful failure to file a return). Making a firearm without approval may be subject to criminal sanction, as is possession of an unregistered firearm

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set forth in section 216 of this title.

Id.

222. *Crandon*, 494 U.S. at 158.

223. *Id.*

224. 504 U.S. 505 (1992).

225. *Id.* at 517-18.

226. 26 U.S.C. § 5849 (2000).

227. *Thompson*, 504 U.S. at 508.

> and failure to pay the tax on one, 26 U.S.C. §§ 5861, 5871. It is proper, therefore, to apply the rule of lenity and resolve the ambiguity in Thompson/Center's favor. See *Crandon v. United States*, 494 U.S. 152, 168 (1990) (applying lenity in interpreting a criminal statute invoked in a civil action); *Commissioner v. Acker*, 361 U.S. 87, 91 (1959). Accordingly, we conclude that the Contender pistol and carbine kit when packaged together by Thompson/Center have not been "made" into a short-barreled rifle for purposes of the NFA.[228]

This time, Justice Stevens dissented:

> The plurality, after acknowledging that this case involves "a tax statute" and its construction "in a civil setting," nevertheless proceeds to treat the case as though it were a criminal prosecution. In my view, the Court should approach this case like any other civil case testing the Government's interpretation of an important regulatory statute. This statute serves the critical objective of regulating the manufacture and distribution of concealable firearms—dangerous weapons that are a leading cause of countless crimes that occur every day throughout the Nation. This is a field that has long been subject to pervasive governmental regulation because of the dangerous nature of the product and the public interest in having that danger controlled. The public interest in carrying out the purposes that motivated the enactment of this statute is, in my judgment and on this record, far more compelling than a mechanical application of the rule of lenity.[229]

Note the dynamic in light of the models I propose in this Article. The plurality employs the lenity model in order to fight statutory inflation. In so doing, it relies on *Cheek v. United States*,[230] in which the Court held that tax evasion requires proof that the defendant knew he was violating the law.[231] But *Cheek* does not employ the lenity model, as the plurality implies. It employs the standard model: the tax code can be interpreted broadly in civil cases, but criminal activity will only be found in the most clear cut violations

228. *Id.* at 517-18 (parallel citations omitted).
229. *Id.* at 526 (Stevens, J., dissenting) (citation omitted).
230. 498 U.S. 192 (1991).
231. *Id.* at 199-204.

of the law. Justice Stevens' dissent, in contrast, seems willing to accept the risk of statutory inflation in subsequent cases. As there was no risk of criminal sanctions to Thompson/Center Arms Company, and because the Supreme Court decision provides fair notice, lenity is no longer a consideration.

D. The Law Enforcement Model

I have found no instances in which a court interprets the same language broadly in criminal cases, and more narrowly in civil ones.[232] Because lenity is such a deeply entrenched value in our system of justice, one would expect narrow construction in civil cases to lead to statutory *de*flation in criminal ones. Nonetheless, examination of a few RICO doctrines suggests that the courts have been generous with prosecutors and stingy with civil plaintiffs in interpreting various provisions of the statute. This judicial perspective is consistent with the view that RICO is principally a criminal statute with civil remedies tacked on.[233] In these circumstances, a court might wish to interpret narrowly those provisions that appear to be used by civil litigants, while giving prosecutors broad latitude to fight crime. I will illustrate this phenomenon, and point out deflationary pressures that accompany this tactic.

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232. Arguably, the Supreme Court has been generous with the government and stingy with private plaintiffs bringing claims under the securities statutes. Over the past several decades, a number of cases have reduced access to the courts in civil cases by private plaintiffs. *See, e.g.*, Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164 (1994) (finding no liability for aiders and abettors in private action); Blue Chip v. Manor Drug Stores, 421 U.S. 723 (1975) (holding that plaintiffs must be actual sellers or purchasers). But the record on this issue is by no means uniform. *See* Basic, Inc. v. Levinson, 485 U.S. 224 (1988) (relaxing requirements for proof of reliance in private actions); Bateman Eichler, Hill Richards, Inc. v. Berner, 472 U.S. 299 (1985) (limiting in pari delicto defense, thus expanding potential scope of liability).

233. In fact, its legislative history suggests that RICO is just that. *See* Religious Tech. Ctr. v. Wollersheim, 796 F.2d 1076, 1084-87 (9th Cir. 1986). The Supreme Court recently declined to rule on the power of district courts to grant injunctive relief to private plaintiffs under § 1964(c). *See* Scheidler v. NOW, Inc., 123 S. Ct. 1057 (2003).

1. Mail Fraud as a RICO Predicate Act

The Racketeer Influenced and Corrupt Organization Act (RICO)[234] makes it illegal to use an "enterprise" to engage in "a pattern of racketeering activity," among other things.[235] "Racketeering activities" are listed in a glossary, and include both violent crimes such as murder and arson, and crimes of dishonesty, including wire fraud, mail fraud, and securities fraud.[236] A "'pattern of racketeering activity' requires at least two acts of racketeering activity" within a ten year period.[237]

Although RICO is principally a criminal statute, it also contains a provision that permits those injured by RICO violators to recover treble damages plus attorneys' fees.[238] Other than through RICO, there is no private right of action for violation of the federal mail fraud[239] and wire fraud[240] statutes. RICO, therefore, quickly became a fantastic opportunity for plaintiffs' attorneys to bring mail and wire fraud claims in federal court which otherwise would have to be prosecuted in state courts as statutory or common law torts. At the same time, plaintiffs could seek treble damages and attorneys' fees.

Because mail fraud is a statutory predicate act, and because plaintiffs generally plead more than one mailing in connection with a fraud, the crucial issue in RICO cases based on mail fraud is whether the mailings form a pattern. In *H.J., Inc. v. Northwestern Bell Telephone Co.*,[241] the Supreme Court held that a pattern requires both a relationship among the predicate acts and continuity from one to another, an easy standard to meet in many cases.[242] According to the Court in *H.J., Inc.*, the pattern

234. 18 U.S.C. § 1961 (2000).

235. *Id.* § 1962(a).

236. *Id.* § 1961(1).

237. *Id.* § 1961(5).

238. *Id.* § 1964.

239. *Id.* § 1341. Courts have held for decades that no private right of action exists under the mail fraud statute. *See, e.g.*, Ryan v. Ohio Edison Co., 611 F.2d 1170, 1177-79 (6th Cir. 1979).

240. 18 U.S.C. § 1343 (2000). Courts have similarly held that no private right of action exists under the wire fraud statute. *See, e.g.*, Napper v. Anderson, Henley, Shields, Bradford & Pritchard, 500 F.2d 634, 636 (5th Cir. 1974).

241. 492 U.S. 229 (1989).

242. *Id.* at 239. The Court had spoken in similar terms four years earlier. *See* Sedima, S.P.R.L. v. Imrex, Co., 473 U.S. 479, 497 n.14 (1985).

requirement is met when a defendant uses exactly the same type of scheme to defraud multiple plaintiffs.[243] The question the Court did not address is whether multiple mailings in connection with a single fraud is a sufficient basis for liability.

In case after case, district courts and courts of appeals have found that multiple mailings in furtherance of "a single scheme to inflict a single injury on a single victim" does not constitute a RICO pattern.[244] As the Seventh Circuit explained:

> Virtually every garden-variety fraud is accomplished through a series of wire or mail fraud acts that are "related" by purpose and spread over a period of at least several months. Where such a fraudulent scheme inflicts or threatens only a single injury, we continue to doubt that Congress intended to make the availability of treble damages and augmented criminal sanctions dependent solely on whether the fraudulent scheme is well enough conceived to enjoy prompt success or requires pursuit for an extended period of time.[245]

Moreover, virtually all of the cases in which this situation arises are civil ones. There is really no need for a federal prosecutor to take on the burden of proving all the elements of RICO in a case involving only multiple acts of mail and wire fraud. An indictment for the underlying crimes alone can lead to a lengthy prison sentence.

Perhaps the courts are right to limit RICO in this way, but their holdings are not easy to justify as a straightforward analytical matter. As we have seen, the Court has defined "pattern" as requiring only that acts be both related and sequential. Surely multiple mailings in furtherance of a fraudulent scheme meet that requirement and, as we will see below, courts have been very generous to prosecutors in interpreting the mail fraud statute. It is the contrast between the civil RICO decisions on the one hand, and the underlying doctrines, developed largely in the context of

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243. *H.J., Inc.*, 492 U.S. at 242.

244. Tudor Assoc., Ltd. v. AJ & AJ Servicing, Inc., 1994 U.S. App. LEXIS 26175, at *12 (4th Cir. 1994); *see also* Trundy v. Strumsky, 1992 U.S. App. LEXIS 23228 (1st Cir. 1992); Kehr Packages, Inc. v. Fidelcor, Inc., 926 F.2d 1406 (3d Cir. 1991); Marshall-Silver Constr. Co., Inc. v. Mendel, 894 F.2d 593 (3d Cir. 1990).

245. United States Textiles, Inc. v. Anheuser-Busch Cos., Inc., 911 F.2d 1261, 1268 (7th Cir. 1990).

criminal law, on the other, that puts these cases into the law enforcement model of statutory interpretation.

2. Criminal Mail Fraud and Criminal RICO

Consider the leading mail fraud case, *Schmuck v. United States*.[246] The mail fraud statute makes it a crime to use the mail for the purpose of executing a fraudulent scheme.[247] Wayne T. Schmuck indeed was involved in a fraudulent scheme: He purchased automobiles, set back the odometers, and resold them to car dealers, who would in turn sell the cars.[248] Only after Schmuck had reaped the benefit of his fraudulent scheme did a mailing occur. As Justice Blackmun explained:

> To complete the resale of each automobile, the dealer who purchased it from Schmuck would submit a title-application form to the Wisconsin Department of Transportation on behalf of his retail customer. The receipt of a Wisconsin title was a prerequisite for completing the resale; without it, the dealer could not transfer title to the customer and the customer could not obtain Wisconsin tags. The submission of the title-application form supplied the mailing element of each of the alleged mail frauds.[249]

The question was whether this scheme met the statute's requirement that the mailing be in furtherance of a fraudulent scheme. Schmuck argued that the fraud was complete by the time the mailing occurred.[250]

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246. 489 U.S. 705 (1989).

247. At the time the case was decided, the statute read in relevant part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises ... for the purpose of executing such scheme or artifice or attempting so to do ... knowingly causes to be delivered by mail ... according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than five years, or both.

Id. at 710 n.6 (quoting 18 U.S.C. § 1341).

248. *Id.* at 707.

249. *Id.*

250. *Id.* at 711.

The Supreme Court disagreed and upheld the conviction reasoning that "[a] rational jury could have concluded that the success of Schmuck's venture depended upon his continued harmonious relations with, and good reputation among retail dealers, which in turn required the smooth flow of cars from the dealers to their Wisconsin customers."[251] Justice Scalia dissented:

> [I]t is mail fraud, not mail and fraud, that incurs liability. This federal statute is not violated by a fraudulent scheme in which, at some point, a mailing happens to occur—nor even by one in which a mailing predictably and necessarily occurs. The mailing must be in furtherance of the fraud.[252]

Schmuck is an instance of expansive interpretation of a criminal statute. Not only was lenity not a consideration, but the mail fraud statute was interpreted as broadly as "a rational jury" would take it. The jurisprudence of statutory interpretation does not ordinarily leave such decisions in the jury's hands.[253]

The Court's interpretations of the mail and wire fraud statutes in the *Carpenter* and *O'Hagan* securities fraud cases discussed earlier were nearly as aggressive. *Carpenter* involved a financial journalist's sale of information to brokers that was about to appear in his *Wall Street Journal* column. The Supreme Court rejected his argument that the information did not constitute property, as required by the mail fraud statute. It further rejected the same argument that *Schmuck* made—that the fraud was over by the time any mailing occurred in connection with the column's subsequent publication.[254] In *O'Hagan*, although there was considerable controversy about the securities fraud convictions, the Court had little trouble affirming convictions for mail fraud, relying heavily on *Carpenter*.[255] Even if these holdings were reasonable under the circumstances, they are undeniably broad readings of the statute.

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251. *Id.* at 711-12.

252. *Id.* at 723 (Scalia, J., dissenting).

253. *But see* Darryl K. Brown, *Plain Meaning, Practical Reason and Culpability: Toward a Theory of Jury Interpretation of Criminal Statutes*, 96 MICH. L. REV. 1199 (1998).

254. United States v. Carpenter, 484 U.S. 19, 28 (1987).

255. *See* United States v. O'Hagan, 521 U.S. 642, 700-01 (1997) (Thomas, J., concurring in part, dissenting in part).

Especially striking is the contrast between these cases—especially *Schmuck*—and the civil RICO cases discussed above. Given the broad sweep of the mail fraud statute in criminal cases, there can be little doubt that it should cover the "garden-variety fraud" that the courts have held are not covered by RICO. Similarly, given the definition of "pattern" in *H.J., Inc.*, it seems relatively clear that the mailings in the civil RICO cases form a pattern. The courts have made it easy for federal prosecutors to use the mail fraud statute to obtain federal jurisdiction over "garden-variety frauds," but extremely difficult for plaintiffs to use the mail fraud statute to sue for treble damages over those same "garden-variety frauds." It is for this reason that these cases, taken together, embody the law enforcement model of statutory interpretation. The cases are all the more dramatic in light of the fact that, at the time it decided *H.J., Inc.*, the Supreme Court had interpreted RICO broadly more often than not in both criminal and civil cases.[256]

II. CONTROLLING STATUTORY INFLATION

A. How Much Should Statutory Inflation Be Controlled?

When we speak of "controlling" monetary inflation, we generally mean keeping it to a minimum. Here, however, I use the word in a weaker sense to mean "to regulate," the way a good ventilation system controls temperature in a building. Statutory inflation should not be regarded negatively in all cases. To the contrary, it is one means by which the legal system responds to new ways of disobeying social norms. Inflation can be seen as a form of what William Eskridge calls "dynamic statutory interpretation."[257] Professor Rubin has suggested recently that dynamic statutory interpretation is a natural by-product of the administrative state,[258] a conclusion consistent with the findings of this Article that

256. *See, e.g.*, Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985); Russello v. United States, 464 U.S. 16 (1983); United States v. Turkette, 452 U.S. 576 (1981).

257. *See* ESKRIDGE, *supra* note 23; William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987). For recent discussion of Eskridge's theory of dynamic statutory interpretation, including his most recent thoughts, see Symposium, *Dynamic Statutory Interpretation, in* ISSUES IN LEGAL SCHOLARSHIP, DYNAMIC STATUTORY INTERPRETATION (2002), *at* http://www.bepress.com/ils/iss3 (last visited Apr. 5, 2003).

258. *See* Rubin, *supra* note 23.

statutory inflation occurs largely when agencies and law enforcement bureaus pressure courts over time for more expansive readings of statutes. The question thus contextualized is how dynamically criminal statutes should be interpreted.

In advocating for dynamism in the interpretation of statutes, Eskridge focuses largely on the civil rights laws and other civil statutes. Both his article and book by the same title barely mention criminal law. Similarly, Guido Calabresi's book, *A Common Law for the Age of Statutes*, which argues that courts should update statutes as they become obsolete, spends little time dealing with crimes.[259] This should not be surprising. The federal courts rejected the notion of common law crimes early in American judicial history.[260] Although lenity, as we have seen, is certainly not applied across the board, it offends due process values to give courts too much leeway in expanding the scope of a criminal statute without the fair notice that a duly-enacted statute brings.

However, there seem to be circumstances in which the dynamic interpretation of criminal statutes does not offend the values of legislative primacy or fair play.[261] The most obvious cases are ones in which the legislature uses broad words in the statute. When Congress writes a statute outlawing the use of fraudulent devices, for example, we are not offended when the law is applied to fraudulent schemes that were concocted after the statute was enacted, so long as it is clear at the time of the prosecution that they are indeed fraudulent.[262] The criminalization of insider trading, decades after it was deemed to be a violation of the securities laws, provides one illustration.[263] The prosecution of fraud over the Internet provides another.

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259. *See* CALABRESI, *supra* note 23.

260. *See* United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32 (1812); Gary D. Rowe, Note, *The Sound of Silence:* United States v. Hudson & Goodwin, *The Jeffersonian Ascendancy, and the Abolition of Federal Common Law Crimes*, 101 YALE L.J. 919 (1992).

261. For a more detailed discussion, see Lawrence M. Solan, *Should Criminal Statutes be Interpreted Dynamically?*, *in* ISSUES IN LEGAL SCHOLARSHIP, DYNAMIC STATUTORY INTERPRETATION (2002): Article 8, *at* http//www.bepress.com/ils/iss3/art8 (last visited Apr. 5, 2003).

262. *See* Kahan, *supra* note 68 (arguing that such statutes constitute delegation of legislative power to the courts—a kind of common law of criminal jurisprudence).

263. *See supra* Part I.B.1.

Nor are we offended when courts *de*flate the scope of criminal statutes whose scope once could be justified by social norms, but which now are obsolete in various potential applications. For example, the Supreme Judicial Court of Massachusetts held three decades ago that a statute banning "any unnatural or lascivious act with another person"[264] should apply to criminalize only acts that are nonconsensual or performed in public.[265] At the time it issued this decision, there were doubts about the constitutionality of the statute under the Supreme Court's privacy jurisprudence. Recently, the Massachusetts high court held that the state's sodomy statute should be similarly construed,[266] although state sodomy laws had been held to be constitutional by the Supreme Court after the Massachusetts court's earlier "lascivious act" decision.[267] Thus, there was no impetus from the Supreme Court's interpretation of the federal Constitution for the Supreme Judicial Court's view regarding sodomy. The court has construed the sodomy statute dynamically so that it conforms more with today's social norms than with those of nineteenth century society, when it was enacted.

Nonetheless, some of the examples of statutory inflation presented in this Article do raise concerns about both legislative primacy and due process. For one thing, whether statutory inflation is likely to occur depends largely on the institutional choices that the legislature makes in establishing the statutory scheme. Typically, however, there is no evidence that the legislature is aware when it enacts statutes that these choices will govern which canons of statutory construction courts will apply decades later to resolve disputes over the statute's scope. With respect to federal statutes, Congress can attempt to regain control of the legislative process by doing in advance what courts do later: It can control statutory inflation, as part of the legislative process, either by specifying the mens rea requirement for prosecutions, or by actually including rules of construction in the statute itself. A recent article by Nicholas Rosenkranz proposes that Congress use the latter

264. MASS. GEN. LAWS ANN. ch. 272, § 35 (2000 & Supp. 2002).

265. Commonwealth v. Balthazar, 318 N.E.2d 478, 481 (Mass. 1974).

266. Gay & Lesbian Advocates & Defenders v. Attorney General, 763 N.E.2d 38 (Mass. 2002).

267. *See* Bowers v. Hardwick, 478 U.S. 186 (1986).

approach more generally as part of the legislative process.[268] I argue below, however, that the former approach is far more likely to be successful.

As for due process concerns, they arise when a court breaks new ground by interpreting a statute or regulation broadly for the first time in the context of a prosecution. That was true of some of the older antitrust cases that influenced later doctrine in civil cases.[269] Currently, due process concerns arise when courts apply the *Chevron* doctrine aggressively to uphold prosecutions for regulatory violations before the validity of the regulation has been firmly established. *O'Hagan* illustrates the phenomenon. I suggest below that courts should not apply the *Chevron* doctrine in criminal cases unless (1) the regulation has already been upheld in a civil case, (2) the conduct in question is clearly illegal based on civil cases interpreting the statute itself, or (3) the statute's language is clear.

B. Imposing Strong Mens Rea Requirements

One way the legislature can influence the degree of statutory inflation is by regulating the mens rea required for a conviction in a criminal case. When the statute requires proof beyond a reasonable doubt that the defendant was aware of the law and knew his conduct was prohibited, it will be very difficult for the government to prosecute any case other than those in which illegality is obvious. Those cases, in turn, are precisely the cases that would be permitted if the rule of lenity were to apply. Thus, a heightened state of mind requirement helps to simulate the standard model of interpretation of dual-remedy statutes. Other states of mind, ranging from knowledge that the act was wrongful to simple negligence, will permit prosecution of more marginal violations of the statute, and therefore will control inflation less.

Many dual-remedy statutes permit prosecution only of "willful" violations of statutes or regulations. Courts, however, do not treat the word "willful" uniformly, and Congress often does not adequately specify the state of mind required for a criminal

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268. Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085 (2002).

269. *See supra* Part I.B.2.

violation to occur. Consider *Cheek v. United States*,[270] which interpreted the statute governing tax evasion.[271] The tax laws have a long history of requiring specific intent in order for nonpayment to constitute a crime. Consistent with this history, the Court held: "Willfulness, as construed by our prior decisions in criminal tax cases, requires the Government to prove that the law imposed a duty on the defendant, that the defendant knew of this duty, and that he voluntarily and intentionally violated that duty."[272] As we saw earlier, the same elevated level of mens rea is generally considered an element of criminal cases brought under the Copyright Act.[273]

The willfulness requirement in the securities laws,[274] in contrast, has been interpreted more leniently toward the government. Conscious of the due process concerns that its opinion raises, the *O'Hagan* Court held specifically that "a defendant may not be imprisoned for violating Rule 10b-5 if he proves that he had no knowledge of the Rule."[275] Yet that requirement does little to help defendants who are convicted as a result of the application of the *Chevron* doctrine, or those who are aware of the rule, but not of its inflationary application to new circumstances. The holding in *O'Hagan*, then, although resembling that in *Cheek*, is weaker in significant respects, and therefore should allow a somewhat broader array of prosecutions.

The Supreme Court has also construed the antitrust laws to require a heightened state of intent in criminal cases. In *United States v. United States Gypsum Co.*,[276] the Court held that criminal violations of the Sherman Act require proof of a specific mens rea.[277] The government accused gypsum board manufacturers of conspiring

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270. 498 U.S. 192 (1991).

271. 26 U.S.C. § 7201 (2000). The statute states that any person "who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof" shall be punished. *Id.* The Court in *Cheek* also interpreted § 7203, which defines willful failure to file a tax return as a misdemeanor. *See Cheek*, 498 U.S. at 192.

272. *Id.* at 201.

273. *See supra* notes 88-89 and accompanying text (discussing mens rea requirement of the Copyright Act); *see also* United States v. Moran, 757 F. Supp. 1046, 1050-51 (D. Neb. 1991) (presenting the interpretation of "willful" that prevails in federal courts)

274. 15 U.S.C. § 78ff (2000).

275. United States v. O'Hagan, 521 U.S. 642, 665-66 (1997).

276. 438 U.S. 422 (1978).

277. *Id.* at 438.

to fix prices when it learned that they had been verifying their prices with each other, largely by telephone.[278] The jury charge instructed in part that "if the effect of the exchanges of pricing information was to raise, fix, maintain, and stabilize prices, then the parties to them are presumed, as a *matter of law*, to have intended that result."[279]

United States Gypsum and others were convicted, but the Third Circuit reversed on appeal.[280] The Supreme Court affirmed the reversal.[281] Recognizing that the Sherman Act, "unlike most traditional criminal statutes, does not, in clear and categorical terms, precisely identify the conduct which it proscribes,"[282] the Court applied lenity, and imposed the traditional rule of mens rea on criminal enforcement of the antitrust laws: "Our analysis focuses solely on the elements of a criminal offense under the antitrust laws, and leaves unchanged the general rule that a civil violation can be established by proof of either an unlawful purpose or an anticompetitive effect."[283]

The Court in *United States Gypsum* did not go so far as to require the defendant to be aware of the specific provisions of the antitrust laws, and to violate them despite such knowledge. This decision, then, leaves more room for prosecution of antitrust cases than for tax fraud cases under the more difficult standard articulated in *Cheek*.[284] The contrast between the two standards raises the possibility of a significant legislative opportunity. By fine-tuning the state of mind requirements, legislatures can exercise considerable control over statutory inflation, allowing it differentially as a matter of policy. Neither Congress nor the Supreme Court, however, has settled on a uniform vocabulary for expressing these small differences in proof, leaving the law governing state of mind requirements in a somewhat muddled state.[285]

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278. *Id.* at 427-28.
279. *Id.* at 434.
280. United States v. United States Gypsum Co., 550 F.2d 115 (3d Cir. 1977).
281. *United States Gypsum Co.*, 438 U.S. at 465.
282. *Id.* at 438.
283. *Id.* at 436 n.13.
284. *See supra* notes 270-72 and accompanying text.
285. For discussion of some of the problems in this area of law, see Kenneth W. Simons, *Rethinking Mental States*, 72 B.U. L. REV. 463, 464-66 (1992).

For example, a number of statutes provide criminal sanctions for "knowing" violations of the law. "Knowing" seems on its face to be an easier standard for the government to meet than "willful." Yet in some cases, the Supreme Court has interpreted such statutes to mean that the defendant must know the rules and that he was violating them. In *Liparota v. United States*,[286] the Court applied the rule of lenity to interpret a statute making it illegal to knowingly transfer food stamps in violation of the law.[287] The Court held that the statute is ambiguous as to whether the illegality of the sale comes within the scope of "knowingly."[288] The Supreme Court ruled similarly in *Ratzlaf v. United States*,[289] interpreting a statute making it a crime to "willfully" evade currency structuring laws.[290]

In *Bryan v. United States*,[291] however, the Court interpreted "willfully" more flexibly: "As a general matter, when used in the criminal context, a 'willful' act is one undertaken with a 'bad purpose.' In other words, in order to establish a 'willful' violation of a statute, 'the Government must prove that the defendant acted with knowledge that his conduct was unlawful.'"[292]

The statute at issue in *Bryan* was the Firearms Owners' Protection Act, which requires a federal license to deal in firearms.[293] The Act added a scienter requirement to a preexisting law. Under the revised Act willful violators are subject to criminal penalties.[294] In *Bryan*, circumstantial evidence suggested that the defendant was aware that his commerce in firearms was wrongful, but there was no proof that he was aware of the particular licensing requirements that he was accused of violating.[295] Syntactically, the statutes interpreted in *Liparota* and *Ratzlaf* are very similar to that

286. 471 U.S. 419 (1985).

287. *Id.* at 427. The statute, simplified for purposes of exposition, reads: "Whoever knowingly ... transfers ... [food stamps] in any manner contrary to this chapter or the regulations issued pursuant to this chapter shall ... [be punished]." 7 U.S.C. § 2024(b) (1) (2000).

288. *Liparota*, 471 U.S. at 424.

289. 510 U.S. 135 (1994).

290. *Id.* at 136-37.

291. 524 U.S. 184 (1998).

292. *Id.* at 191-92 (quoting *Ratzlaf*, 510 U.S. at 137).

293. 18 U.S.C. § 922(a) (2000).

294. *Id.* § 924(a)(1)(D).

295. *Bryan*, 524 U.S. at 189.

in *Bryan*. *Bryan*, in turn imposed a stronger mens rea requirement than the Court had earlier required for a related statute. In 1994, four years before its decision in *Bryan*, the Court had held that the National Firearms Act[296] contains a mens rea requirement, although not expressly stated in the Act.[297] That statute imposes a tax on statutorily-defined "firearms" and makes it a crime to own such a weapon without registering it and paying the tax.[298] In *Staples v. United States*,[299] the Court held that it would be unfair to assume that Congress would impose such harsh penalties (a maximum of ten years in prison) without proof that the defendant was aware of the features of the firearm that would bring it within the statute.[300] The Court held that "to obtain a conviction, the Government should have been required to prove that petitioner knew of the features of his AR-15 that brought it within the scope of the Act."[301] Professor Joseph Kennedy has argued that many of the Court's recent mens rea decisions appear to be reactions to the severity of the punishment contained in the statute, rather than an analysis of the language Congress used or failed to use.[302]

Environmental laws present perhaps the most interesting cases in which state of mind requirements have been a significant issue in the construction of dual-remedy statutes. Defendants in environmental crimes cases have routinely asked courts to apply lenity on the model of *Liparota*. To date, the courts of appeals have interpreted this mens rea requirement narrowly, and, therefore, have interpreted the statute broadly. For example, in *United States v. Kelley Technical Coatings, Inc.*,[303] the defendants were charged with storing and disposing of hazardous waste without a permit, in violation of the Resource Conservation and Recovery Act.[304] The Act

296. 26 U.S.C. §§ 5801-5872 (2000). The National Firearms Act is the same statute to which the Court applied lenity in *United States v. Thompson/Center Arms Co.*, 504 U.S. 505 (1992), a civil tax case; *see supra* note 20 and accompanying text.

297. Staples v. United States, 511 U.S. 600, 605 (1994).

298. *See* 26 U.S.C. §§ 5801(a), 5861 (2000).

299. 511 U.S. 600 (1994).

300. *Id.* at 616.

301. *Id.* at 619.

302. Joseph E. Kennedy, *Making the Crime Fit the Punishment*, 51 EMORY L.J. 753, 757-58 (2002).

303. 157 F.3d 432 (6th Cir. 1998).

304. *Id.* at 432.

imposes criminal sanctions against a person who "knowingly treats, stores, or disposes of any hazardous waste identified or listed without a permit ...."[305] The Sixth Circuit held that knowledge of the law was not an element of the crime.[306] Other courts have ruled similarly.[307]

The lax mens rea requirements in environmental crime cases follow from the "public welfare offense" doctrine that the Supreme Court carved out in *United States v. International Minerals & Chemical Corp.*[308] The doctrine reduces the mens rea requirement for violations of statutes regulating the movement of dangerous materials.[309] *International Minerals* involved the knowing transportation of sulfuric acid by a shipper without adequate disclosure, in contravention of Department of Transportation regulations.[310] Justice Douglas, writing for the majority, concluded that issues of notice are greatly reduced when a defendant is accused of dealing with hazardous substances that are heavily regulated:

> In *Balint* the Court was dealing with drugs, in *Freed* with hand grenades, in this case with sulfuric and other dangerous acids. Pencils, dental floss, paper clips may also be regulated. But they may be the type of products which might raise substantial due process questions if Congress did not require, as in *Murdock*, "*mens rea*" as to each ingredient of the offense. But where, as here and as in *Balint* and *Freed*, dangerous or deleterious devices or products or obnoxious waste materials are involved, the probability of regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation.[311]

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305. 42 U.S.C. § 6928(d)(2)(A) (2000).

306. *Kelley Technical Coatings, Inc.*, 157 F.3d at 438-40.

307. *See, e.g.*, United States v. Weitzenhoff, 35 F.3d 1275, 1284 (9th Cir. 1993) (holding that knowledge of illegality is not required for conviction for knowingly violating provisions of the Clean Water Act). This is not to say that courts never apply the rule of lenity in cases involving criminal application of environmental statutes. For example, in *United States v. Plaza Health Laboratories, Inc.*, 3 F.3d 643 (2d Cir. 1993), the Second Circuit found the expression "point source" in the Clean Water Act to be unclear and invoked the rule of lenity. *Id.* at 644-45.

308. 402 U.S. 558, 565 (1971).

309. *Id.* at 565.

310. *Id.* at 559.

311. *Id.* at 564-65.

The statute at issue in *International Minerals* had the same syntactic structure as the statutes in *Liparota* and *Ratzlaf*. It stated that whoever "knowingly violates any ... regulation" promulgated under the underlying Interstate Commerce Act shall be fined or imprisoned.[312] *International Minerals* is now more than a quarter of a century old and courts of appeals have followed its holding regularly with respect to the interpretation of the environmental laws.[313]

Commentators who support strong enforcement of the environmental laws have voiced concern that the Supreme Court will ultimately apply the rule of lenity to reduce the laws' clout.[314] To date, the Supreme Court has not ruled on this issue, and has denied certiorari in a Ninth Circuit case that ruled in favor of the government.[315] If the Court does hear such a case, there is reason to believe that it will continue in the path of the courts of appeals, and refuse to apply lenity, notwithstanding *Ratzlaf* and *Liparota*. This is not to say that hard cases will not test the applicability of the public welfare offense doctrine. In *Staples*, the Supreme Court held that the doctrine does not apply to the National Firearms Act, which required the registration of machine guns.[316] The Court refused to liken firearms to poison, and held that the statute required knowledge of the law as well as of the underlying facts.[317] In *Staples*, however, the Court reaffirmed the applicability of the doctrine to cases like *International Minerals*,[318] adding another

312. *Id.* at 559 (quoting 18 U.S.C. § 834(f)).

313. *See, e.g.*, United States v. Hopkins, 53 F.3d 533 (2d Cir. 1995); United States v. Weitzenhoff, 35 F.3d 1275 (9th Cir. 1993); United States v. Buckley, 934 F.2d 84 (6th Cir. 1991); United States v. Dee, 912 F.2d 741, 745 (4th Cir. 1990). *But see* United States v. Johnson & Towers, Inc., 741 F.2d 662, 668 (3d Cir. 1984).

314. *See* David E. Filippi, Note, *Unleashing the Rule of Lenity: Environmental Enforcers Beware*, 26 ENVTL. L. 923 (1996); Patrick W. Ward, Comment, *The Criminal Provisions of the Clean Water Act as Interpreted by the Judiciary and the Resulting Response from the Legislature*, 5 DICK. J. ENVTL. L. & POL'Y. 399 (1996). For a related concern that courts will begin interpreting the bankruptcy law with undue lenity, see Markell, *supra* note 217, at 336-37.

315. United States v. Weitzenhoff, 1 F.3d 1523 (9th Cir. 1993), *amended*, 35 F.3d 1275 (9th Cir. 1994), *cert. denied*, 513 U.S. 1128 (1995). Those circuits that have considered this issue have ruled in this manner, both with respect to the Clean Water Act, and with respect to other environmental crimes that criminalize knowing violations. *See, e.g.*, United States v. Buckley, 934 F.2d 84 (6th Cir. 1991) (construing the Clean Air Act and CERCLA).

316. Staples v. United States, 511 U.S. at 600, 618-19 (1994).

317. *Id.* at 616.

318. *Id.* at 607.

reason to expect the Court to continue to apply this doctrine in the realm of environmental crimes, unless, of course, Congress changes the law.[319]

Where does this leave us? Mens rea requirements in criminal cases vary from requiring that a defendant was aware of the law and knowingly violated it, to requiring that he knew his conduct to be illegal in some way, to requiring that he knew that he was acting wrongfully, to simply requiring, in the case of environmental statutes, that he knew what he did. These differences, intended to match statutory requirements with societal values, offer protection against prosecution for inadvertent violation of highly technical statutes in some instances, such as tax laws, food-stamp regulations, copyright laws, and currency transactions. The different mens rea requirements further serve to impose knowledge of everyday norms in other instances, such as antitrust laws, securities laws, and certain firearm laws, and to hold people responsible for acquiring knowledge of their legal obligations in still others, such as environmental laws. I have argued here that the differences have an additional and important effect on the system of criminal justice: The strength of the mens rea requirement interacts with the institutional setting in which the statute is enforced to serve as a control on statutory inflation.

The guesswork imposed on the courts to divine legislative intent from statute to statute suggests that Congress does not do a very good job in this area. In fact, in one case decided in the 1990s, the Court had to rewrite a statute to rescue it from being held unconstitutional because Congress failed to write the state of mind requirement in a sufficiently clear manner.[320] In other cases discussed earlier in this section, the Court likewise added state of mind requirements to statutes that did not contain any at all.[321] I have argued that more is at stake than the doctrines suggest. The

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319. I do not mean to imply that lenity should never apply to ambiguous or vague terms in criminal prosecutions under the environmental statutes. *See* United States v. Borowski, 977 F.2d 27 (1st Cir. 1992) (applying lenity to conclude that criminal provisions of the Clean Water Act do not apply when defendants and employees are placed at risk prior to toxins entering the public water supply).

320. United States v. X-Citement Video, 513 U.S. 641 (1994) (inserting additional mens rea requirement into Protection of Children Against Sexual Exploitation Act of 1977, 18 U.S.C. § 2252).

321. *Staples*, 511 U.S. at 619; United States v. United States Gypsum Co., 438 U.S. 422, 437-38 (1978).

state of mind requirements affect not only who will be convicted under the law as it is written, but also how the law develops in the future. Congress should draft statutes with this understanding, and draft them clearly enough to leave the courts with less uncertainty.

C. Writing Rules of Construction into the Statute Itself: The Wrong Path

The most straightforward approach to controlling statutory inflation is for the legislature to write instructions into the statute. As long as no constitutional problems arise,[322] the decision of how much inflation should exist will become more a legislative decision, and less a by-product of institutional choices. We have just seen how regulating the state of mind requirements of dual-remedy statutes can affect the subsequent interpretive history. One might hypothesize that statutory statements regarding the legislature's interpretive philosophy might be more direct and at least as effective.

In fact, Congress commonly writes interpretive instructions into criminal statutes. For example, a federal statute that makes it illegal to import certain injurious animals into the United States contains this instruction:

> Nothing in this section shall be construed to repeal or modify any provision of the Public Health Service Act or Federal Food, Drug, and Cosmetic Act. Also, this section shall not authorize any action with respect to the importation of any plant pest as defined in the Federal Plant Pest Act, insofar as such importation is subject to regulation under that Act.[323]

Similarly, the statute that outlaws counterfeiting outside the United States contains the following provision: "No provision of this section shall be construed as authorizing any entity to conduct investigations of counterfeit United States currency."[324] And the federal bribery statute, which outlaws bribing witnesses as well as

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322. See Rosenkranz, *supra* note 268, for a discussion of constitutional limits of legislatively-imposed rules of construction. Rosenkranz argues persuasively that Congress does not regularly use this device to the extent permissible under the Constitution.

323. 18 U.S.C. § 42(a)(1) (2000).

324. *Id.* § 470.

government officials, instructs interpreters not to construe as bribery the payment of a statutory witness fee or reasonable travel expenses.[325] There are many other examples.

Despite the availability of this limiting device, it does not seem to be a particularly useful means of controlling statutory inflation. All three examples referred to in the previous paragraph instruct interpreters with respect to a particular potential misconception about legislative intent that the language of the statute may have left open. In contrast, statutory inflation occurs opportunistically, generally as the result of dogged efforts by agencies and prosecutors over time, often in response to changing patterns of conduct by those whose conduct the statute was enacted to regulate. Thus, only a general instruction concerning the interpretation of the statute as a whole will likely have an effect on subsequent inflation, apart from particular interpretive pitfalls that can be identified in advance. Such an instruction is unlikely to do its intended job well, however, because it is not possible to write such an instruction so that it affects all and only the set of potentially inflationary cases without having unwanted effects on other cases.

Consider a situation in which Congress considers the matter in advance, and would like the courts to adopt the standard model of interpretation: liberal construction in civil cases, narrow construction in criminal cases. As we have seen, courts rarely impose dual interpretations on the same statutory language, and it would probably be unmanageable to expect them to begin doing so as a matter of law.[326] The standard model arises largely from prosecutorial discretion. When only the most egregious violations of a statute or regulation become the subject of criminal prosecution, the system works as though it had adopted the standard model of interpretation. Inflation often occurs when broad interpretations in civil cases sufficiently alter behavioral norms so that broad interpretation in criminal cases appears natural to the interpreter.

If that is what is happening, however, there seems to be little Congress can do to impose the standard model in other situations, short of eliminating the institutional settings that lead to statutory inflation as a by-product. To eliminate such institutions—principally administrative agencies—would be to throw the baby

325. *Id.* § 201(d).

326. See Sachs, *supra* note 28, for a discussion of the benefits of a single interpretation.

out with the bath water if there are independent reasons for maintaining them, which there surely must be.

To see how poorly legislative instructions can work in this context, let us return to RICO. In *Sedima, S.P.R.L. v. Imrex Co., Inc.*,[327] the Supreme Court rejected a civil defendant's request that lenity be applied to interpret the statute narrowly in a civil case because of the existence of criminal liability under the statute.[328] RICO contains a statement that the statute is to be liberally construed.[329] The Court noted: "Indeed, if Congress' liberal-construction mandate is to be applied anywhere, it is in § 1964, where RICO's remedial purposes are most evident."[330]

Acknowledging that the rule of lenity might act to limit the scope of criminal prosecutions under RICO, the Court refused to construe narrowly § 1964(c)'s requirements for bringing civil actions which, like the antitrust laws, permit treble damages plus attorneys' fees.[331] Thus, the Court interpreted the liberal construction provision of RICO at most to call for the standard model of interpretation—a model for which the provision was not needed, because courts tend to employ this model anyway.

Since *Sedima*, the Supreme Court has noted RICO's liberal construction provision on a number of occasions, often finding it inapplicable. For example, in *Rotella v. Wood*,[332] the Court refused to expand the statute of limitations for bringing civil RICO cases through a discovery rule that would toll the statute until it would have been reasonable for the plaintiff to discover that a pattern of racketeering activity had occurred.[333] Citing *Sedima*, the Court stated: "This objective of encouraging prompt litigation to combat racketeering is the most obvious answer to Rotella's argument that the injury and pattern discovery rule should be adopted because

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327. 473 U.S. 479 (1985).

328. *Id.* at 491 n.10.

329. 18 U.S.C. § 1961 (2000).

330. *Sedima*, 473 U.S. at 491, n.10.

331. The Court ultimately decided that there was no interpretive problem, because the language of RICO is so clear that no substantive rules of construction are needed in any event. *Id.* at 497-98. The dissent agreed that the language was plain, but decided that it meant the opposite of what the majority thought it meant. *Id.* at 501 (Marshall, J., dissenting). For criticism of the reasoning presented by both sides, see Solan, *supra* note 66, at 99-104.

332. 528 U.S. 549 (2000).

333. *Id.* at 558-59.

'RICO is to be read broadly' and 'liberally construed to effectuate its remedial purposes.'"[334]

Likewise, in *Reves v. Ernst & Young*,[335] the Court found RICO's liberal construction provision insufficient to justify an expansion of RICO liability to include auditors:

> This clause obviously seeks to ensure that Congress' intent is not frustrated by an overly narrow reading of the statute, but it is not an invitation to apply RICO to new purposes that Congress never intended. Nor does the clause help us to determine what purposes Congress had in mind. Those must be gleaned from the statute through the normal means of interpretation. The clause "only serves as an aid for resolving an ambiguity; it is not to be used to beget one."[336]

And in *Holmes v. Securities Investor Protection Corp.*,[337] the Court held that only those directly injured by a pattern of racketeering activity are proper RICO plaintiffs, notwithstanding the liberal construction clause.[338]

This does not mean that the Supreme Court has not interpreted RICO broadly in a number of cases.[339] Nonetheless, this brief survey suggests that the liberal construction provision in RICO has not served its purpose. Early in the statute's history, the Court issued several opinions that required the lower courts to follow the statute's broad language even if that language led to RICO litigation far beyond the sphere of organized crime, which RICO was initially intended to combat.[340] In one of these earlier cases, *United States v. Turkette*,[341] the Court, interpreting the word "enterprise" broadly, took pains to make it clear that it would have done the same if the liberal construction provision had

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334. *Id.* at 557-58 n.3 (quoting *Sedima*, 473 U.S. at 497-98).

335. 507 U.S. 170 (1993).

336. *Id.* at 183-84 (citing *Sedima*, 473 U.S. at 492 n.10).

337. 503 U.S. 258 (1992).

338. *Id.* at 268-70.

339. *See supra* Part I.D.

340. *See* Bryan T. Camp, *Dual Construction of RICO: The Road Not Taken in* Reves, 51 WASH. & LEE L. REV. 61 (1994); David Kurzweil, *Criminal and Civil RICO: Traditional Canons of Statutory Interpretation and the Liberal Construction Clause*, 30 COLUM. J.L. & SOC. PROBS. 41 (1996).

341. 452 U.S. 576 (1981).

not existed.[342] In another, *Russello v. United States*,[343] the Court actually made reference to the liberal construction provision in construing RICO's forfeiture provision broadly.[344] Since then, the Court has been rather stingy with civil RICO plaintiffs, sometimes even more so than with the government.[345] This history is both dynamic and very complicated. It does not lend support to the proposition that the legislature can decide in advance how to deal with statutory inflation by inserting general rules of construction into a statute.

D. Modifying the Chevron *Doctrine in Criminal Cases*

Let us return to *O'Hagan*.[346] In a single opinion, the Supreme Court upheld Rule 14e-3, the validity of which was controversial at the time, and held O'Hagan criminally liable for having willfully violated it.[347] As discussed above, part of the rationale for upholding the regulation was the *Chevron* doctrine. *Chevron* has generated a great deal of controversy, and it is not my intention here to discuss its general merits.[348] Rather, *O'Hagan* raises a somewhat narrower, but nonetheless important issue: Should courts defer to agency interpretations of statutes in holding defendants criminally liable? In *O'Hagan*, the Supreme Court did not address the question head-on, but its holding was consistent with an affirmative answer.

Whether deference to agencies in these circumstances is appropriate depends upon two considerations—legislative intent and due process. As for legislative intent, criminal liability for violation of either the Exchange Act itself or the SEC's rules promulgated

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342. *Id.* at 587.

343. 464 U.S. 16 (1983).

344. *Id.* at 27.

345. *See supra* Part I.D.1.

346. United States v. O'Hagan, 521 U.S. 642 (1997); *see supra* notes 151-79 and accompanying text.

347. *O'Hagan*, 521 U.S. at 676-78.

348. The literature on the *Chevron* doctrine is enormous. For a few interesting examples, see Thomas W. Merrill, *Textualism and the Future of the* Chevron *Doctrine*, 72 WASH. U. L.Q. 351 (1994); Richard J. Pierce, Jr., Chevron *and Its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 VAND. L. REV. 301 (1988); Sunstein, *supra* note 24. For an interesting article that argues that *Chevron* deference should be limited to situations in which the agency interpretation has the force of law, see Thomas W. Merrill & Kristin E. Hickman, Chevron's *Domain*, 89 GEO. L.J. 833 (2001). Much of the major literature on the doctrine is cited in this article as well.

thereunder has been part of the Securities Exchange Act since its enactment in 1934.[349] It is beyond controversy that Congress intended to permit the SEC to write rules, which if disobeyed, could lead to criminal sanctions. There is no evidence, however, that Congress contemplated that the SEC would exercise its rulemaking authority to define crimes beyond those that Congress was willing to legislate, later relying on courts applying the *Chevron* doctrine for judicial approval of its expansion of the criminal law. Without evidence that Congress intended to delegate to agencies the sweeping power to define crimes at the margins of the statute, lenity, at least to some extent, should play a role in judicial interpretation.

Moreover, it is difficult to reconcile the Court's perspective in *O'Hagan* with the principles of fair play that underlie the rule of lenity generally. Most examples of statutory inflation result from the subsequent criminalization of norms that had been long-established in civil contexts. The history of liability for insider trading[350] and the criminalization of extraterritorial violations of the antitrust laws[351] illustrate this process. In reality, these cases do not present serious problems of notice, since, within the relevant interpretive community,[352] the conduct being charged as a

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349. The Act states in relevant part:

> Any person who willfully violates any provision of this chapter (other than section 78dd-1 of this title), or any rule or regulation thereunder the violation of which is made unlawful or the observance of which is required under the terms of this chapter, or any person who willfully and knowingly makes, or causes to be made, any statement in any application, report, or document required to be filed under this chapter or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of section 78o of this title, or by any self-regulatory organization in connection with an application for membership or participation therein or to become associated with a member thereof, which statement was false or misleading with respect to any material fact, shall upon conviction be fined not more than $1,000,000, or imprisoned not more than 10 years, or both, except that when such person is a person other than a natural person, a fine not exceeding $2,500,000 may be imposed; but no person shall be subject to imprisonment under this section for the violation of any rule or regulation if he proves that he had no knowledge of such rule or regulation.

15 U.S.C. § 78ff(a) (2000). This section became effective July 1, 1934, as provided by Act of June 6, 1934, ch. 404, tit. I, § 34, 48 Stat. 905 (1934).

350. *See supra* Part I.B.1.

351. *See supra* notes 189-96 and accompanying text.

352. For discussion of interpretive communities and their relevance to legal

crime had clearly been unacceptable for some time prior to the prosecution. But that is not what happened in *O'Hagan*, where aggressive rulemaking and the *Chevron* doctrine combined to create a new crime. Whether one is concerned with fair notice or with separation of powers, *O'Hagan* seems to give too much deference to agency interpretation.

A number of writers have noticed this problem, but there is no consensus in the literature about how to deal with it. Cass Sunstein has suggested that agencies should receive *Chevron* deference only when the legislature has spoken clearly.[353] Mark Alexander argues that there should be no *Chevron* deference at all when it comes to administrative crimes, largely because of separation of powers concerns.[354] Sanford Greenberg defends the *Chevron* doctrine in the case of administrative crimes, arguing, among other things, that the notice problems are not serious, especially since defendants have notice of the regulation itself, and that congressional delegation to agencies is a mature doctrine in American jurisprudence.[355]

Although I prefer Sunstein's proposal to the others, some modification is needed. Consider the following three scenarios:

(1) An agency makes a rule that is of questionable validity in order to cooperate with the Department of Justice in forming the basis of criminal prosecution for willful violations of a regulation. The Department of Justice promptly brings a series of prosecutions, and the validity of the regulation makes its way through the courts in that context.

(2) An agency makes a rule that only questionably applies to a particular species of conduct. Before any prosecutions are brought, however, the agency itself brings a series of civil enforcement actions under the new rule. The United States courts of appeals review agency rulings, and find the regulation valid in that context. Thereafter, the Department of Justice brings a series of prosecutions.[356]

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interpretation, see DENNIS PATTERSON, LAW AND TRUTH 76-127 (1996); William S. Blatt, *Interpretive Communities: The Missing Element in Statutory Interpretation*, 95 NW. U. L. REV. 629 (2001).

353. Sunstein, *supra* note 24, at 2115-16.

354. Alexander, *supra* note 24, at 613.

355. Greenberg, *supra* note 24, at 4, 17-18.

356. In a related version of this scenario, the validity of a questionable regulation remains untested in any context until the first criminal case is brought.

(3) An agency makes a rule that is clearly within the scope of its authority as set forth in the relevant statute. The Department of Justice promptly brings a series of prosecutions for willful violation of the regulation, and the validity of the regulation makes its way through the courts in that context.

The first scenario describes *O'Hagan*. The second resembles the state of insider trading law at the time of *Chiarella*. The courts by that time had clearly held the conduct described in *Chiarella* to be a violation of Rule 10b-5 in civil cases, although it would not be accurate to say that Congress had spoken clearly on the matter in § 10 of the Securities Exchange Act. The third scenario describes a valid exercise of agency authority regardless of the standard of review.

How can one uphold the prosecutions in the last two scenarios but strike down the prosecution in the first? Sunstein's model comes close, but relies exclusively on Congress to make the clear statement. I suggest that if a court with jurisdiction over the defendant has already spoken on the matter in civil cases—even if it relied upon the *Chevron* doctrine to do so—the prosecution should be upheld. Thus, I would add to Sunstein's proposal that a clear statement of the regulation's validity from any legal authority with jurisdiction over the defendant should be sufficient to permit subsequent inflationary decisions.[357] This will allow the criminal law to evolve, but only after the relevant interpretive community has absorbed the norms sufficiently to be on notice. One may argue that this proposal does not adequately take into account concerns about the separation of powers, but Congress did enact the enabling statute, and Congress does retain the right to override any regulation it believes to be too aggressive.

The Supreme Court, has, in fact, employed a similar standard in other contexts. In *United States v. Lanier*,[358] the defendant was a trial court judge in Tennessee who was accused of sexually assaulting a number of women who had judicial business before him.[359] He was charged with violating § 242 of the federal Criminal Code, which makes it a crime to act "willfully" and under color of

357. The differences between my position and Sunstein's may be more a difference of focus than of substance since he does not address these options.

358. 520 U.S. 259 (1997).

359. *Id.* at 261.

law to deprive a person of rights protected by the Constitution or laws of the United States.[360] The question raised in *Lanier* was the standard for determining whether the defendant had violated the constitutional rights of the women he assaulted.[361] The United States Court of Appeals for the Sixth Circuit held that only a decision of the Supreme Court finding a constitutional right in "a factual situation fundamentally similar to the one at bar"[362] would suffice. Applying this standard, the appellate court reversed Lanier's conviction.[363]

In a unanimous decision, the Supreme Court reversed and reinstated the conviction.[364] Justice Souter wrote:

> There are three related manifestations of the fair warning requirement. First, the vagueness doctrine bars enforcement of "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." Second, as a sort of "junior version of the vagueness doctrine," the canon of strict construction of criminal statutes, or rule of lenity, ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered. Third, although clarity at the requisite level may be supplied by judicial gloss on an otherwise uncertain statute, due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope ....[365]

Applying these principles, the Supreme Court held that opinions by the court of appeals with jurisdiction over the defendant are an adequate source of fair notice to any public official accused of criminally violating the constitutional rights of another.[366] To the extent that the circuits are divided on a particular issue, that fact should also be taken into account in determining whether notice

360. *Id.* (citing 18 U.S.C. § 242 (1996)).
361. *See id.* at 263.
362. *Id.* (quoting Lanier v. United States, 73 F.3d 1380, 1393 (6th Cir. 1996)).
363. Lanier v. United States 73 F.3d 1380, 1394 (6th Cir. 1996).
364. *See Lanier*, 520 U.S. at 272.
365. *Id.* at 266 (citations omitted).
366. *Id.* at 269.

is sufficient.[367] Relying on authority that deals with qualified immunity in civil cases, the Court held that criminal liability under § 242 should attach only if "[t]he contours of the right [violated are] sufficiently clear that a reasonable official would understand that what he is doing violates that right."[368]

A similar standard should be applied to judicial deference to administrative agencies when a defendant is charged with administrative crimes. Whether from the statute itself or from prior judicial decisions, it must be "sufficiently clear" that a reasonable person would understand the regulation in question to be a valid exercise of the agency's rulemaking authority before criminal liability may attach. A recent article by Merrill and Hickman suggests that as a descriptive matter the Supreme Court has applied the *Chevron* doctrine unevenly in a systematic way.[369] They rely heavily on *Christensen v. Harris County*,[370] a case in which the Court refused to give deference to the Department of Labor's interpretation of a statute contained in an agency opinion letter that did not carry the force of law. Instead, the Court applied the older, multi-factored standard of *Skidmore v. Swift & Co.*[371] to determine how much deference should be given. Obviously, the questioned regulations in *O'Hagan* and other cases do carry the force of law. However, cases like *Christensen* demonstrate that, even within current legal doctrine, it is possible to carve out areas in which courts consider a broader range of factors. One of those factors should be whether the boundaries of the law were sufficiently clear before a person was convicted of committing an administrative crime.

III. CONCLUSION: STATUTORY INFLATION AND INSTITUTIONAL CHOICE

Although most of the cases discussed in this Article deal with doctrines governing how broadly or narrowly to interpret a statute, I have argued that which of these principles a court invokes depends in large part on the institutions that are entrusted with

367. *Id.*
368. *Id.* at 270 (quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987)).
369. Merrill & Hickman, *supra* note 348.
370. 529 U.S. 576 (2000).
371. 323 U.S. 134, 140 (1944).

enforcing the statute. My argument is not that this dynamic *always* occurs, or that it is entirely predictive. Counterexamples and gaps surely exist. Nonetheless, the trend is sufficiently robust to merit attention. This concluding section will focus on the institutions that are involved in the interpretive process, using the recently enacted Sarbanes-Oxley Act of 2002[372] as an illustration.

Thus far, we have not discussed the defendants. Putting RICO to one side, virtually all of the statutes discussed above can be seen as regulating conduct within the marketplace. The securities and antitrust laws do so overtly. Others, like the Clean Water Act and the Copyright Act, can be seen as preventing individuals from gaining an unfair advantage in the market at the expense of others. The Bankruptcy Code may be viewed in terms of market failure as well. This approach to legal problems, a centerpiece of the law and economics movement, provides a means for characterizing regulatory legislation. Thus, many of the cases discussed above involve individuals who were accused of failing to conduct their business affairs according to the rules of the market. The market itself, then, is clearly an institution that participates in the dynamic discussed throughout this Article.

The three branches of government are also players. How broadly a regulatory statute is likely to be interpreted depends largely, of course, on the language of the statute. But it also depends in part upon how aggressively its enforcers advocate for expansive interpretations in court. Broad interpretation of criminal statutes is least likely to occur when there is no agency attempting to convince courts to expand the law's reach in the civil context and prosecutors do not give top priority to the criminal cases that do arise. Prosecutorial discretion based on limited resources leads prosecutors to bring fewer—and only the most egregious—cases.[373]

The institutional setting not only affects rights by virtue of the substance of the law itself and any regulation that agencies promulgate under delegated authority, but it also affects rights by influencing the ways in which interpreters are likely to resolve disputes about the law's scope. Neil Komesar has put it succinctly: "[V]ariation in institutional choice dictates variation in law and

372. Pub. L. No. 107-204, 116 Stat. 745 (2002).

373. *See supra* text following note 104.

rights."[374] Komesar illustrates his point with a host of examples from the law of property. For example, in the much-studied case, *Boomer v. Atlantic Cement Co.*,[375] seven neighbors sued a cement company for creating a nuisance. Atlantic had quietly acquired land in upstate New York for its plant, and once it opened, the dust and debris made life very difficult for those who lived nearby.[376] The ordinary remedy for nuisance is an injunction, but the court decided to award damages instead. The plant had cost some $45 million to build, and the neighbors' economic losses were rather small.[377] Had an injunction issued, Atlantic could have paid to have it dissolved, at least in principle. But the presence of as many as seven plaintiffs increased the likelihood of holdouts or unreasonable bargainers, so the trial court decided to balance the equities and to award the plaintiffs the diminution in the value of their property.[378] On appeal, the case was remanded, not for an injunction, but for a reassessment of damages.[379] In response to the dissent's suggestion that an injunction was necessary not only to protect the property and health of the plaintiffs, but of others in the Hudson Valley,[380] the majority argued that that problem is for the legislature to address.[381] Thus, the majority's conclusion is based not only on a balancing of costs and benefits of the parties, but a balancing of abilities and liabilities of various institutions: the market, the courts, and the legislature.

As Komesar points out, the court's conclusion that the market was not competent to set the value of the loss by allowing post-injunction bargaining, and that the court was not competent to make legislative choices, was devastating to the plaintiffs, who stood to gain much more by an injunction. Thus, the decision as to who should make the decision—the courts, the legislature, or the

374. KOMESAR, *supra* note 26, at 20.

375. 257 N.E.2d 870 (N.Y. 1970).

376. *Id.* at 876 n.5 (Jasen, J., dissenting).

377. *Id.* at 873.

378. *Id.* at 875.

379. *Id.*; *see* Daniel A. Farber, *Paradise Lost/Pragmatism Regained: The Ironic History of the Coase Theorem*, 83 VA. L. REV. 397 (1997) (analyzing the Coase Theorem through a hypothetical case based on *Boomer*).

380. *Boomer*, 257 N.E.2d at 875-76 (Jasen, J., dissenting).

381. *Id.* at 871.

market—not only affected the legal process, it also affected the property rights of the plaintiff neighbors.[382]

As remote as bankruptcy is from *Boomer*, my principal argument in this Article is very much like Komesar's. Consider the Sarbanes-Oxley Act, enacted in response to the Enron and Worldcom scandals, among others.[383] With little dissent, both houses of Congress voted to give the SEC broad new powers concerning the regulation of accountants,[384] to impose new disclosure requirements on companies,[385] to require chief executive officers to certify annual and quarterly reports,[386] and to enhance criminal penalties for securities law violations.[387] In addition, the statute provides more than $100 million to the SEC as additional enforcement resources.[388] In July 2002, the month the Act was signed into law, President Bush announced an increase of some $120 million for the SEC's enforcement budget.[389]

These are precisely the circumstances that lead to statutory inflation: an evil that appears in need of remedy, new legislation to combat that evil, agencies charged with vigorous enforcement, and the government's financial commitment to enforcement. Moreover, enhanced criminal penalties make prosecutions a matter of higher priority for Justice Department attorneys. If these enforcement resources continue to be allocated over time, one might expect this statute to lead to broad construction of the securities laws generally, whatever the merits of the statute's substantive provisions as a means of fighting securities fraud and related misconduct.

This is not to say that any inflationary effects of the statute are likely to occur soon. To the contrary, an interesting intergovernmental dynamic began on July 30, 2002, the day that President Bush signed the law. At the White House ceremony, the President said: "This new law sends very clear messages that all concerned must heed. This law says to every dishonest corporate leader: 'You

382. KOMESAR, *supra* note 26, at 12-16.

383. 107 Pub. L. No. 204, 116 Stat. 745 (2002).

384. *Id.* §§ 101-208.

385. *Id.* §§ 401-409.

386. *Id.* § 302.

387. Title IX of the Act is entitled, "White-Collar Crime Penalty Enhancement Act of 2002." *Id.* §§ 901-905.

388. *Id.* § 601.

389. Bob Kemper, *Bush Lectures Big Business*, CHI. TRIB., July 10, 2002, at 1.

will be exposed and punished; the era of low standards and false profits is over. No boardroom in America is above or beyond the law.'"[390] Later that day, however, the White House released a "Statement by the President," containing a narrow interpretation of the whistleblower protection provisions of the statute.[391] Section 806 of the Act offers protection to employees of public companies who provide information of wrongdoing to various authorities.[392] As for the entities to which such information may be provided, the statute is inartfully worded. It states in part that no action may be taken against an employee because of any act done by the employee:

> (1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of [various laws], when the information or assistance is provided to or the investigation is conducted by ...
>
> (B) any Member of Congress or any committee of Congress;
>
> ....[393]

The statute empowers the Department of Labor to enforce this provision,[394] which means that the Department's interpretation of the statute will be given deference under the *Chevron* doctrine. The Statement by the President says in relevant part:

> Given that the legislative purpose of [the whistleblowing provision] is to protect against company retaliation for lawful cooperation with investigations and not to define the scope of investigative authority or to grant new investigative authority, the executive branch shall construe section [806] as referring to investigations authorized by the rules of the Senate or the House of Representatives and conducted for a proper legislative purpose.[395]

This seems to mean that the administration had determined not to bring an enforcement action against a corporation that fires an

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390. Remarks on Signing the Sarbanes-Oxley Act of 2002, 38 WEEKLY COMP. PRES. DOC. 1283, 1284 (July 30, 2002).

391. Statement on Signing the Sarbanes-Oxley Act of 2002, 38 WEEKLY COMP. PRES. DOC. 1288 (July 30, 2002).

392. Sarbanes-Oxley Act § 806(a).

393. *Id.*

394. *Id.* § 806(b).

395. Statement on the Signing of the Sarbanes-Oxley Act of 2002, *supra* note 391, at 1286.

employee for telling a member of Congress about corporate wrongdoing unless the member is participating in an investigation, commenced under the rules of the House in which she sits.

The President's interpretation of the statute was so narrow that it probably would not survive even the minimum scrutiny under *Chevron*.[396] The statute provides that no action may be taken against an employee for assisting in an investigation *"when the assistance is provided to,* or the investigation is conducted by *any member of Congress ...."*[397] Senators Grassley and Leahy, who wrote the provision, criticized the administration's statement as a flawed reading of the law that "risks chilling corporate whistleblowers who wish to report securities fraud."[398] Eventually, the Department of Labor abandoned the position that the President had espoused, increasing the likelihood of litigation under the statute, and thereby the possibility of subsequent statutory inflation.[399] Such policies, if actually implemented, would impact the types of fraud subject to scrutiny under the law, which should blunt inflation, at least in the near term.

As for the statute itself, it also contains some anti-inflationary provisions. For example, § 405 exempts from Title IV's enhanced financial disclosure requirements any investment company registered under the Investment Company Act.[400] This provision is typical of the anti-inflationary provisions discussed earlier in this Article,[401] and should not have a global effect on the interpretation of the securities laws generally.

Probably more important is the statute's interpretive statement that nothing in the Act should be construed to limit the authority of the SEC to regulate the accounting profession.[402] This provision, in effect, deprives future litigants of using canons such as *ex-*

396. This is not to say that the statement on its own is entitled to *Chevron* deference without formal adoption by the Department of Labor. *See* Merrill & Hickman, *supra* note 348.

397. Sarbanes-Oxley Act § 806(a) (emphasis added).

398. *See* Holly Rosenkrantz, *Senators Call for More Support for Corporate Whistleblowers*, BLOOMBERG NEWS, July 31, 2002, *available at* LEXIS, News Library, Bloomberg-All Bloomberg News.

399. Christopher Lee, *Labor Dept. Shifts Whistle-Blower View*, WASH. POST, Jan. 28, 2003, at A19.

400. Sarbanes-Oxley Act § 405.

401. *See supra* Part II.B, II.C.

402. Sarbanes-Oxley Act § 3(c).

pression unius est exclusio alterius (the expression of one thing is the exclusion of another) to argue that the absence of a particular stricture in such a broad statute should imply Congress' intent to exclude an area from regulation.[403] As such, it may well encourage inflation as rulings in civil cases, perhaps under the *Chevron* doctrine, begin to influence the statute's interpretation in criminal cases. Similarly, the provision requiring chief executive officers to certify SEC filings "based on the officer's knowledge"[404] is likely to result in disputes over the precise interpretation of the statute's state of mind requirements. Institutional conduct over time may play some role in how these issues are ultimately resolved. The courts ultimately will determine whether an individual should be held civilly or criminally liable for violating this Act and the statutes that it amends.

When appellate courts start issuing their opinions, there will be little or no mention of the institutional dynamics that have colored their perspectives. As the law develops, and the scope of the statute becomes better defined, the institutional choices that led to these outcomes will also be deeply embedded in the background. Perhaps the decisions will generally be supportable. Yet, as I hope to have shown in this Article, it would do the system well to legislate, regulate, and adjudicate with the predictable consequences of these governmental actions more openly discussed in advance of their implementation.

403. See Rosenkranz, *supra* note 268 for discussion of Congress' power to eliminate such canons in a particular statute. This Act has done so indirectly with respect to a portion of its substance.

404. Sarbanes-Oxley Act § 302(a)(2).